

THE FIGHT AGAINST TRAFFICKING IN SELECTED SEM AND EU STATES

Kristina Touzenis

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Abstract

This report tries to give an insight into what case law on trafficking and exploitation has told us about implementation of trafficking legislation, focusing especially on the Mediterranean Region. Five countries from the South and five from the North have been taken to give as examples. The countries from the North have been chosen partly to give an overview from different parts of the EU partly because they each present interesting and rather developed case law which helps understand what the contents of the crime and crimes related to trafficking actually consist of. As a background for the analysis of what trafficking/exploitation means in these countries is a brief overview of relevant international and regional legislation. The interpretation given by the courts to human trafficking indirectly affects the way in which the pre-trial investigation authorities and other parties working with trafficking in human beings define human trafficking and whom they identify as a victim of trafficking. Court decisions affect the way in which the authorities identify victims of human trafficking and under what offence categories the cases are investigated and prosecuted. By their decisions, the courts also have an influence on who is entitled to the services of the system for victim assistance intended for victims of human trafficking, reflection periods, and residence permits. The implementation of the rights of human trafficking victims has strong links to how the courts apply and interpret the penal provisions on human trafficking and their relation to offences related to human trafficking.

Résumé

This report tries to give an insight into what case law on trafficking and exploitation has told us about implementation of trafficking legislation, focusing especially on the Mediterranean Region. Five countries from the South and five from the North have been taken to give as examples. The countries from the North have been chosen partly to give an overview from different parts of the EU partly because they each present interesting and rather developed case law which helps understand what the contents of the crime and crimes related to trafficking actually consist of. As a background for the analysis of what trafficking/exploitation means in these countries is a brief overview of relevant international and regional legislation. The interpretation given by the courts to human trafficking indirectly affects the way in which the pre-trial investigation authorities and other parties working with trafficking in human beings define human trafficking and whom they identify as a victim of trafficking. Court decisions affect the way in which the authorities identify victims of human trafficking and under what offence categories the cases are investigated and prosecuted. By their decisions, the courts also have an influence on who is entitled to the services of the system for victim assistance intended for victims of human trafficking, reflection periods, and residence permits. The implementation of the rights of human trafficking victims has strong links to how the courts apply and interpret the penal provisions on human trafficking and their relation to offences related to human trafficking.

Introduction and outline

In 2000 the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (Trafficking Protocol)¹, supplementing the United Nations Convention against Organized Crime (UNTOC).² The Protocol entered into force on the 25th of December 2003. At the same time the Protocol against the Smuggling of Migrants by Land, Air and Sea (Smuggling Protocol), supplementing the United Nations Convention against Transnational Organized Crime was adopted.³ The two protocols are also known as the Palermo Protocols, after the city in which they were adopted. The Convention and the Protocols were negotiated at a series of eleven meetings of a special intergovernmental Ad-hoc Committee under the auspices of the UN Crime Commission, which were held in Vienna from January 1999 until October 2000 and more than 100 countries took part.

The Protocol against trafficking responds to two needs: combating exploitation and combating a certain type of transnational crime. The Protocol is a criminal law instrument, not a human rights instrument and as such it responds with a criminal law answer: it legally criminalizes a certain activity in which exploitation is an important element. The criminalization of the act and the rest of the protocols provisions, needs to be incorporated into national law in order to be effective and, quite obviously, the national law on trafficking will need to be implemented in order to obtain real effectiveness. While States Parties to the Protocol are required to criminalize domestically the conduct of trafficking in persons, as defined in the Protocol, many States are still not party to the Protocol. As it usually takes some years from the signature and ratification of the Protocol to the adoption of relevant anti-trafficking laws, and other states have not yet signed or ratified the Protocol at all, there are still many States without any specific anti-trafficking laws in place. At the same time there are some States not party to the Protocol who nevertheless have anti-trafficking laws in place, even if the definition of human trafficking offences may not always conform to that in Article 3 of the Protocol.⁴

It is important to note that combating exploitation can be done even when a trafficking case cannot be prosecuted because elements are lacking for that particular crime or because evidence of trafficking is absent even when evidence of exploitation is there. Trafficking belongs to the category of “organised” crime, and cases of prosecution for organised crime have always been less than prosecution for other kinds of crime. An example can be that it is easier to prosecute and convict for selling drugs on the street than it is to prosecute and convict the organisers behind the street level pusher, much more money needs to be spend on investigation, proof and witnesses is much harder to come by and to bring forth and convictions of the top people in the organised crime networks are fewer than convictions of street pushers (and most probably not only because there are fewer top people). Trafficking is a very specific organised criminal activity and prosecuting and convicting for it can be just as difficult as prosecuting and convicting other sorts of organised crime. But this does not mean that trafficking does not exist, it does not mean that it is superfluous to have it as a criminal offence nor does it mean that the definition of trafficking is not good enough. What it does mean is that trafficking is a serious crime with a series of characteristics, some of which can be found in other crimes and which can then be prosecuted in accordance with other provisions (e.g. in penal or in labour law).

While it is true that estimates of the extent of trafficking in persons often lack a solid methodological base, the knowledge of the existence in Europe of exploitative practices such as child

¹ Signatories: 117, Parties: 124 as of February 2009.

² Entry into Force: 29 September 2003, in accordance with article 38. Registration: 29 September 2003, No. 39574. Status: Signatories: 147, Parties: 147 as of February 2009.

³ Entry into force: 28 January 2004. Signatories 112; Parties: 116 as of February 2009.

⁴ UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p 5

begging, work under irregular labour conditions, exploitation of the prostitution of others, domestic servitude etc. leads to the conclusion that the trafficking segments of these phenomena are large, compared to the few cases detected,⁵ it is however true that there is a general tendency to state that trafficking is a “growing” crime and/but the Palermo Protocol does not “work” since there are relatively few prosecution cases. This invites for critical and more detailed reflection first of all of what the Palermo Protocol is *supposed* to address – international organised crime – and also of the basis for the statement of “growing” crime. It is perhaps important to note that there is a willingness to fund projects on counter trafficking and less economic attention towards elimination of exploitation outside the trafficking framework.

The lack of specific legislation against trafficking in persons is arguably the most serious obstacle in countering the crime. In the absence of legislation, it is very difficult to punish human trafficking and bring the traffickers to justice. However, even where provisions against trafficking in persons exist under national law, these often cover only parts of the crime in trafficking in persons as defined in the UN Protocol. For example, legislation may still be based on previous conceptions (e.g. the 1949 Convention mentioned elsewhere) of trafficking in women and children and may hence be “limited to equating human trafficking with exploitation in the sex industry while ignoring exploitation in the labour market”. Where this is the case, the focus of human trafficking activities is then on women forced into prostitution, while trafficking of men (e.g. for exploitation on the labour market) may be dealt with under existing labour laws. The understanding of human trafficking depends, first and foremost, on the underlying legal instruments that define and criminalize the crime as well as on the focus of law enforcement efforts dedicated to giving effect to these laws.⁶

There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation. States should consider amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized. States should also enact legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons, this includes reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals) is part of creating an adequate legislative framework.⁷ Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.⁸

Bound as it is by social and cultural contexts the interpretation of crime and penalty has been subject to many queries. It is however absolutely crucial to keep in mind that the basis for the trafficking definition is classical criminal law, with notions such as intent central to the concept, otherwise confusion may very easily arise.

⁵ UN.GIFT: Trafficking in Persons, an analysis on Europe, p 9

⁶ UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p 6

⁷ The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking - Guidelines 7.1-2

⁸ The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking. Guidelines 7.3-4

As the ratification of the Protocol by a State is usually followed by the adoption of relevant legislation and national action plans within a matter of years rather than months, the implementation of national anti-trafficking legislation that is in line with the Protocol is often a very lengthy process. Thus, many States (most of those who have not yet ratified the Protocol and many who have already ratified it) still use different definitions regarding the act of trafficking, the means of trafficking or the purpose thereof.⁹

In the process of implementing anti-trafficking practices, the significance of the social and cultural milieus conducive to human trafficking and re-trafficking emerged as a new subject requiring analytical attention. This analysis covers a variety of social structures such as gender, sexuality, age and ethnicity, as well as intra-household dynamics and attitudes of communities. The first wave of trafficking in adult women from West Africa to Western Europe began in the 1980s and continued through the 1990s. This was followed by the trafficking of minors involving both males and females. Where children are concerned, the specificities of their vulnerability deriving from local contexts (such as belonging to marginal ethnic groups, subservient castes, or dysfunctional families affected by war or disaster) have contributed to the creation of child-specific demand for wide-ranging types of work. Children are trafficked into a variety of exploitative situations including commercial sex, domestic service, armed conflict, service industries like bars and restaurants; or into hazardous forms of work in factories, mines, agriculture and fishing, construction; also begging. Exploitation of trafficked children can be progressive. Those trafficked to work in factories, domestic service or restaurants, may subsequently be forced into prostitution. Those trafficked for prostitution may be subject to re-sale more than once. The vulnerability of women and children to re-trafficking is due to a number of factors such as the forms of intra-household decision-making and tacit 'tolerance' of trafficking mechanisms among the wider public, but also to the mishandling of trafficked persons driven by social and cultural values that carry stigmatising effects. Reports have revealed many cases wherein the children and women who have been intercepted and/or later returned to their communities do not stay in their communities for long, being subject to re-trafficking.¹⁰

The Palermo Protocols are framed around a central dichotomy between coerced and consensual irregular migrants. People who are trafficked are assumed not to have given their consent and are considered to be "victims or "survivors," whereas people who are smuggled are considered to have willingly engaged in a criminal enterprise. There is also a gender dimension to these distinctions: those who are smuggled are mostly assumed to be men, whereas victims of trafficking are associated with the traditional targets of protective concern¹¹ — women and children, which affects protection schemes. The protocols share several key features. Both require state parties to criminalize the relevant conduct of traffickers or smugglers, to establish and implement domestic law enforcement mechanisms, and to cooperate with other states to strengthen international prevention and punishment

⁹ As of November 2008, 63% of the 155 countries and territories the 2008 UNODC Global Report on Trafficking in Persons covered had passed laws against trafficking in persons addressing the major forms of trafficking. These laws criminalize, at the very least, sexual exploitation and forced labour and have no restriction regarding the age or gender of the victim. Another 16% had passed anti-trafficking laws that cover only certain elements of the Protocol definition. For example, laws that are limited to sexual exploitation or only apply to female or child victims. In 2003, only one third of the countries covered by this report had legislation against human trafficking; at the end of 2008, four-fifths did. The number of countries having anti-trafficking legislation more than doubled between 2003 and 2008 in response to the passage of the Protocol. In addition, 54% of responding countries have established a special anti-human trafficking police unit, and more than half have developed a national action plan to deal with this issue. Given that this legislative framework is very new, it is remarkable that 91 countries (57% of the reporting countries) reported at least one human trafficking prosecution, and 73 countries reported at least one conviction. A core of 47 countries reported making at least 10 convictions per year, with 15 making at least five times this number.

¹⁰ UNESCO: Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children, p 11

¹¹ Bhabha, J.: Trafficking, Smuggling, and Human Rights, at <http://www.migrationinformation.org/USfocus/display.cfm?ID=294> (visited September 2008)

of these activities. Both stipulate that the migrants themselves should not be subject to criminal prosecution because of their irregular entry.¹²

When responding to human trafficking within the criminal justice system, it is important to have the best interests of the trafficked victim at the forefront of all activities.¹³ A victim-centred criminal justice response to trafficking is most effective in terms of achieving a successful prosecution of the traffickers and protecting and supporting the human rights of the trafficked victim. Prioritising the well-being of the trafficked victim and their recovery from a trafficking ordeal is compatible with achieving the desired results in a criminal prosecution. Furthermore the identification¹⁴ of a trafficked victim is vital to ensure that they may be granted access to protection and support services. If a trafficked victim is not identified as such, he/she may be treated as an irregular immigrant if they are in the country irregularly, or he/she may be left without resources, protection or appropriate support in order to recover from the trafficking ordeal. This is to the detriment of the trafficked victim and to the trafficking investigation. Without access to protection and support services, trafficked victims may not recover to gain the sufficient confidence and security to cooperate with law enforcement officials in their criminal investigations. Without evidence and testimony from trafficked victims, it is often difficult to prosecute the traffickers with full effect.¹⁵ The question arises whether the harm done to workers on arrival at their place of work should be classified (and assisted) as victims of trafficking or as exploited workers. One could argue that not all harms done to migrants can be classified as trafficking harms. At the same time, if one avoids the use of the term “trafficking” altogether, in favour of using civil and criminal laws to address exploitations and abuses, is there a danger of ignoring the organized, systemic structures that exist (such as violence or the threat of violence, restrictions on the freedom of movement, as well as transnational organized crime) and which are of

¹² Ibid.

¹³ The European Council Framework Decision of March 15, 2001 on the Standing of Victims in Criminal Proceedings defines a victim as: “A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.” The European Convention on Action Against Trafficking in Human Beings, May 16, 2005, CETS No. 197, provides that: “Victim shall mean any natural person who is subject to trafficking in human beings.” Following on from this reasoning, one possible definition of a ‘victim of trafficking in persons’ is “a person who has suffered physical, mental or economic harm from the crime of trafficking in persons, as defined by Article 3 of the Trafficking Protocol.” This should be so irrespective of whether or not there is a strong suspicion against an alleged trafficker or, or official recognition of victim status; so as not to deny victims from receiving the full range of rights of assistance and protection available to them as victims. Where victim assistance and support measures to be withheld pending the verification of a the perpetrator as a trafficker or the victim as an officially recognized victim, further harm could result to them amounting to secondary victimization and ultimately leave them vulnerable again to being re-trafficked. Therefore, specifically on the basis of the definition of trafficking in persons provided by Article 3 of the Protocol, a victim is anyone who is subjected to a combination of elements: acts, means and purpose established by Article 3(a) of the Protocol. However, where the person who has suffered harm is a child, they are to be considered as victims regardless of whether ‘means’ have been established. However, where a definition of a victim of trafficking is linked to the offence, questions are raised as to the level of proof needed to ascertain that an offence has indeed been committed. See The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation

¹⁴ Proper identification of trafficked victims can be broken down into four stages and can be applied to both adult and child victims of trafficking. The four stages include; i) initial identification to assess if one or more indicators of human trafficking is present, ii) enquiries to corroborate these indicators, iii) further action which may include offering victims access to recovery and support services, evidential interviews or arrest and iv) active review of the action to establish that the indicators are corroborated further or to assess if further indicators of trafficking are present. See UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking

¹⁵ UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking. p 3

concern?¹⁶ It must be underlined that this research focuses on establishing what jurisprudence has determined to constitute trafficking/exploitation and how these crimes have been prosecuted. It does not aim at going into a detailed examination of victim protection or the human rights component of trafficking. Suffice it to say that the human rights component is of the utmost importance but not strictly within the scope of this paper.

Outline

The interpretation given by the courts to human trafficking indirectly affects the way in which the pre-trial investigation authorities and other parties working with trafficking in human beings define human trafficking and whom they identify as a victim of trafficking. Court decisions affect the way in which the authorities identify victims of human trafficking and under what offence categories the cases are investigated and prosecuted. By their decisions, the courts also have an influence on who is entitled to the services of the system for victim assistance intended for victims of human trafficking, reflection periods, and residence permits. The implementation of the rights of human trafficking victims has strong links to how the courts apply and interpret the penal provisions on human trafficking and their relation to offences related to human trafficking.

Case law gives not only “teeth” but in many instances contents to legal provisions by showing and creating precedence on what is meant by certain concepts in the legal texts – in this case e.g. concepts such as “exploitation” or “vulnerability”.

When dealing with a concept which has been laid down and defined by international law and which is now being interpreted by national systems these systems further influence each other or perhaps more specifically one court may well look into jurisprudence in another state or region if said state or region has had relevant decisions in the concerned area. Concepts such as “murder”, “theft”, “fraud”, “tort” have been established and interpreted and developed by national systems long before they perhaps were used in an international context and they thus have a firm basis in each national legal system – what are they, how are they defined, what are the constituent elements, has all been determined in national law before an international system came and occasionally mentioned these concepts without however making them its main *raison d’être*. Concepts such as “international organised criminal groups”, “exploitation” and more broadly labour rights and human rights and international criminal law have on the contrary been the focus of international law and have in great measures been guided and imposed/controlled by international law. There is just an element in these concepts of sharing experiences in how to understand them and how to implement them. That is why it is not out of place to mention a case from India when discussing jurisprudence on these issues even if one focuses on the US – clearly a case from India does not create a precedence for a US court but it does tell us something about what e.g. a certain human right as been seen to contain in another context and thus various legal systems do look to each other in these cases of internal implementation of international law. It is much the same principle as that used to e.g. determine States’ positive obligations in relation to the right to life based on case law on e.g. the prohibition on ill treatment or family life – a quite normal and commonly accepted practice.

This report tries to give an insight into what case law on trafficking and exploitation has told us about implementation of trafficking legislation, focusing especially on the Mediterranean Region. Five countries from the South and five from the North have been taken to give as examples. The countries from the North have been chosen partly to give an overview from different parts of the EU partly because they each present interesting and rather developed case law which helps understand what the contents of the crime and crimes related to trafficking actually consist of – exactly what is under

¹⁶ See Touzenis, K. Trafficking in Human Beings - Human rights and trans-national criminal law, developments in law and practices, UNESCO Migration Studies Series, no 3, 2010.

analysis in this paper. As a background for the analysis of what trafficking/exploitation means in these countries is a brief overview of relevant international and regional legislation.

As will be seen the countries in the South of the Mediterranean have very few cases on these issues (Lebanon being a notable exception with quite a few relevant cases) partly also because legislation on this issues is so relatively new. In this context the much more (even if not very extensive) case law in the chosen countries of the Northern Mediterranean may be extremely relevant in understanding what these new legalisation in the neighbouring regions may mean when cases will be brought to court. The same concepts are found in the national legislation examined, based on the same international legal framework, thus it can easily be expected that case law in the countries of the North will give a good pointer as to what these concepts can be interpreted to mean also in other states – especially since such cases are based on international obligations.

It will be considered below why there are not more cases on international trafficking, it must however be highlighted from the outset that case law is considerably easier accessed in the European countries under examination than in the countries from the Southern Mediterranean where cases are not necessarily published. The lack of cases will thus be taken into consideration in the following.

International Legal Framework

United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The definition developed and agreed to in 2000 by the international community for trafficking in persons is found in Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: *“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”*

Article 3 of the Protocol represents the first clear, internationally agreed definition of trafficking in persons. This forms the basis of the subject matter covered in the Protocol, the basis of international cooperation and other fundamental elements of the treaty. Prominent among these is the obligation to establish criminal offences: all States parties to the Protocol are obliged by article 5 to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition. The Trafficking in Persons Protocol requires the criminalization of only “trafficking in persons” as defined, although many States have voluntarily identified and criminalized other related conduct. States parties to the Protocol are also obliged to criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence must also be criminalized, but only “subject to the basic concepts” of the legal system of each State party (art. 5). The obligation applies to both natural persons and legal persons, though in the case of the latter the liability established need not necessarily be “criminal” liability (see art. 10 of the Convention).

The definition refers to three distinct elements:

ACT (what is done): Recruitment; Transport; Transfer; Harbouring; Receipt

MEANS (how it is done): Threat or use of force; Coercion; Abduction; Deception; Fraud; Abuse of power or vulnerability; Giving payments or benefits

PURPOSE (why it is done): Exploitation, including Prostitution of others; Sexual exploitation; Forced labour; Slavery or similar practices; Removal of organs.

All three elements must be present. The only exception is for child victims of trafficking who do not require illegal means.¹⁷

The Protocol makes reference to some specific forms of exploitation; however the list is not exhaustive and it may include other forms as well. The choice made was to extend as much as possible the definition of trafficking in persons to include any possible – known or still unknown – form of exploitation. Consequently the Protocol is well equipped to fight against new forms of exploitation that might constitute the necessary elements of the offence.¹⁸

All the forms of exploitation mentioned in the Protocol are left undefined,¹⁹ but most of them e.g. forced labour, slavery, practices similar to slavery and servitude have been defined elsewhere in other international treaties. The Vienna Convention on the Law of Treaties prescribes that a treaty shall be interpreted in good faith in conformity with the ordinary meaning given to its terms in their context and in the light of the treaty's object and purpose. Any subsequent agreement between the parties or practices in the application of the treaty, establishing the agreement of the parties regarding its interpretation, shall also be taken into consideration. Supplementary means of interpretation, including the preparatory works, the circumstances at its conclusion.²⁰

The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves. Thus, any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking. Individual elements such as abduction or the exploitation of prostitution¹⁵ need not be criminalized, although in some cases supplementary offences may support the purposes of the Protocol and States parties are free to adopt or maintain them if they wish to do so. Dealing with prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of individual States parties (see the interpretative notes (A/55/383/Add.1, para. 64)). The offence defined in article 3 of the Protocol is completed at a very early stage. No exploitation needs to actually take place, as in other criminal matters intent will be a crime.

The main reason for defining the term “trafficking in persons” in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases. Apart from direct advantages in that area, it was also hoped that the agreed definition would also standardize research and other activities, allowing for better comparison of national and regional data and giving a clearer global picture of the problem. The requirement to criminalize trafficking was intended as an element of a global counterstrategy that would also include the provision of support and assistance for victims and that would integrate the fight against trafficking into the broader efforts against transnational organized crime.

There is always a point in the trafficking chain at which people are subjected to *force or coercion*: when they are recruited, during transportation, upon entry or during work. Both overt and subtle forms of coercion are used, such as the confiscation of papers, non-payment of wages, induced indebtedness or threats to denounce irregular migrant workers to authorities if they refuse to accept the working conditions. Currently, few traffickers are prosecuted, whereas workers are locked up and deported. Part of the difficulty in prosecuting employers, contractors, recruiting and transporting agents may be

¹⁷ See Touzenis, K. Op.cit

¹⁸ UNODC: Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto, 2004, para 35

¹⁹ See Touzenis, K. op.cit

²⁰ Vienna Convention on the Law of Treaties Art 31.1

due to the current trend towards increasing penalties for the hiring of “illegal” workers and punishing the off-the-books workers themselves.²¹ Courts are struggling with the issue of indirect forms of coercion. If the coercion at issue is psychological, is it too subjective to be quantified? What defence does an employer have against the charge that his or her legitimate warnings regarding job performance were in fact “threats” that transformed the work into forced labour? See, for example, the decision of the US First Circuit Court of Appeals in *US v. Bradley* 390 F.3d 145 (1st Cir. 2004)²². A question arises as to what consideration should be given to general economic pressure? Even though debt bondage is a form of forced labour, it is perhaps stretching it too far to argue that economic constraint in general can transform work into forced labour, nor that an employer should necessarily be liable for external constraints or indirect coercion that s/he does not create. Clearly concepts such as criminal negligence may come into play but there has to be a lower limit of both exploitation and constraint in order to have a fair system. Notably the Supreme Court of India, have been more receptive to the idea of economic compulsion. In this regard, see *Bandhua Mukti Morcha v. Union of India* 1992 AIR 38 1991 SCR (3) 524, 1991 SCC (4) 177 JT 1991 (3) 408, 1991 SCALE (2)306.²³

The Palermo Protocol adds to coercion, fraud, deception and abuse of power as a means of trafficking. Importantly, the Palermo Protocol connects the issue of coercion to that of consent. In other words it is absolutely irrelevant if the victim *apparently* voluntarily entered or stayed in a situation or conditions of labour exploitation if they were put in that situation through the use of threats, force, coercion, abduction, deception or fraud or by an abuse of power or an abuse of their own position of vulnerability. Most of these concepts will already be clear in national law however

²¹ In OSCE Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification – Prevention – Prosecution Report of the 3rd *Alliance against Trafficking in Persons* Conferences on Human Trafficking for

Labour Exploitation/Forced and Bonded Labour. Vienna, 7 and 8 November 2005 p 13

²² The two defendants, Bradley and O’Dell, recruited seasonal workers from Jamaica for the tree cutting company that they operated in New Hampshire. The workers were promised wages of at least \$11 per hour as well as housing. Upon arrival, their passports were confiscated by O’Dell, who explained that a worker had run away the previous year and that Bradley would hire someone to “destroy” that man. The men were housed in poor conditions and badly treated. They were paid \$8 per hour and also charged \$50 per week in rent. One worker was told by Bradley that he only needed to stay long enough to pay the \$1,000 spent on his air fare. Although the men did travel independently throughout the neighbourhood, Bradley and O’Dell kept tabs on their whereabouts. Eventually the workers ran away, and Bradley and O’Dell were charged with forced labour. After being convicted at trial, they argued on appeal that the trial court’s instructions on the forced labour counts were legally flawed. The trial court had charged the jury as follows: “The term ‘serious harm’ includes both physical and non-physical types of harm. Therefore, a threat of serious harm includes any threats – including threats of any consequences, whether physical or non-physical – that are sufficient under all the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labour or services.” The defendants contended that the trial court’s instruction would apply “to a broad range of innocent conduct, such as employers who legitimately convince their ‘victims’ to continue working, for example, by threatening to withhold future pay that is sorely needed by a worker”. The appellate court found aspects of the defendants’ argument convincing and appeared to recognize potential problems with the use of psychological coercion. “We do agree that the phrase ‘serious harm,’ as extended to nonphysical coercion, creates a potential for jury misunderstanding as to the nature of the pressure that is proscribed... [It] could be read to encompass conduct such as the employer’s ‘threat’ not to pay for passage home if an employee left early. Depending on the contract, surely such a ‘threat’ could be a legitimate stance for the employer and not criminal conduct. Thus, in an appropriate case, we think that the court in instructing the jury would be required to draw a line between improper threats or coercion and permissible warnings of adverse but legitimate consequences.” The appellate court did not find this to be an appropriate case. Although a standard instruction should arguably include “qualifying language explaining that some warnings from the employer could be legitimate”, the defendants’ had failed to preserve this objection for appeal. In the trial court, they had not asked for an instruction excluding “innocent warnings from the class of threats that would violate the statute”. In this case, there was no evidence that the defendants had “made legitimate threats, so there is no risk that the jury convicted them for such threats”. Therefore there was no plain error warranting reversal. Looking at the fact of the case an eventual acquittal would clearly have had to be exclusively based on a procedural error.

²³ See ILO: Forced Labour and Human Trafficking Casebook of Court Decisions, 2009

coercion and *abuse of power/vulnerability* are unlikely to be.²⁴ The “abuse of a power or of a position of vulnerability” contained in Article 3 of the Protocol 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. The terms “abuse of a position of vulnerability”, and the UN’s interpretive note on that wording, make it clear that trafficking can occur without any use of force. What elements should be recognized as constituting a situation of vulnerability or dependence? Some elements are explicitly provided for in law, such as youth, migrant status, physical and/or mental incapability and gender, while others are left to the discretion of judges. In France, a court has identified the risk of unemployment as creating a situation of workers’ economic dependence vis-à-vis their employer (see *Procureur de la République v. Monsieur B*. Decision No. 97/8641, Court of Appeal of Poitiers

(26 February 2001)²⁵). The question then arises, what role a worker’s own unique vulnerabilities plays in the analysis of whether labour was forced. Should coercion still need to be proved when vulnerabilities are apparent, bearing in mind that vulnerabilities may in certain cases render coercion unnecessary? Courts appear to require less overt coercion when they recognize that a particular kind of victim is especially likely to be exploited in the labour field, but to what extent should a person’s unique vulnerabilities be taken into account?²⁶

Several general principles of criminalization established in the Organized Crime Convention apply to its Protocols. It may also be important in some legal systems to ensure that criminal offences established in accordance with the Convention and the Protocols are coherent to support the investigation and prosecution of organized criminal groups and their members for any offence, or combination of offences, established in accordance with the instruments. In many cases, for example, organized criminal groups involved in firearms trafficking are also engaged in smuggling or trafficking human beings or narcotic drugs or other commodities, or in other crimes such as money-laundering, and national legislatures will need to ensure that the formulation of provisions on the relevant criminal offences pursuant to the Convention and its Protocols will support coordinated efforts to investigate and prosecute all of those activities together, where appropriate. As the ratification of the Protocol by a State is usually followed by the adoption of relevant legislation and national action plans within a matter of years rather than months, the implementation of national anti-trafficking legislation that is in line with the Protocol is often a very lengthy process. Thus, many States (most of those who have not yet ratified the Protocol and many who have already ratified it) still use different definitions regarding the act of trafficking, the means of trafficking or the purpose thereof.²⁷ For example, many national legislations do not include internal trafficking in their definition of trafficking in persons but instead refer to transnational trafficking only, while the Protocol arguably,

²⁴ OSCE Occasional Paper Series n. 1. A Summary of Challenges: Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region. p 8

²⁵ See below

²⁶ The case of *Saliadin v France* considered below may give some pointers to this

²⁷ As of November 2008, 63% of the 155 countries and territories the UNODC Global Report on Trafficking in Persons covered had passed laws against trafficking in persons addressing the major forms of trafficking. These laws criminalize, at the very least, sexual exploitation and forced labour and have no restriction regarding the age or gender of the victim. Another 16% had passed anti-trafficking laws that cover only certain elements of the Protocol definition. For example, laws that are limited to sexual exploitation or only apply to female or child victims. In 2003, only one third of the countries covered by this report had legislation against human trafficking; at the end of 2008, four-fifths did. The number of countries having anti-trafficking legislation more than doubled between 2003 and 2008 in response to the passage of the Protocol. In addition, 54% of responding countries have established a special anti-human trafficking police unit, and more than half have developed a national action plan to deal with this issue. Given that this legislative framework is very new, it is remarkable that 91 countries (57% of the reporting countries) reported at least one human trafficking prosecution, and 73 countries reported at least one conviction. A core of 47 countries reported making at least 10 convictions per year, with 15 making at least five times this number.

and other national and regional human rights instruments (such as the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings) cover also internal trafficking.²⁸

There are also significant differences in various anti-trafficking laws when it comes to the purpose of exploitation.²⁹ In many countries, the specific offence of trafficking in persons extends only to sexual exploitation while leaving trafficking for other forms of exploitation out. Where national legislation extends only to trafficking for sexual exploitation, trafficking for some other purposes may be prosecuted under national penal law, for example, under a more general offence of “reducing someone to a condition analogous to slavery” or similar offences. In countries where such provisions are not available under penal law, or where the application of penal law has proven to be too cumbersome in practice, the offence of trafficking for forced labour is sometimes also pursued under existing labour legislation rather than criminal law. This means that the resulting penalties are likely to be different than provided for in criminal or penal law (for example, they may be less severe for the perpetrators or consist of the payment of collective damages rather than incarceration for the same offence).³⁰ Whatever the outcome, such cases would not be recorded in criminal justice statistics on human trafficking, as the prosecutions and convictions would fall under different categories. Though the implementation of the Trafficking Protocol varies from country to country,³¹ the general picture

²⁸ UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 024 Workshop: Quantifying Human Trafficking, its Impact and the Responses to it. p 9

²⁹ See Touzenis, K. op.cit

³⁰ *ibid.* p 9

³¹ See in OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for

Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006.: The experiences in the United States show a continuum in the workplace between forced labour and labour exploitation. One could speak of mixed workplaces in which people can find themselves in different positions. The United States has a broad spectrum of laws to address this variety of situations, a large part of which stems from the abolition of slavery two centuries ago. Moreover, in 2000 the Trafficking Victims Protection Act (TVPA) was adopted. The Act contains three important elements: It criminalises broader forms of coercion by including more subtle forms of psychological control. Such psychological coercion can be based on factors which include culture, threats of harm to family members, hopes for a better life or false promises. It offers a generous scheme of social welfare benefits to victims, along with residence in the form of visas that allow victims and their families to stay in the U.S. for a period of three years. It requires cooperation between law enforcement and social services. Law enforcement must write a letter for the visa procedure to start, of which the social service providers are dependent, so this forces both parties to co-operate. Apart from the TVPA, the federal laws contain provisions on peonage, involuntary servitude, forced labour, trafficking into servitude, sex trafficking and document servitude (“holding the actual or purported identity documents in the course of committing or with intent to commit any trafficking crime”). Forced labour is defined as “providing or obtaining another person’s labour or services by threats of serious harm or physical constraint, by means of any scheme, plan or pattern intended to instil fear of serious harm or physical constraint; or by means of the abuse or threatened abuse of legal process”. The definition of coercion in the trafficking provisions matches the concept of coercion in the Forced Labour Statute. ‘Serious harm’ is subjectively defined: it must have led to the decision of the victim not to run away. Which type of coercion is necessary to achieve this depends on individual circumstances. Statutory examples include isolation, sexual abuse, starvation, threats, psychological harm and coercion. Moreover, abuse of legal process (e.g. threat of deportation or detention) or holding identity documents are separate offences. These are effective tools: if it is not possible to make a trafficking case because of problems with witnesses, it is possible to prosecute on these minor offences. Trafficking can also be prosecuted under violent crime offences (extortion, kidnapping, hostage taking), immigration offences and labour offences. Other relevant provisions include legal provisions on mandatory victim restitution and forfeiture of criminal property. Forfeited criminal assets and fines are used to fund victim provisions and to provide compensation to victims. Policy initiatives to overcome these problems include targeted messaging to migrant populations, training of local law enforcement, outreach to specific first responders like intake officers at hospitals, emergency room personnel, restaurant health inspectors, and people who install telephones in houses, and co-operation with the Department of Labour. The latter is important because labour inspectors can enter any workplace and report back to law enforcement in case of suspicions of trafficking or forced labour. Another initiative, in co-operation with the Mexican authorities, consists in providing Mexican workers with a card that asks them to call their own consulate in case of labour abuse. Particularly for undocumented workers this is a more comfortable route, which has led to a number of prosecutions. Currently half of the cases are reported by local officers, 40 % by NGOs, and only 10 % by federal officers.

shows that only few victims are identified and protected and only few perpetrators prosecuted. Reasons include the newness of the legislation,³² lack of conceptual clarity, resources as well as political will making the fight against this form of trafficking a priority, the disproportionate focus on combating irregular migration and on the irregular status of the victims rather than on the conditions they are subjected to, and the lack of assistance and protection services for victims.³³

When a country is a party to the UNTOC and the Protocol, it must bring its definition of trafficking in persons in its national Criminal Code in line with the Protocol; the precise wording of that definition may differ from that contained in the Protocol, but the conduct of trafficking must be criminalised. Drafters of national legislation should check for consistency with other offences, definitions and other legislative uses before relying on formulations or terminology of the UNTOC and the Protocol, which was drafted for general purposes and addressed to Governments. Thus, the level of abstraction is higher than that necessary or workable for domestic legislation. Therefore, in drafting legislation, care should be taken not to incorporate verbatim parts of the text but to reflect the spirit and meaning of the various articles.

Whereas it is true that the definition may be complex, it should not be presented to people in the field as inoperative. The three elements must be there for a case to constitute trafficking, and it is not always those three elements are clear upon e.g. arrival. But in these cases it should not be forgotten that e.g. abuse and bodily harm are criminal offenses outside the trafficking context, and can be prosecuted as such. The trafficking definition further follows classical criminal law in giving intent (to exploit) a central role. This is not necessarily easy to prove, but on the other hand does not differ terribly from other definitions or understandings of when crimes can be prosecuted. As the ‘purposes’ for which people are recruited are an intrinsic part of the definition of what trafficking involves, it is worth noting that they refer to a wide range of situations involving forced labour or slavery-like situations. They also involve the “exploitation of the prostitution of others or other forms of sexual exploitation”. The crucial importance of avoiding confusing regarding the definition and its practical operational value underscores the importance of understanding and remembering that trafficking is a

³² UNODC Global Patterns in Human Trafficking, United Nations 2008, p 22-24: One of the elements emerging from the collected data is that most legislative frameworks on trafficking in persons have been developed only within the last few years. The real impact of the Protocol appears through a time-analysis of the dates when countries first introduced trafficking in persons legislation. The UN Protocol entered into force in December 2003. The data shows that the majority of countries did not have any sort of trafficking in persons legislation prior to that year and that most of the current laws criminalizing human trafficking were established after 2003. About 35% of the countries included in the report adopted a specific offence on trafficking in persons prior to 2003, but the UN Trafficking Protocol generated a wave of amendments to criminal codes introducing this offence. Forty-five per cent of the countries covered in this report adopted an offence of trafficking in persons for the first time during the period 2003-2008. These countries are mainly in East Asia and the Pacific, Central America and the Caribbean, and West Africa. While 65% of the countries had no specific anti-trafficking legislation before 2003, this figure was reduced to 20% by November 2008. Additionally, after 2003 many of the 35% of countries with long-standing anti-human trafficking provisions amended their criminal codes to include more forms of trafficking (i.e. criminalizing trafficking for forced labour and trafficking in adults). About 25% of the countries in the report (N: 39) either introduced a new anti-trafficking law or amended their existing provisions between 006 and November 2008. This number is likely to increase by the end of 2008, because at the time of publication of this report, many countries had proposed amendments that were still awaiting approval by competent authorities. A few more countries have specialized police dealing with organized crime matters, in general, or with human rights or child protection issues that deal directly or indirectly with the crime of trafficking in persons. Similarly, about 76 countries adopted a specific national plan of action on trafficking in persons prior to November 2008, and other countries adopted plans of action for related matters, such as child protection. A country without a national action plan to combat trafficking in persons might, however, not necessarily be less efficient than those that have one in place. Nevertheless, the adoption of a national action plan can generally be seen as a sign of the importance that trafficking in persons has in a country's political agenda.

³³ OSCE: Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims. Report of the 5th Alliance against Trafficking in Persons Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour Vienna, 16 and 17 November 2006. p 2

criminal law concept, but with a strong human rights dimension. Trafficking must be addressed from a criminal law perspective, trafficking victims must be addressed with a human rights perspective.³⁴

In this context, it must be stressed that the UN Trafficking Protocol requires Member States to criminalize trafficking in persons in all its forms, as defined in article 3. While using trafficking-related offences may enable to prosecute and convict criminals easily, applying legislation that is not specifically in line with the UN Trafficking Protocol can be at the expense of the victims. Victim protection measures are often not considered or not appropriate within the context of trafficking-related offences.³⁵ For victims of human trafficking, it is not without significance whether they are identified as victims of human trafficking or one of the related offences. Persons believed to be victims of human trafficking are entitled to the certain special protection (such as services of the system for victim assistance and other special support measures during the pre-trial investigation and criminal procedure, and it is possible for them to apply for a special reflection period and residence permit).

When it comes to the Human Rights provisions within the Palermo Protocol Article 6, 7 and 8 contains obligations which States have to follow, some are mandatory and some are not. Each State party is obliged to fulfil the mandatory requirements such as (a) Protect the privacy and identity of victims in appropriate cases and to the extent possible under domestic law (Art. 6, para. 1); (b) Ensure that victims receive information on relevant court proceedings in appropriate cases and have an opportunity to have their views presented and considered (Art. 6, para. 2); (c) Endeavour to provide for the physical safety of victims while they are in their territory (Art. 6, para. 5); (d) Ensure that measures exist to allow victims the opportunity to seek compensation for damages suffered (Art. 6, para. 6); (e) Facilitate and accept the return of victims who are nationals or have the right of permanent residence, with due regard for their safety (Art. 8, para. 1); (f) Verify without unreasonable delay whether a trafficking victim is a national or has the right of permanent residence and issue the necessary travel documents for re-entry (Art. 8, paras. 3 and 4). In addition, each State party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons (Art. 6, para. 3). Articles 6, 7 and 8 of the Trafficking in Persons Protocol include measures that must be taken or considered in respect of trafficking victims. Those articles should be read and implemented in conjunction with Articles 24 and 25 of the Convention, which make provisions for victims and witnesses that apply to all cases covered by the Convention. Essentially the Convention and the Protocol supplement the general rules for dealing with witnesses and victims with additional assistance and support specifically established for victims of trafficking. Thus, where the Trafficking in Persons Protocol applies, trafficking would be an offence covered by the Convention and victims would be covered by articles 6-8 of the Protocol and Article 25 of the Convention. To the extent that the victims are also witnesses, they would also be covered by Article 24 of the Convention. Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance and support for victims incorporate some element of discretion. The various obligations apply equally to any State party in which the victims are located, whether a country of origin, transit or destination. The nature of the social obligations reflects concerns about the costs and difficulties in delivering social assistance to all victims (or indeed, the general population) in many countries.³⁶

Although trafficked persons are recognised by law as “victims,” survivors of human trafficking are often only assisted by authorities if they “co-operate with law enforcement officials” and agree to testify, otherwise, they are often treated as irregular immigrants in need of deportation. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines “Victim of Crime” as: “Persons who, individually or collectively, have suffered harm, including physical or

³⁴ See Touzenis, K.: Op.cit

³⁵ UN.GIFT: Trafficking in Persons, an analysis on Europe, 2009 p 6

³⁶ UNODC: Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto.

mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.” Under this Declaration, the person is to be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.³⁷ This means that conditioning the protection of a victim of trafficking upon the criminal case against the trafficker goes against basic UN principles of Justice.³⁸

In this context it must be underlined that the Trafficking Protocol is not a human rights instrument. The UN Crime Commission, which developed the Trafficking Protocol, is a law enforcement body, not a human rights body.³⁹ That is to say it is not a body occupied with monitoring human rights violations. The Trafficking Protocol is primarily a law enforcement instrument. From the human rights perspective, it would perhaps have been preferable if an international instrument on trafficking had been created within a human rights body rather than in a law enforcement body. However, the impetus for developing a new international instrument arose out of the desire of governments to create a tool to combat the enormous growth of transnational organized crime. Therefore, the drafters created a strong law enforcement tool with comparatively weak language on human rights protections and victim assistance.⁴⁰ Does this necessarily mean that the Protocol is irrelevant for human rights protections? Not at all and even within the Protocol the reference to the wider international legal framework is found – Art. 14 of the Protocol makes the obvious evident – the Protocol does not exist in a vacuum: it compliments and is complimented by other instruments including the major human rights conventions and it cannot be seen isolated from these.⁴¹

Regional: The Council of Europe Convention Against Trafficking and The European Convention and Court of Human Rights

Its human rights perspective and focus on victim protection is the main added value of The Council of Europe Convention Against Trafficking in relation to other international instruments. It is however important to consider that the CoE Convention needs to consider all aspects of trafficking where the UN instruments compliment each other. It requires State Parties to take a number of measures to assist victims in their recovery and to provide for a reflection period of at least 30 days. Moreover, it opens the possibility to grant residence permits not only on the basis of the persons’ co-operation with law enforcement authorities, but also on the basis of their personal situation. Article 1 of the Convention provides that its purpose include the protection and assistance of the victims and the designing of a comprehensive framework of the protection and assistance of victims and witnesses.

Notwithstanding the confusion which may be created by the Convention in relation to which extent trafficking is a violation of the human rights of victims when there is no failure from the state the Convention does impose direct human rights obligations on the state which are welcome. Article 5(3) stipulates the promotion of a human rights based approach in the development and implementation of policies and programmes that states are under an obligation to establish in order to combat trafficking, Chapter III on measures for the protection and promotion of the rights of victims, sets out minimum standards for the provision of assistance to victims to promote physical, psychological and social

³⁷ UN GA Res 49/34, Annex (29 Nov. 1985) UN DOC A/RES/40/34, para 1

³⁸ See Touzenis, K. op.cit

³⁹ Priority areas within the mandate of the UN Crime Commission are: international action to combat national and transnational crime, including organized crime, economic crime and money laundering; promoting the role of criminal law in protecting the environment; crime prevention in urban areas, including juvenile crime and violence; and improving the efficiency and fairness of criminal justice administration systems.

⁴⁰ Jordan, A.D.: The Annotated Guide to the Complete UN Trafficking Protocol, p 2-3

⁴¹ See Touzenis, K. op.cit

recovery. These provisions neatly encapsulate the two main aspects of anti-trafficking: that of seeking to protect the victim and prosecute the traffickers.⁴²

A similar human rights based approach is reflected in the recent judgements of the European Court of Human Rights below.

The Council of Europe Trafficking in Persons Convention aims at preventing human trafficking, protecting victims, prosecuting traffickers and promoting international cooperation – much like the Palermo Protocol.

Article 4 of the CoE Convention defines trafficking in human beings and it contains only one difference from the definition in Art. 3 of the Protocol; it includes any natural person who is subject to trafficking in human beings as defined”.

The CoE Convention deals more comprehensively with identification of victims and includes this as the first right of the trafficked person – to be properly identified.

According to Art 14 State Parties *shall* grant as a minimum protection: an adequate standard of living; emergency medical treatment; translation and interpretation services; counselling and information services in a language the victim can understand on legal rights and services available; assistance in defending rights and interests; access to education;⁴³ due consideration for safety and protection needs. Article 15 ensures that victims are also granted access to information on relevant judicial or administrative proceedings; legal assistance and free legal aid; compensation and the adoption of measures for the adoption of programmes for social assistance or social reintegration.

The CoE Convention has a number of differences compared to the Protocol: it clarifies its scope of application so there can be no doubts and space for no contra-productive discussions on its scope of application whether national or trans-national committed by an individual or an organisation; it shifts focus from mainly prosecution to mainly victim protection; it addresses demand side; it deals specifically with identification; the protection and assistance provisions are clearly binding; the reflection period is obligatory; the chapter on criminal law (Art 18-26) is comprehensive; recognising the work of civil society.⁴⁴

Some of these issues are most of all clarifications of what could be deducted from the Palermo Protocol and the UNTOC together – e.g. some of the criminal law provisions which are not to be found in the Protocol but in the UNTOC, others are improvements in the sense that there is a victims centred approach with no direct need to refer to other human rights instruments – which nonetheless are applicable also in trafficking cases covered by the Protocol, since general Human Rights instruments will apply to these cases even if not directly stated so in the Protocol – a fact which is too often forgotten or overlooked.

Legislation in selected SEM States

In the Middle East and North Africa the few convictions has to be inserted into a general framework of a scarcity of criminal justice statistics in the region. Only Israel, Lebanon and Morocco have had the specific offence of trafficking in persons in their criminal codes long enough to really analyse trends in their criminal justice responses. Egypt have just now adopted a trafficking legislation but have had offences related to trafficking to prosecute some forms of trafficking in persons. The number of persons investigated in these countries decreased between 2003 and 2008. The United Arab Emirates

⁴² Piotrowicz, R.: Trafficking of Human Beings and their Human Rights in the Migration Context, in Cholewinski, R.; Perruchoud, R. and MacDonald, E.: International Migration Law – developing paradigms and key challenges. p 285

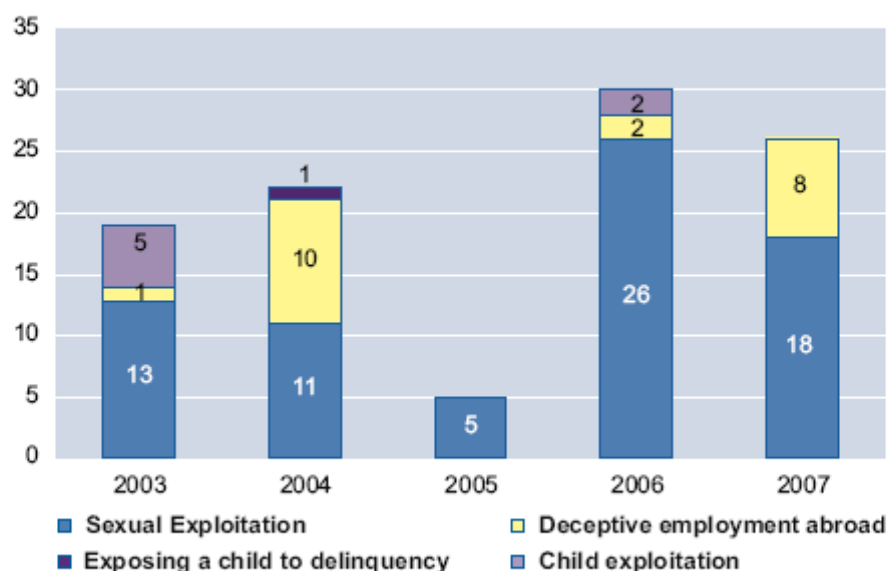
⁴³ The CRC has already granted the right to education to all children – including non-nationals.

⁴⁴ Scarpa, S.: Trafficking in Human Beings – modern slavery. p 163-64

and Bahrain adopted comprehensive legislation on trafficking in persons after 2006, and convictions were recorded in both countries, but criminal justice trends have not been identified.⁴⁵

The UNODC “Global Patterns on Trafficking in People” from 2008 contains convictions/investigation statistics only for one of the five countries examined here: Egypt

Fig. 2: Cases Investigated for offences used to prosecute trafficking in persons in Egypt, by offence (2003-2007)



Source: Public Prosecution, Ministry of the Interior

It is quite clear in many countries that any investigation into cases related to trafficking is seriously impaired by the general lack of data, the non-publishing of sentences and perhaps in some cases a lack of investigation into possible crimes of exploitation.⁴⁶

Legislation on Trafficking

Generally the legislation on trafficking adopts the definitions from the Protocol, which is quite sensible as long as the laws are being giving true value either by interpretation at courts or until that happens administrative or further legislative interpretations. Egyptian definitions are largely analogous to the ones found in the Convention and Protocol,⁴⁷ but they do differ in several respects, with the Egyptian law arguably providing wider protection to trafficking victims. For example, the definition of “organized criminal group” under Egyptian law includes groups aiming to obtain a moral benefit as a result of their criminal activity. Furthermore, Egyptian Law 64/2010 replicates the Convention’s

⁴⁵ Global Patterns on Trafficking in People, 2008, UNODC

⁴⁶ One reason given by several of the people involved in searching for cases and data

⁴⁷ Article 3 of the Protocol defines “trafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Article 2 of the Convention defines “organized criminal group” as “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”.

definition of a crime that is “transnational in nature” (section 1(2)); however, the Law waives the requirement that the effects of a crime in one state be *substantial* in another (article 3(2)(d) Convention), or that a *substantial* part of the preparation, control, direction or planning of the crime takes place in one state and the crime is committed in another state (article 3(2)(a) Convention). Put differently, the *substantial* criterion is waived and a crime is deemed transnational under the Law if (i) it is committed in more than one state, (ii) it is committed in one state but part of its preparation, control, direction or planning takes place in another state, (iii) it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state, or (iv) it is committed in one state but has effects in another state.

Furthermore, section 2 of this Law has a wider scope than the Protocol (articles 3-4) in that it includes the following additional factors in the definition of “trafficking”: (i) the crime of trafficking will be found to exist if it takes place exclusively in Egypt (as opposed to the exclusively transnational nature of the crime in the Protocol); and (ii) the crime of trafficking extends to situations where victims are used for the purpose of begging and the forced removal of human tissues. The latter criteria are particular to the Egyptian context where begging and the phenomenon of street children constitute a major problem, and where cloning is strongly opposed by a significant portion of the Egyptian population.

Interestingly in Tunisian laws which touch upon trafficking or smuggling related offences it is more often the “simple” expression of exploitation which is used when trafficking (or smuggling) is legislated against – which may lead to the conclusion that it is specially trafficked related crimes which are the object of Tunisian legislation. The reasoning behind this seems to be that Tunisian legislation already covered the trafficking offence when Tunisia ratified the Protocol. This may very well be true, but as noted elsewhere it is paramount to combating this transnational crime to have a somewhat uniformity in legislation and implementation and thus it may pose a problem to effective implementation that no specific crime of trafficking has been adapted. This is may be partially remedied by the specific provisions on economic or sexual exploitation but the lack of known cases (prosecuted or investigated) related to these provisions over the past decade may be seen as an indicator that more specific legislation is needed.

Trafficking was not prohibited in all its forms before the promulgation of Jordan’s anti-human trafficking law 9 in 2009.⁴⁸ The law follows the Palermo Protocol’s definition too and defines it as “attracting, transporting, harboring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of the lower of or position of vulnerability or of the giving or receiving payments or benefits to achieve the consent of a person having control over other persons.” However article ten of the law punishes any person who knows (by virtue of the job that s/he holds) about the existence of a plan to commit one of the crimes of human trafficking involving aggravated circumstances or knew that one of these crimes occurred and did not notify competent official authorities about this, by imprisonment for a period of six months to three years.

Lebanon has no specific law or provisions against trafficking but as other concerned states treat the crime of trafficking by applying trafficking related provisions such as deprivation of liberty, physical and sexual assault and labour related offences (see below). In January 2009 a first step was taken towards creating a new chapter in the penal law which will criminalize trafficking as such. The proposed amendment unfortunately focuses on exploitation for sexual purposes – even if the wording says that exploitation is to be considered “acts contrary to law” (including trafficking of organs) the proposed provision goes on to say “especially those contrary to moral or instigating prostitution or the exploitation of prostitution”. The punishments foreseen are from 5 to 15 years of prison with payment of fines from the equivalent of 25.000 Euro to 125.000 Euro. It is considered an aggravating

⁴⁸ Jordan Official Gazette no 4932, p. 920

circumstance if the victim is a woman or a child. The means and acts of the crime correspond to the definition in the Palermo Protocol. It is also specified that in case the acts are carried out by a civil servant, a family member to the victim or someone with authority over the victim this will be considered as an aggravating circumstance.

The proposed law encourages collaboration with civil society by permitting the Ministry of Justice to ask the help of associations and institutions specialized in the protection of victims of trafficking. The proposal foresees the possibility to exclude victims of trafficking who have been forced to commit criminal acts from prosecution, in accordance with international principles and also provides for a possible residence in Lebanon for victims while investigation is in progress. The proposal is still being discussed, partly also due to various gaps which have been pointed out, among others the lack of an all encompassing definition of exploitation as mentioned above; lack of specific mentioning of exploitation of vulnerability; lack of specific protection.

Morocco as well does not specifically criminalise trafficking and thus the necessary provisions are found in the criminal code, migration laws and different laws related to labour and protection of children. Morocco has not yet ratified the Palermo Protocol which is obviously part of the explanation for the non-existence of a specific trafficking crime. One specific provision on trafficking is found in law 16-98 on trafficking in organs. The provisions in this law criminalise export and import of human organs without authorization. In 2003 a change in the criminal code introduced a new provision criminalizing the abandon, sale and purchase of children, inciting minors to prostitution and begging and child forced labour and pornography.

Legislation on Trafficking related offences

Although they are not required to do so under the Trafficking in Persons Protocol, many States have also criminalized many of the conducts related to human trafficking. Most States have laws criminalizing abduction, illegal sequestration and kidnapping in general. These acts constitute criminal offences in most States and could be invoked to address certain elements of the full range of crimes. Many offences related to trafficking are “serious crimes”, which may actually trigger the application of the Organized Crime Convention. A “serious crime” under the Convention is one punishable under national law by four years of imprisonment or more. States reviewing their legislation may wish to ensure that, when appropriate, offences that are frequently associated with trafficking in persons meet this requirement. Where the Convention applies, a wide range of powers and procedures, including mutual legal assistance, extradition and various forms of law enforcement cooperation become available for dealing with transnational aspects of a case.⁴⁹

These acts constitute criminal offences in most States and could be invoked to address certain elements of the full range of crimes. This could be useful in States where a distinct criminal offence of trafficking does not yet exist, or where penalties for trafficking do not sufficiently reflect the seriousness of the crime. There may also be cases where the existing evidence is not sufficient to support prosecution for human trafficking, but may be sufficient for a prosecution for related offences. The prosecution of accused individuals for additional or overlapping offences may also be useful in demonstrating to courts the seriousness of a particular trafficking operation. In some instances, for example, evidence relating to certain aspects of the trafficking operation (e.g. total number of victims, length of time of the operation, the corruption involved and the seriousness of the harm done to the victims) may only be fully revealed by bringing additional charges before the court.⁵⁰ Such offences include, but are not limited to, the following: • Slavery • Slavery-like practices • Involuntary servitude • Forced or compulsory labour • Debt bondage • Forced marriage • Forced prostitution • Forced abortion • Forced pregnancy • Torture • Cruel, inhuman or degrading treatment • Rape or sexual

⁴⁹ UNODC, Toolkit to combat trafficking in persons, 2008, p 34

⁵⁰ Ibid.

assault • Causing bodily injury • Murder • Kidnapping • Unlawful confinement • Labour exploitation • Withholding of identity papers • Corruption

Slavery and forced labour are criminal offences in most of the concerned states. In Jordan slavery is prohibited and has been ground for punishment 1929. The law combating slavery punished whomever sold or bought a person, whomever convinced any person to come or to leave Trans-Jordan in order to treat him as a slave. As could be expected, and as most criminal laws from before 2000 the Jordanian penal law of 1960 does not deal with human trafficking, but neither does it deal with forced labour as such. It does however punish trafficking-related offenses such as kidnapping, assault, rape, and physical restraint. In May 2010 a temporary criminal law was passed by the cabinet to improve the criminal justice system, particularly crimes committed against women and children. Ten articles of the law as amended by provisional law 12 of 2010 are devoted to offenses of incitement to immorality committed against anyone including migrant workers. Article 310 of the law punishes by imprisonment and a fine whomever procures or attempts to procure a woman as a prostitute either within the kingdom or abroad and any woman leaving the kingdom with intent to live in or frequent a brothel; the punishment is more severe in case these crimes are committed through threats or intimidation (Article 311). The law further establishes penalties for anyone who allows his home to be used for purposes of prostitution and any male person who lives wholly or in part on a woman's earnings from prostitution (Article 315).⁵¹ Such laws clearly help to interpret what constitutes trafficking – and can also be used in non-trafficking cases, either because it is impossible to prove trafficking or in many cases because these crimes are crimes outside the trafficking discourse.

Forced labor is not dealt with in Jordanian labor law and it is not defined in the prohibition of human trafficking law. Nevertheless, Article 13 of the Jordanian Constitution (1952) prohibits forced or bonded labor, except in a state of emergency such as war or natural disaster. Another area of concern is the area of child labor in Jordan. Forced or compulsory labor by children is specifically prohibited but the prohibition of such work falls under the general prohibition of forced labor in Article thirteen of the Jordanian Constitution. Jordan ratified many international conventions related to the child labor: the ILO Convention for the elimination of the worst forms of child labor convention 182 of 1999 and the Convention of the Rights of the Child of 1989 (Article 31). Article 389 of the Penal Code as amended by the provisional penal code twelve in 2010 punishes beggars and whomever the beggars work for.

In order to protect the right of migrant domestic workers Jordan adopted a new set of rules. Migrant domestic workers are employed through private recruitment agencies that specialize in bringing and employing non-Jordanian domestic workers. Regulations governing recruitment agencies of 2006⁵² were amended recently by bylaw (89) in 2009. The new bylaw regulates and streamlines the work of the recruitment agencies of migrant domestic workers, takes into account human rights standards, and aims to improve the working and living conditions of the thousands of regular migrant domestic workers in the country. Domestic workers (whether Jordanian or foreigners) were not covered by the labour law before the issuance of law 48 of 2008 amending the former. They were not considered real workers entitled to labour protection and the household⁵³ in which the work was not considered a "work place" and was still largely seen as private domain beyond the reach of regulations and supervision by labour inspectors.

It is important to note that they do not cover trafficking by one or two persons. For example, "traffickers" of domestic workers are often a wife and husband who bring a worker from abroad and force her to work in a foreign country with little or no pay or freedom. They would not be covered by

⁵¹ Committee on The Elimination of Discrimination Against Women, Jordan second periodic report, 26 October 1999, p.17 and Jordan combined third and fourth report. CEDAW/JOR/3-4, 10.3.2006

⁵² The Official Gazette, no. 4761, 1.6. 2006, p. 2007.

⁵³ See <http://www.migrationinformation.org>. September 8, 2007.

2(a). Also not clearly covered is trafficking that is done entirely within a country by nationals of the country. From the perspective of the victims, the harm can be just as great no matter whether there are one or ten traffickers and whether the trafficking is cross-border or internal. So the punishments for the traffickers and the protections for the rights of trafficked persons should be the same regardless of whether the trafficking is internal or across borders and whether there are one or twenty traffickers.⁵⁴ It is however important to keep in mind, that for the victim it is less relevant whether the exploiter is prosecuted for the crime of trafficking or for labour exploitation may not be crucial as long as the crime is prosecuted/punished. It is very often overlooked that it is not always necessary to prove trafficking in order to effectively protect people in exploitative situations and effectively repress offenders. Most of the components of the trafficking crime is punishable without trafficking as a whole taking place. What may be problematic is if trafficking has not taken place and the victim therefore is not granted proper protection in form of e.g. an offer to remain in the country of origin but is repatriated without concern for his/her safety and well-being.

The situation was partially changed in August 2008 when Jordan revised its Labour Law including migrant domestic workers. With this new law, Jordan became the first Arab country to extend protections in its labour law to domestic workers.

In Egypt forced labour is included in the definition of trafficking in the new anti trafficking law. Until the coming into force of this Law, Egyptian law did not have a detailed legal instrument banning forced labour. Prior to the enactment of this Law, rights defenders could generally rely on the provisions of the Unified Labour Code, the National Law on the Rights of the Child, the Criminal Code, or general international legal obligations. These tools were, nonetheless, insufficient. For example, the Unified Labour Code explicitly excludes domestic workers (section 4) from its ambit. It is also an inefficient deterrent as it imposes minor penalties on those who violate the rules relating to the employment of children⁵⁵ and non-Egyptians.⁵⁶ Similarly, the Criminal Code does not contain detailed provisions on forced labor. At best, one can rely on sections 280 and 281 of the Criminal Code, which cover forced confinement by non-state representatives.

In Tunisia a lot of emphasis on the crime of irregular entry into the country (or on preventing smuggling) – noticeably the law expresses concern that the smugglers abuse the vulnerability and dreams of people in order to benefit and obtain gain – this formulation is surprisingly close to express what trafficking is all about – but it does not aim at prevent or punish trafficking (it does not mention exploitation and it does not protect victims) but only at preventing smuggling and irregular entry. The underlining of the conditions of the smuggled migrant is however quite interesting.

Trafficking can be prosecuted on the basis of various laws – which was one of the reasons why a specific provision on trafficking has not been adopted upon the ratification of the Protocol. First of all the several laws have provisions against sexual exploitation: the criminal code represses rape and kidnapping. Furthermore the law on protection of children (Loi n° 95-92 of 9th of November 1995) specifically aims at protecting children from sexual exploitation – focusing on prostitution of children but adding that it does not have to be for monetary gain. In case of a possible sexual exploitation of children the family judge will interfere in order to protect the child.

Tunisian Labour Law (Loi n° 66-27 of 30th of April 1966) have certain provisions which may be used in cases of trafficking for labour/economic exploitation. Some of these are applicable for all workers, such as rules on maximum hours of work, minimum wages; some are applicable to specifically vulnerable categories and some are specifically aimed at foreign workers. The rules have

⁵⁴ Jordan, A.D.: The Annotated Guide to the Complete UN Trafficking Protocol, p 13

⁵⁵ The penalty is a fine that ranges between 500 and 1000 Egyptian Pounds (section 248). The chapter dealing with the employment of children explicitly excludes children who work exclusively in the agricultural section from the protection of this chapter (section 103).

⁵⁶ The penalty is a fine that ranges between 500 and 5000 Egyptian Pounds (section 245).

been criticized for not offering an adequate protection due to the possibilities of derogations permitted e.g. in “situations of urgency”. Dismissal is also legislated but leaves a wide margin for the employer – this beg the question whether it may be possible to construct vulnerability and dependence on the grounds of lack of protection in employment taking the French case (below) one step further from when it decided that a general insecurity in the employment market created vulnerability. Alone this will not be enough to determine that an employer is particularly dependent/vulnerable but if other and aggravating factors are present the possibility is at least an interesting intellectual exercise. Foreigners’ access to the labour market is very restricted in Tunisia. The labour code obviously sanctions illegal employment of irregular and regular migrants but actually the penalty is relatively lenient which ends up favouring exploitation of foreign workers since the sanctions are not an effective deterrent.

Lebanon criminalizes many of the same acts in specifically their penal code: kidnapping and deprivation of liberty obtained by fraud or violence – the inclusion of fraud is notable especially considering the definition in the Palermo Protocol of the possible means used in trafficking. Lebanese penal law (Legislative decree 34/NI from 1st of March 1943 with amendments) also criminalises acts which with violence or threats forces someone to commit acts contrary to public moral (“modesty”). In this context soliciting a minor under the age of 15 is considered an aggravated offence. Always in the context of crimes contrary to public moral the exploitation of the physical or mental incapacity of a victim is particularly mentioned in the penal code. Sentencing will be more severe in case the crimes have been committed by two or more persons who have acted to overcome the resistance of the victim. Sexual assault is punished and if the victim is a minor the punishment is considerably more severe (15 years of forced labour instead of 5). The exploitation of the prostitution of others is punished by prison not forced labour (Articles 503-05; 524,527)

As in Jordan the problem of domestic workers is considerable in Lebanon, an estimate of more than 200.000 women work as maids, most of the foreigners, and many of them suffering conditions which are contrary to their human and labour rights. Very often their passports are confiscated and given directly to the recruitment agency or their employer who thus have considerable power over them (as in the selected jurisprudence below). Domestic workers are most often confined to the house in which they work and have no communication with the outside world. They have to be available 24h/24h and generally have a working day of 16-17 hours. As previously in Jordan domestic workers are excluded from the labour law which leaves them particularly vulnerable and without possibility of legal redress. Lately numerous efforts have been made in order to address this situation and ameliorate the conditions of domestic workers. A special system related to the work contract for domestic workers has been on place since 2009 which establishes that the contract must be approved by a notary and be in a specific agreed format. These contracts have brought certain improvements such as the possibility of the domestic worker to annul the contract; limit working hours to 10 hours per day; establish a minimum of 6 days of holiday per year; improving health conditions and granting a decent lodging. The contract however do not conform to the labour law in its whole.

An important step was taken in 2004 since when it has been possible for persons who have been trafficked to avail themselves of the services of Caritas Lebanon – both legal and medical.

A specific problem in Lebanon is interesting especially in light of the Rantseva case from the ECtHR examined below. In Lebanon “artists” are immigrating to work in bars, as models, in nightclubs etc.⁵⁷ This (or these) category of persons are particularly vulnerable and are usually relatively young (18 to 28 years of age). They most often come from Eastern Europe particularly Ukraine, Russia and Rumania. Their entry into Lebanon is based on a contract which has as object the “employment as dancers and models”. Once they have arrived they are most often subjected to various forms of exploitation, mostly sexual. They are thus forced to prostitute themselves through the use of force or threats. The number of women in this situation is estimated to be between 5000 and 6000 per year.

⁵⁷ www.general-security.gov.lb/arabic/stay8/

Most of the concerned women will be subject to treatments which are part of the trafficking crime: deprivation of liberty; non payment or underpayment of wages/profits; physical violence and threats. According to Lebanese law these “artists” cannot work for more than six months on Lebanese territory and cannot return until they have absented themselves for a period equal to their stay in Lebanon. A subcategory of these girls “the add girls” cannot return to Lebanon for a year. What appears peculiar is that there are a number of conditions upon which these girls stay in Lebanon but there seems to be a limited attention to the possibilities of exploitation.

In Morocco crimes against physical integrity such as torture, maiming, and murder are obviously sanctioned in the criminal law. So are menaces and kidnapping, or deprivation of liberty, and also illegal abortion and sexual assault and harassment. In this context public solicitation is particularly considered and criminalised as is helping, assisting, protecting or harbouring a prostitute, living with one or profiting from prostitution. Being associated with an organised criminal group is also criminalised and can be punished with 5 to 10 years of prison (Law n°43-04, Articles, 231, 293-99 392-99, 400-08, 425-28, 436-41 and 485-8)

Crimes which are related to trafficking and which are often a big part of the trafficking business such as corruption and white washing of funds are also included and criminalised (Articles 224, 244-51) – this is entirely in line with what the Protocol requires and is actually a very important part of combating trafficking as a transnational organised crime.

Crimes related to children

Generally laws consider the possibilities of exploitation of children.⁵⁸ This is partly due to the fact that exploitation of children can be considered especially aggravating but perhaps also partly because of the title of the Palermo Protocol. It should be remembered that the Protocol’s definition is gender-neutral and that the title only says “especially” women and children. During the draft process states expressed the view that the Protocol should address all persons.⁵⁹ The gender-neutrality is also reflected in the content of types of exploitation in the definition.⁶⁰

There is a lack of data on the extent and magnitude of child prostitution and trafficking of children for prostitution,⁶¹ but it seems that the number of child workers in Jordan is high and growing constantly. Children between five and seventeen years old are working as car mechanics, agricultural laborers, carpenters, sailors, or tailors. There is also a large number of street children working as vendors as well as in garbage collection. All these jobs are dangerous for children and falls under the worst forms of child labor according to international standards.

In Egypt the National Law on the Rights of the Child prohibits any form of employment that prevents children from pursuing their education (section 54 and section 125 of the law’s Executive Regulation), or that exceeds six hours a day (section 66), that is unremunerated (section 69), or

⁵⁸ The focus on women and children obviously is funded in three main factors: that these two groups are considered more vulnerable in general; that statistics underpin the need for this focus; that trafficking is often linked to sexual exploitation even if trafficking is actually also for other forms of exploitation. Whereas there is a concrete and urgent need to protect these two groups of victims, it is important not to create an invisible group of trafficked persons – both in reality and in research. It is necessary to have gender equality based approach to the problem; first because it is true that because of discriminatory attitudes towards women and girls, these are more vulnerable, also because we need to recognise that maltreating women often leads to maltreatment of children. Secondly a gender sensitive approach is needed because sometimes it is assumed that boys cannot fall victim to trafficking and exploitation – this makes them double victims because they are further marginalised and hide their suffering perhaps even more than girls do.

⁵⁹ UN DOC A/AC.254/5/Add.3/Rev2

⁶⁰ Obokata, T.: Trafficking of Human Beings from a Human Rights Perspective – towards a holistic approach. p 29

⁶¹ The committee on the right of the Child (CRC), 2006 report.

employing a child that is younger than fourteen years of age (section 64), it provides no penalty for breach of these provisions.

In Tunisia specific provisions providing protection against economic exploitation of women and children (grouping those two together may not be very fortunate but it is very often seen). The labour code sets the minimum age at 16 but has numerous exceptions which makes effective protection difficult. Specific sectors such as mining other specifically hardship jobs are limited to people over 18 years of age, but again the law admits a number of exceptions which may too easily end up favouring exploitation of minors in these sectors.

The change in the Moroccan criminal law in 2003 punished the abandonment, sale and purchase of children. This includes punishing those who influence parents to abandon their children and those who act as intermediaries in such operations. Furthermore child labour – defined as labour which is damaging to the child's health, safety or his or her manners or education – is with the amendment punishable. The sale and purchase of children is punished with prison from 2 to 10 years. The same punishment is foreseen for those who instigate or facilitate such actions.

In case of sexual assault and instigation to prostitution the age of the victim may constitute and aggravating factor, and furthermore the law on film production provides for heavy punishments for those who engage in production of child pornography, in whatever form.

Part of the criminal proceeding code is dedicated to children living in difficult circumstances and the family judge can apply protective measures in order to protect children in danger of exploitation, unaccompanied minors are included in the groups of children warranting such special protective measures. Other measures are going in the same direction such as the creation of a programme of the 52 Special Victim Units within the police and an office of the judicial police in charge of minors. In this context is included a new collaboration with Interpol in the combat of trafficking of women and children for sexual exploitation and the creation in 2001 of the Cybercrime Services. A specific problem mentioned in Morocco concerns the networks of illegal adoption of which the journal *Marco Hebdo* has reported a case brought to justice.⁶²

As can well be seen exploitation of children is a recurrent issue in most states and it is mentioned as of particular concern in Lebanon as well. Children are exploited as beggars (organised), are being sold, are found in forced labour, are victims of trafficking of organs, are to be found in sexual tourism and child pornography. For evident reasons the sale of children is hidden but it can be deducted in certain instances – the organised beggars on the streets are clearly using children for commercial exploitation; in the building sector children can be found to work in exploitative situations; certain types of marriages are known to be a form of prostitution; domestic servitude of minors have been seen to constitute situations similar to slavery and the above mentioned “artists” are sometimes considerably younger than what their documents lead to believe.

The Lebanese penal code has specific provisions regarding the protection of children, specifically kidnapping, exchanging one child for another, or in other ways substituting the child's registration are punishable offences. Registration of children is an incredibly important measure to avoid exploitation (including trafficking) since the registration in civil registers is a basis for having an identity and thus legally existing. Abandoning a child is a separate offence.

Apart from the penal law, the child protection act from 2006 (N422/2002) protects children who live in an environment which potentially makes him/her vulnerable to exploitation or which threatens his/her security, health or ethic, who has suffered a physical or sexual assault, who is a street beggar or have no home.

⁶² Mouna Izzdine, “ces enfants marchandisés”, in *Maroc Hebdo International*, N° 73, du 6 au 12 Avril 2007, http://www.maroc-voirhebdo.press.ma/MHinternet/Archives_739/PDF/Page48a50.pdf

In this context a proposal to amend the Labour code is in the pipe line which will criminalise all forms of slavery or like practices such as sale of children, child labour, prostitution or the use of children in criminal activities. Already in 1996 did law 536 criminalise the use of children in certain dangerous and damaging jobs.

Punishments

It is a requirement of parties to the Palermo Protocol that they criminalize the offence of trafficking, but it is not specified what the punishments should be (clearly it must be in conformity with international obligations related to punishment and trial) this will depend on the national legal framework.

As required in article five of the Protocol, Jordanian law criminalizes all forms of trafficking and prescribes penalties of up to ten years and a fine of not less than 3,000 dinars and not more than 20,000 dinars furthermore any person who possessed, hid, or disposed of any items while knowing that it was obtained through one of the crimes stipulates in the law shall be penalized by imprisonment for a period of no more than a year or a fine of not less than 200 dinars and not more than 1,000 dinars or both penalties. The law also punishes a corporate person if he commits human trafficking crime by a fine and this is without exempting responsibility of his representatives who committed this crime. The court may also decide to stop a corporate person from conducting business completely or partially for a certain period of time if one of the responsible parties or the staff of this corporation commits a crime of trafficking in persons. Other penalties are also provided for in case the corporate person repeats the commission of the said crime (Article eleven). The inclusion of corporations is very welcome and is clearly taking into account the UNTOC aspect of the Protocol which is positive.

The standard penalty for trafficking in Egypt is imprisonment for a period that exceeds three years and the greater of a fine that ranges between fifty and two hundred thousand Egyptian pounds or a fine that is worth the value gained by being involved in such criminal enterprise (Section 5). According to section 6 of Law 64/2010, anyone who is found guilty of trafficking with aggravating circumstances (The perpetrator organized, established, managed, or was a member or leader of a criminal organization for the purpose of trafficking, or if the crime of trafficking was of a transnational character; The act of trafficking was committed by the means of a threat to kill or cause severe harm, physical or emotional torture, or if the crime was committed by a person carrying a weapon; The perpetrator is the spouse, ascendant or descendant of the victim, or is in charge of supervising, educating or has authority over the victim; The perpetrator is a public servant or a person entrusted with the performance of a public service and committed the crime by using his or her position; The victim died as a result of the crime, or suffered permanent disability or contracted an incurable disease; The victim is a child, a person who lacks capacity or a person suffering from a handicap; The crime was committed by an organized criminal organization) will be sentenced to life imprisonment and a fine that ranges between one hundred thousand and five hundred thousand Egyptian pounds in these aggravated cases. Very few countries have such a severe punishment in reserve for traffickers.

In Tunisia the focus has been very much on preventing and punishing irregular migration (less on punishing exploitation) not only to but also from Tunisia. In a decision from the Appeal Court of Monastir from the 10th of July 2008⁶³ a group of young people had tried to exit irregularly with the scope of arriving in Italy. The tentative ended in shipwreck and 4 of the young people lost their lives. The Court sanctioned both the surviving young people and people who had been indirectly involved, assimilating them to smugglers. In this way a dentist who had rented a boat to one of the implicated potential migrants was sentenced to 8 years of prison for involuntary homicide and illegal exit. Equally a person who had rented a studio to two of the implicated young people was fined.

⁶³ Monastir, affaire n° 238/2, 10 juillet 2008, inédite, rapportée par BOUBAKRI (H), avec la collaboration de LAGHA (N) et LABIDI (R), « Compréhension des migrations irrégulières... », Rapport précité, p. 80. To translate in English ?

Tunisian Labour Law also foresees sanctions for the foreigner who is employed in an illegal working situation. These sanctions which comprises the nullification of a possible existing contract puts the foreigner in a particularly vulnerable situation, emphasised when the Court of Cassation did not recognise the right of foreign employees when their contract has been nullified. This jurisprudence has been altered with a case from 2007 (n°13014 of 1/12/2007, Bulletin Civil, 2007) in which the Court stated that work carried out in an irregular employment situation and performed by a foreigner will result in payment of compensation and not in a nullification of the contract. The Court just put and end to the precedence of nullification and instead – in conformity with ILO standards – considers that the existence of an employment situation should guarantee basic rights.

It is clear from the above that the fight against trafficking and irregular migration/work is very often based on provisions relevant but not exclusive to cases of trafficking. It is also clear that only rather recently has the protection of potential victims of exploitation begun to receive more attention whereas the fight against irregular migration understood in a more limited way as in “fighting irregular border crossings” have had a much more prominent position in national legislation. This is quite natural and is not at all exclusive to the countries examined here – in fact it is shared by most nations. What is positive is that many national laws and to some extent judicial instances seem to be more sensibilised towards fighting exploitation as well.

Protection of Victims

Protection of victims is important both from a human rights point of view and from a law enforcement point of view. If the victims are not put in a condition to collaborate due to fear/psychological problems Section 21 of this law explicitly states that victims of trafficking shall in no way be criminally responsible or civilly liable for the crime of trafficking. Egyptian Law Against Human Trafficking provides unconditional protection to victims of trafficking. The law protects victims of trafficking by affording the necessary environment for rehabilitation and safe and swift return to their states of origin should they be non-Egyptian or not enjoying permanent residence in Egypt in accordance with the rules and procedures issued by the Council of Minister (section 22). While section 21 should provide some comfort to victims of trafficking, section 22 raises certain questions, whose resolution will have to be determined by the Executive Regulation or judicial activism. For example, section 22 stipulates that victims of trafficking who do not hold “permanent residence permits” in Egypt shall be returned to their country safely and swiftly. It is unclear what is meant by “permanent residence permits”, for there is no such thing as permanent residence t in Egypt.⁶⁴ Moreover, section 22 stipulates that the return of victims of trafficking must be “safe”. Law 64/2010 also provides the necessary tools for guaranteeing the physical, mental and emotional protection of victims, their isolation from the perpetrators of the crime of trafficking, as well legal aid to the victims (section 23). The Law also calls for the establishment of designated places (shelters) where victims can stay (section 24) and receive family members, lawyers and representatives of the “specialized authorities”. It is unclear what is meant by specialized authorities, as this is not explained in the Law. Neither is it clear whether victims of trafficking will be allowed to stay somewhere other than these shelters. However, by enacting this section, the Egyptian government has reversed its informal policy of refusing to establish shelters for victims of violence out of fear that these shelters will encourage prostitution.⁶⁵

In Jordan the law entitles the Council of Ministers to establish or designate one or more homes for sheltering victims and those who are harmed by the crime of human trafficking provided that a regulation, issued for this purpose, specifies principles for entering and leaving the house and that a

⁶⁴ Law 88/2005 amending the Law Concerning the Entry and Residence of Foreigners in Egypt (89/1960), section 18 onwards.

⁶⁵ The Egyptian government has consistently refused to set up shelters for female victims of sexual and gender based violence, arguing that these shelters may be wrongly perceived as brothels. The government never provided an explanation of how shelters can be turned into brothels, especially since the shelters are managed by the government.

program of physical, psychological, and social recovery is offered to its residents, its methods of management, and conditions related to its staff (Article one). The shelter is not yet established and the regulations have not yet been adopted. The human rights of victims of trafficking are however sidelined in Jordanian law. The law envisioned the establishment of shelters for trafficking victims awaiting repatriation (Article five-seven). However, the authorities have not worked effectively to identify or protect victims, and its enforcement policies have reportedly encouraged victims to return home rather than remain in Jordan to pursue legal cases against their traffickers. The law does not ensure protection against deportation of trafficked victims nor their right to stay lawfully in the country or their specific rights in a civil action against the perpetrators of the trafficking. Nevertheless, according to the injurious acts of the Jordan Civil Code provisions “every injurious act shall render the person who commits it liable for damages even if he is non discerning person” (Article 256).

Furthermore, foreigners do not have a specific right to remain in Jordan on the basis of an eventual risk of re-trafficking should they return home. This contradicts the general principle that a state may not oblige a person to return to his home state where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁶⁶

The Palermo protocol requires state parties to prevent the victims from being subjected to trial, detention, or punishment for entering or staying illegally, or for carrying out activities derived directly from their status as trafficked persons. The Jordanian law is less protective of victims of trafficking in this regard. Article twelve of the law stipulates that “A. notwithstanding the provisions of any other legislation, the public prosecutor may decide to stop legal procedures against any of the victims or people harmed by crimes of human trafficking stipulated in this law if it is proven that they have committed any of these crimes, participated in them, or incited them provided that this decision is approved by a committee made up of the public prosecution as chairman and two judges of the court of cassation to be selected by its chairman.”

Action Plans and Policy

In March 2010 a strategy for the prevention of human trafficking for the years 2010-2012 was launched by the national committee for the prevention of human trafficking in Jordan. The strategy is based on the three pillars of human trafficking i.e., prevention, protection, and prosecution in addition to enhancing a culture of transparency and building partnerships locally, regionally, and internationally. The plan includes provisions related to the identification of victims of trafficking and to support them through setting up shelters, to accommodate them by issuing work permits or temporary residency until they voluntarily return to their homes or until any other country of their choice agrees to receive them while they pursue a legal case. Other provisions are concerned with the establishment of specialized courts for human trafficking cases and courtrooms specialized in such cases. The strategy is seeking a timing, monitoring, and evaluation mechanism; so far it is hard to evaluate whether it has already been implemented according to design.

In Morocco a national strategy on the fight against trafficking of human beings has been in place since 2003, which has as three main pillars: a) prevention which includes a special focus on children; b) control – border control and security of documents; c) protection – medical and psychological assistance and protection of witnesses in legal proceedings. This strategy seems to build on the “P”s of the Palermo Protocol: Prevention, Prosecution and Protection.

⁶⁶ Piotrowicz, R op.cit, p.9

Implementation – examples of exploitation

There are several reports dealing with the widespread abuse and dismal working conditions of female migrant domestic workers in Jordan. These working conditions which may amount to forced labor include as in cases seen elsewhere (see case law in selected EU States below):

1. Illegal withholding by the employer or by the recruitment agencies of domestic workers passports and identification cards, on the pretext to keep these documents from lost or for fear that the domestic worker will run away.
2. Migrant domestic workers are subjected to particular kinds of infringements such as forcing them to: perform a work which is not the work agreed upon; to work in more than one house or for another employer; to work at any time of the day or night.
3. Migrant domestic workers, as other migrant workers, are exposed to maltreatment and exploitative conditions, including sexual harassment, rape, verbal abuse, beating, etc.
4. Sometimes migrant domestic workers are not paid the agreed wages or they are given a wage less than the wage agreed on in the contract. Although labor law became applicable to domestic workers, these domestic workers are still excluded from the application of the minimum rate of wages which is now 150 JD.

Domestic labor exploitation and abuse in Jordan, whether it comes from the employer or the recruitment agency, could lead to a form of trafficking in persons, but it does not necessarily amount to this crime; whether or not a case of exploitation is classified or identified as human trafficking depends on the fulfillment of the three constituent elements of the crime according to its definition in the Palermo Protocol and Jordan anti-human trafficking law nine of 2009 as considered further below.

Until 1996 there had not been a single case where a person had been prosecuted for the crime of human trafficking or forced labour in Jordan. Due to the absence of the crimes in the penal code, traffickers were charged and prosecuted under a variety of offenses including abuses, indecent and sexual assault and prostitution related offenses. In 1996, the Court of Cassation based on the slavery annulment law of 1929 approved the conviction by the criminal court of the honorary consul of Sri Lanka on the crime of transferring the newborn of a Sri Lankan domestic worker to a Dutch family for 8,000 American dollars. The consul was sentenced to three years imprisonment.⁶⁷

The law of the use of human body parts no 23 of 1977 (Article 4/2) forbids the sale of human body parts whether for medical treatment or research or for any other purpose. According to article ten of the law whomever sells his organ either in Jordan or abroad faces a prison up to one year and a fine for no more than 10,000 JD or with one of these penalties.

Very interestingly the Amman Appeals Court has several times had the occasion to apply provisions on trafficking in organs – a part of the trafficking crime which is very often under-elaborated. This has happened both before and after the entry into force of the new anti trafficking in persons law.⁶⁸

Traffickers of human body organs were considered accomplices to a crime of sale of human body parts and they were sentenced according to article 80 of the penal law governing complicity and the law on the use of the human body. Several cases were brought before Amman First instance Criminal Court related to persons inducing or trying to induce another person to commit this crime.

Since the new law came into force in 2009, there has been a gradual increase in the use of the law to investigate, prosecute, and sentence trafficking in persons offenses. Jordan's public prosecutor suspected several people of committing the crime of human trafficking, but these cases have not yet

⁶⁷ Case no 6333/98

⁶⁸ Case no 1902/2009; 1491/2009; 1761/2005; 2624/2005; 283/2006; 605/2006; 555/2007

been referred to the first instance criminal court.⁶⁹ In one case the public prosecutor found that the accused is not an accomplice in human trafficking according to the anti-slavery law of 2009.⁷⁰

Even though Amman's first instance criminal court had the occasion to apply the anti-human trafficking law on a couple of occasions,⁷¹ there have not been a single case where a factory or an employer has been prosecuted for the crime of human trafficking and the gross violations of migrant workers' rights. However, the police and the public prosecutor are investigating charges of trafficking in migrant workers of different nationalities brought against recruitment agencies. The type of charges reported by police may subsequently change by the time of conviction.

In Egypt the Law will have the strongest impact on three other major problems that exist in Egypt, namely forced marriages, forced labour and the abuse of street children.⁷² It is however still hard to find cases in Egypt as court decisions are not easily available to the public. The most famous case is probably "El-Torbini"; a case that involves the leader of a gang of street children who reportedly kidnapped, raped and murdered up to thirty street children. Egyptian law imposes the death penalty on those who commit premeditated murder. Furthermore, the death penalty is imposed on those who kidnap and rape their victims without necessarily killing them. Surprisingly, the crime of rape can only be committed if the victim is female. Accordingly, the kidnapping and sexual assault of a male victim cannot lead to the death penalty. In this case the police found the bodies of three children. During questioning the men said they had disposed of bodies by throwing them off moving trains, stuffing them down drains or throwing them in the River Nile, police said. Several children gave testimony in court. One child said he was sexually assaulted and then thrown off a moving train, but survived. El-Torbini and his accomplice were sentenced to death. The case shows the problem of violence against and exploitation of children who live on the streets in Egypt, but more than a case against the exploiters this was a case of homicide. It may well be hoped that the entry into force of the new law will spur an increase in investigations and convictions of exploiters both in the labour market and in cases of sexual exploitation.

Violence against domestic workers is reported in newspapers but until now no cases have been brought against the employers.

Tunisia seem to experience trafficking into the domestic sector – also trafficking of Tunisians from the rural areas to the cities – but unfortunately the extent of this practice is not well documented and lacks sufficient documentation. It is however clear that the phenomenon exists. The same lack of sufficient study and data applies to what may be a problem of trafficking for sexual exploitation which however at the surface seem to be individual cases of women who are not exploited by any sort of criminal network. Eventual future cases – judicial or not - may benefit from the existing data on cases from countries with a more significant jurisprudence in order to determine what factors and criteria to look at and examine when determining whether cases of prostitution (particularly in this context of foreigners) is forced or not and whether it is exploitation or not. An interesting fact relating to Tunisia is that there seem to be more data on possible smuggling cases than on possible trafficking cases. This is not rare since smuggling cases enter into irregular migration statistics – e.g. on apprehensions, detentions and deportations, but it is noticeable how the total lack of data on eventual exploitation cases is highlighted compared to the more amply available data on smuggling.

⁶⁹ Cases no 5167/2009; 5981/2009; 5070/2010

⁷⁰ Case no 4806/2008

⁷¹ Cases no 1491/2009; 780/2009

⁷² These are not all the forms of human trafficking in Egypt. For detail on the different forms of trafficking in Egypt, see USAID, *infra* note 15.. A National Study on Human Trafficking is being prepared by the National Center for Social and Criminological Report ("Report"). The Report will cover the major forms of human trafficking in Egypt and will assist the Egyptian government designing more efficient means to combat human trafficking.

The law has been interpreted by the Tunisian judiciary as to be applicable not only to the smugglers but also to the migrants. In this spirit the first instance Court at Sfax sentenced four young people to six years of prison in a sentence from 15 June 2006. The defendants had stolen a boat in order to reach the Italian coasts and their presence in Italy at the moment of sentencing had been established on the basis of witness statements notably phonecalls to their parents.⁷³ This interpretation is however not shared by the Cassation. In two cases from 2007⁷⁴ the Cassation considered that giving money to smugglers or giving them fuel to their boat in order to cross the Strait of Sicily did not constitute “participation in the organisation of smuggling” punishable according to the law of 2004. In conformity with these decisions the Court will sanction only the smugglers – in accordance with international law.

Notwithstanding these two decisions from the Cassation, lower instance judges often extend the law to be applicable to migrants. In 2008 the Court of Appeal of Monastir sentenced a young man for having exchanged phone messages regarding a tentative to cross the borders irregularly. The court considered this was a preparatory act punishable according to article 38 of the law from 2004.⁷⁵

In a more recent decision from 2009 the first instance court of Monastir sentenced a group of nine unemployed persons, a young student and a family father to between seven months and four years of prison, the group was arrested just after having giving up the idea of crossing the border irregularly.⁷⁶ Likewise on the 7th of January 2010 the first instance court of Nabeul sentenced a group of young people to severe punishments on the basis of the law of 2004. The circumstances of the cases are not totally clear but it seems that a young man of 25 years had been arrested while tempting to cross the border – seemingly organised by a group of smugglers.

Both victims of trafficking and smuggled migrants may find themselves irregularly on Tunisian territory and both a subject to the possible punishment which ranges from imprisonment for 1 month to prison for 1 year and a fine. Heavier sentences are foreseen for the foreigner who has made use of false documents. Furthermore foreigners illegally in the country may be subject to administrative expulsion.

Between 2003 and 2006 857 crimes were connected to trafficking in Lebanon. Interestingly in Lebanon jurisprudence on trafficking related cases are quite abundant even if the crime of trafficking as such still does not exist. This is much in line with countries which have a crime of trafficking but which still very much use related crimes either because they have been better defined or because only parts of the trafficking crime can be established in the relevant case. Lebanese judges more often use the term “sale of persons” but will not use the term “commerce in persons”. In the criminal court at Maten case of 26/1/2004 a judge was faced with a crime committed by a group of people including prostitution, facilitating prostitution, living off the prostitution of others and threats and use of violence. All punishable offences. In this case in stead of using the term “trafficking in persons” notwithstanding the presence of a sale of a woman for another who was forced to prostitution the judge used “sale of person”.

In case 369-3/5/2010 the defendants had kept the victim secluded for 50 years and exploited her as a servant without payment, she had been sexually abused. Here the judge found the defendants guilty of deprivation of liberty, infraction of the victims honour, and also found there to be aggravating circumstances (the duration of the crime).

⁷³ TPI. Sfax, n° 2088, 15 juin 2006, inédite, site du CARIM, RASCAS, V° Tunisie, <http://www.carim.org/>

⁷⁴ Crim. n°13006, 19 avril 2007, inédite, site du CARIM, RASCAS, V° Tunisie, Crim. n° n°18182, 7 juin 2007, inédite, site du CARIM, RASCAS, V° Tunisie, <http://www.carim.org/>

⁷⁵ Monastir, n° 5120/08, 27 mai 2008,.

⁷⁶ TPI. Bizerte, n° 5878, 24 décembre 2009,

It is clear that the lack of the crime of trafficking in national law may well create considerable difficulties – especially considering that the lack of specific legislation against trafficking in persons is arguably the most serious obstacle in countering the crime. In the absence of legislation, it is very difficult to punish human trafficking and bring the traffickers to justice.

There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation. States should consider amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized. States should also enact legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons, this includes reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals) is part of creating an adequate legislative framework.⁷⁷ Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.⁷⁸

What can be deducted from the existing cases is that the judiciary does use existing offences which may be found in a variety of provisions to sentence the potential perpetrators of a still non-existing crime. What is also clear is a growing but recent awareness of the seriousness of crimes related to exploitation – an awareness which yet has to yield its fruits.

Final Remarks

The above analysed SEM countries have either very recently adapted their legislation to the Protocol or have not yet done so – based on the assumption that their previous legislation would suffice. It is clear that the situation of the above countries is in many aspects different that the situation of the countries analysed below: the SEM countries are subject to pressure from other destination countries which influence their legislation and programmes – and may condition their focus on smuggling more than on trafficking; generally their court decisions are not public – or not as public as the countries' examined below (who were partly chosen as examples exactly because of the availability to the public of decisions); and generally they are only now setting out to implement their legislation on trafficking. This is one of the main reasons why the next part of this report is of interest – it is clear that most definitions found in law on this phenomenon are similar – adopting more or less the definition of the means, purpose and actions of the Protocol. This is a transnational and transregional trend. It is therefore of interest to see how countries with a longer tradition of prosecuting trafficking and trafficking related crimes have filled out the definitions of their laws when cases have appeared. These cases may well create if not formal precedence then at the very least guidelines for future decisions in similar cases on internationally defined crimes.

It is however clear already from the above that there is a heightened attention towards the problems related to exploitation and in a number of countries laws are being envisaged or have recently been

⁷⁷ The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking - Guidelines 7.1-2

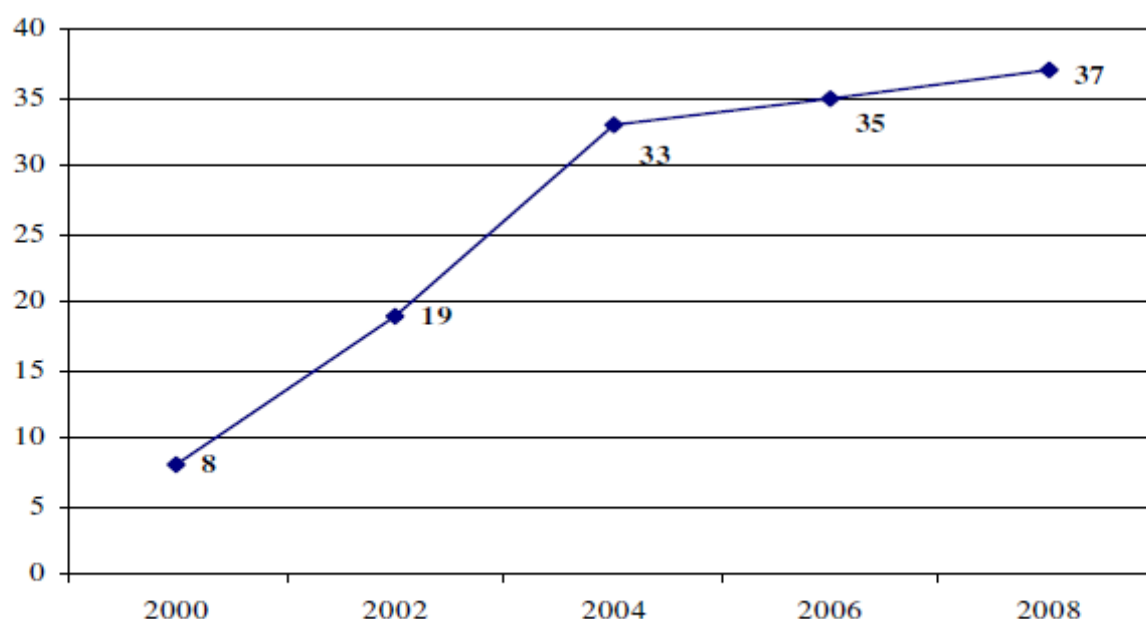
⁷⁸ Ibid. Guidelines 7.3-4

implemented in order to better address problems of exploitation. What will be particularly evident from the below analysis is how these amendments very often follow trends which have been created based on the experience of cases of exploitation which have already created jurisprudence and policy in other countries. Thus the influence of international law and national practices on implementation becomes clear.

Trafficking in Europe

Most of the legislation currently in place in European countries was introduced into the countries' legal systems after the year 2000, when the UN Trafficking Protocol was opened for signature. During the years 2002-2003, many countries established human trafficking as a specific offence. In Europe, as in the rest of the world, the UN trafficking protocol resulted in an acceleration of the number of countries introducing a specific offence on human trafficking in their criminal codes. In addition, between 2005 and 2008, more than 10 countries amended their anti-trafficking legal frameworks, mainly modifying their criminal code to cover forms of trafficking not previously criminalized.⁷⁹ The EU countries' national legislations are increasingly reflecting the EU standards and requirements on trafficking in human beings. However, there are strong differences between the 17 studied countries, and numerous legislative gaps in compliance exist, especially when it comes to victim assistance. The research also indicates large discrepancies between the law and its implementation. The Council Framework Decision of 19 July 2002 (below) is not always fully transposed in domestic legislation. In some countries the definition of trafficking in human beings in the national legislation lacks clarity, while in other cases it does not cover all aspects of trafficking. This weakens law enforcement and prosecution, and it complicates the fight against traffickers and international co-operation.

Number of European countries with a special trafficking offence:



Source: UNODC-UN.GIFT

⁷⁹ UN.GIFT: Trafficking in Persons, an analysis on Europe, p 6

In Europe, *domestic* trafficking has been detected in at least 11 of the 38 countries considered in a recent study by UNODC/UNGift. In some countries, nationals are even the largest group of victims.⁸⁰ Some victims relate to the so-called lover-boys phenomenon. Dutch girls are exploited by their older 'boyfriends' who, abusing their psychological power and leverage, coerce these girls into prostitution. Similar methods cannot be excluded in other parts of Europe.⁸¹ It is however necessary to question whether these cases are trafficking cases or cases of exploitation without the necessary elements of trafficking present. It has to be stressed that, because nationals are not "expected" to be victims of human trafficking, many criminal justice systems may tend to identify their own citizens not as victims of trafficking but as victims of other crimes, such as sexual exploitation, kidnapping or forced labour. The importance of identifying victims as such lie mainly in the need to offer suitable assistance, and it may not be unreasonable to presume that nationals who are victims of exploitation when detected as victims of such are given a reasonable assistance according to national laws on e.g. social assistance etc. The danger of not identifying victims as victims of trafficking is considerable more acute when the trafficked person is a non-national who risks expulsion instead of suitable help and assistance.

There have been relatively few prosecutions of trafficking for labour exploitation in many European destination States.⁸² This seems to be due to several reasons, *inter alia*:

- The precise legal concept is relatively new.
- States have not criminalised the concept or have only recently done so.
- Cases are rarely identified because (among other reasons): the crime is often inherently "underground" by virtue of a victim's legal status and the economic sectors they work in;
- There is a lack of familiarity with the relevant indicators by law enforcers (authorities);
- There is a disproportionate focus on an individual's immigration status rather than on the conditions of their exploitation.
- Regulatory bodies have fragmented frameworks and do not co-ordinate with each other (e.g. labour regulation, immigration control and police).
- There is no central clearing point for monitoring and analysing the cases at national level (e.g. a National Rapporteur) or at international level.
- Lack of resources committed to detection and identification of cases, as well as to protection of victims and training officials does not permit adequate responses.
- There are inherent evidential difficulties for police and prosecutors in establishing a criminal offence of such complexity to the standard of proof required.⁸³

It is however important to note that in several States prosecution of trafficking related offences have been quite successful and that such cases even prior to the creation of legislation on trafficking will

⁸⁰ This is the case for the Netherlands where Dutch victims were by far more numerous than other nationals. In 2007, the number of detected German victims in Germany was 184 of a total of 689 victims, making them the largest group of detected victims. In France, Italy and Romania nationals also accounted for a large part of the trafficking victim population.

⁸¹ UN.GIFT: Trafficking in Persons, an analysis on Europe, p 10

⁸² Exceptions to this include the large number of cases taken in the USA under the Trafficking Victims Protection Act 2000 and the reports provided by the Attorney General to US Congress under the obligations of the Trafficking Victims Protection Reauthorization Act of 2003. See also Eurojust and Human Trafficking: The State of Affairs, de Jonge, B., Dutch desk 2005 ("Eurojust report"), p25. The report concluded, based on country studies and interviews with practitioners, that only very few transnational investigations of labour exploitation are started in the European Union. Occasional Paper Series no. 1

⁸³ OSCE Occasional Paper Series n. 1. *A Summary of Challenges: Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region*. p 4-5

help to understand what exploitation, vulnerability, dependence and such related concepts actually consist of in real life.

Council Framework Decision of 19 July 2002 on combating trafficking in human beings

The Council of the European Union (not to be confused by the Council of Europe) has adopted a Framework Decision on combating trafficking in human beings (Framework Decision 2002/JHA/629 of 19 July 2002). It provides for measures aimed at ensuring approximation of the criminal law of the Member States as regards the definition of offences, penalties, jurisdiction and prosecution, protection and assistance to victims. The Directive 2004/81/EC on residence permits provides for assistance and residence status for third country nationals who are victims of trafficking in human beings. Apart from these, the Framework Decision 2004/68/JHA on combating the sexual exploitation of children, and the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, are pertinent to the issue. A number of non legislative instruments have also been adopted, such as the Brussels Declaration, Council Conclusions of 8 May 2003 (2003/C 137/01) which take note of the Brussels Declaration (OJ C 137, 12.6.2003); European Commission Experts Group, Report 2004; Recommendations on identification and referral to services of victims of trafficking in human beings, issued by the Commission on the occasion of the first EU Anti-Trafficking Day, 18 October 2007.

Following this, in 2005, the Council adopted an action plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311/1 of 9.12.2005). The action plan proposes steps to be taken by Member States, by the Commission and by other EU bodies involving coordination of EU action, scoping the problem, preventing trafficking, reducing demand, investigating and prosecuting trafficking, protecting and supporting victims of trafficking, returns and reintegration and external relations.

The Framework Decision's definition is purposefully drafted "as broad as possible so that the term may also cover modern forms of exploitation resulting from trafficking in human beings, such as forced marriages and debt bondage" which are not specifically mentioned in the definition of the Palermo Protocol. Early drafts of the Protocol however made specific references to specific forms of trafficking such as:

1. forced marriage
2. marriage of convenience
3. illegal adoption
4. sex tourism
5. forced domestic labour
6. pornography

These specific forms may be addressed and may fall within the current purposes of trafficking, as stated in the Protocol. For example, pornography can be considered as another form of sexual exploitation. Similarly, domestic service could be either considered a form of trafficking for labour or services or a form of servitude.⁸⁴ According to the UN Working Group on Contemporary Forms of Slavery, early and forced marriage are a contemporary form of slavery⁸⁵ and in many cases they are not related to trafficking, but they may be. The Supplementary Convention on Slavery also defines forced marriage as a practice of slavery⁸⁶ and the Convention on Consent to Marriage, Minimum Age

⁸⁴ See Touzenis, K.op.cit

⁸⁵ UN DOC E/CN.4/Sub.2/2003/31 para. 5

⁸⁶ Article 1.1.c Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of consideration in money or in kind to her parents, guardian, family or any other person or groups;

for Marriage and Registration of Marriage provides for minimum rules on the entering into marriage – voluntarily. Besides, state parties may add other forms of exploitation since the Protocol’s definition only covers these forms of trafficking “as a minimum.”⁸⁷

The Framework decision aims at addressing “(...) serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion”. Lastly, the definition aims at providing clarity to better understand the crime and encourage minimum harmonisation of Member States’ national legislation. Minimum harmonisation involves a synchronised combat of human trafficking in and between the Member States through: (a) transnational co-operation in criminal matters, (b) uniform sentencing within the EU, and (c) comparable adjudication following the Framework Decision’s definition: (1) ‘the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude (...). (2) The consent of a victim of trafficking in human beings to the exploitation, intended or actual, shall be irrelevant where any of the means set forth above have been used’.

As can be seen the Framework Decision’s definition follows the Palermo Protocol but differs slightly in the elaboration on what the action and means are and also in the purpose for exploitation.

It has to be kept in mind that in order to have any reasonable chance of fighting human trafficking, criminal legislation is not enough. The crime necessarily poses problems in other legal areas such as labour, migration, and human rights law. In the context of the EU migration issues may become further complicated due to the free movement area. Within the EU, citizens can freely move as and migration legislation is supposed to protect this area of free movement for citizens, on the other hand the EU have a unique opportunity to obtain the harmonisation of legislation on trafficking which is necessary in order to obtain results.

Criminal investigations can, for instance, be facilitated by transnational co-operation in Joint Investigation Teams of Member States’ police forces, as well as with support at the EU-level by virtue of the European police office, Europol. These can also involve: (a) money investigations into legal persons that enable confiscation of criminal gain, and (b) measures directed at criminal organisations. Further the use of the European arrest warrants which permit effectuation of another Member States’ judicial authority’s arrest warrants for alleged traffickers create a rather unique possibility for a group of independent States to have a transnational common approach. This may to a certain extent influence the relative increase, over the past decade, slow but steady, in national prosecutions, either for the offence of forced labour as such, or for offences including trafficking for either labour or sexual exploitation, debt bondage, slavery and slavery-like practices. The impetus has come in large part from the entry into force of the Palermo Protocol. In the years since, a significant number of countries have amended their criminal and other legislation in order to give specific recognition to the offence of human trafficking for a number of purposes, including sexual exploitation, various forms of labour exploitation and the removal of organs. The penalties for the criminal offence of human trafficking tend to be severe, generally involving long terms of imprisonment. Law enforcement agencies are also

(Contd.) _____

or (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.

⁸⁷ Mattar, M.: The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Reflections After Five Years. Concord Center Annual Conference on Disposable People: Trafficking in Persons. Tel Aviv, Israel December 22, 2005

having to consider the important issue of compensation for the wrongs they have suffered to the victims of forced labour and trafficking.⁸⁸ Notwithstanding this fact that “human trafficking” in accordance with the Palermo Protocol and/or the Framework Decision have by now been incorporated into national legislation related offences are still used to prosecute some trafficking cases in many European countries. For instance, the offences of “sexual exploitation”, “soliciting prostitution” or “pandering” are often used to prosecute cases of trafficking for sexual exploitation. The offences of “slavery”, “trade of slaves” and laws on labour standards are used to prosecute cases of trafficking for forced labour.⁸⁹ Not all exploitation *is* trafficking and that in case exploitation occurs and cannot be prosecuted as a trafficking crime many elements of exploitation, if not exploitation itself, can be prosecuted separately and will be a breach of international human rights law. Not all transport and not all exploitation needs to fit into the trafficking definition in order to warrant attention and in order to be a human rights violation.⁹⁰

Latest developments

Any action of the European Union in the field of human trafficking obviously must respect fundamental rights and observe the principles recognised in particular by the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – a CoE instrument to which all EU Members States are party, notably human dignity, the rights of the child, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, prohibition of trafficking in human beings, right to fair and just working conditions, right to liberty and security, respect for private and family life, protection of personal data, non-discrimination, as well as the special procedural rights contained in Article 47 to 50 EU Charter (Articles 6, 7 and 13 ECHR). Member States, when implementing Union law, must do so in accordance with these rights and principles. Of particular importance in this respect is Article 5 of the EU Charter which explicitly prohibits trafficking in human beings. This is an innovative provision even compared to the ECHR, which, however, also prohibits slavery and forced labour (Article 4 ECHR). Furthermore, as many of the victims of trafficking are children, Article 24 of the EU Charter is of relevance. This provision foresees a positive obligation to act with the aim of ensuring the necessary protection of children. It states that children shall have the right to such protection and care as is necessary for their well-being. In addition, it requires that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interest must be a primary consideration. Finally, as regards Articles 1 and 3 of the ECHR, the European Court of Human Rights has held that Contracting States are required to take measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals.⁹¹

A 2006 report on the implementation of the Framework Decision on combating trafficking in human beings (Report based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 287 final.) found that the Framework Decision's requirements had been largely met by Member States in terms of transposition of legislation. In fact Member States comply with the essential requirements of the current Decision, largely as consequence of pre-existing legislation, or new legislation transposing the Decision. However, since a number of provisions in the Decision allow for exceptions or reservations, and since it only contains criminal law provisions, implementation of comprehensive anti-trafficking policy in Member States is still

⁸⁸ ILO: Forced Labour and Human Trafficking Casebook of Court Decisions, p III

⁸⁹ UN.GIFT: Trafficking in Persons, an analysis on Europe, p 6.

⁹⁰ See Touzenis, K. op.cit

⁹¹ Commission Staff Working Document accompanying document to the Proposal for a Council Framework Decision on Preventing and Combating Trafficking in Human Beings, and Protecting victims, repealing framework decision 2002/629/jha impact assessment {com(2009) 136 final} {sec(2009) 359}

unsatisfactory from a protection point of view – protection which is required by international law and obligations. It has been found that there is still more to do in terms of implementation of anti-trafficking policy, especially in the following areas:

- effectiveness of law enforcement activities aimed at detecting and prosecuting trafficking;
- victims protection and assistance;
- monitoring of trafficking trends and anti-trafficking policy.

Furthermore, the effects of the possible ratification of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings by EU Member States should be taken in due consideration.

Taking into account the current legal framework, relating to both UN and CoE instruments, and EU legislation, a Commission staff working document accompanying document to the proposal for a council framework decision on preventing and combating trafficking in human beings, and protecting victims, repealing framework decision 2002/629/jha identified the following:

1. Failure to convict criminals
 - a. insufficient approximation of relevant criminal law provisions in Member States;
 - b. victims do not report crimes for fear of denunciation to immigration authorities and immediate deportation;
 - c. insufficient international cooperation and poor use of effective investigation tools.
2. Insufficient protection and assistance to victims
 - a. assistance measures are not in place or are insufficient in many Member States; the number of assisted victims is very low;
 - b. victims may face sanctions for violations due to their exploitative situation such as violations of immigration laws;
 - c. secondary victimisation affect vulnerable victims including children and persons with special needs, as a consequence of inadequate law enforcement and judicial practice;
 - d. victims do not receive effective protection and compensation.
3. Insufficient measures to prevent trafficking
 - a. lack of resources and expertise in law enforcement agencies and social authorities in countries of origin and destination;
 - b. not enough action to identify vulnerable groups, potential and presumed victims of trafficking in countries of origin and destination;
 - c. no sanctions against employers who knowingly employ trafficked persons, and for clients who knowingly buy sexual services from a trafficked person are envisaged.
4. Insufficient knowledge
 - a. insufficient data concerning the magnitude of the crime and the effectiveness of antitrafficking policy in Member States;
 - b. lack of comparable data at the EU level, due to lack of coordination between existing national monitoring mechanisms

On the basis of the identification of the above mentioned problems and especially due to the lack of focus on assistance to victims a Proposal for a Council Framework Decision on Preventing and Combating Trafficking in Human Beings, and Protecting victims, repealing framework decision 2002/629/jha came into existence. Compared to the current Framework Decision, The new Framework Decision would provide for:

1. *Substantive criminal law provisions*, including definition of the crime, aggravating circumstances and higher penalties, non-punishment of the victims for unlawful activities such as the use of false documents in which they have been involved for being subjected to by traffickers and *prosecution of offenders*, including extraterritorial jurisdiction (the possibility to prosecute EU nationals for crimes committed in other countries), use of investigative tools typical for organised crime cases such as phone tapping and tracing proceeds of crime
2. *Victims' rights* in criminal proceedings, including specific treatments for particularly vulnerable victims aimed at preventing secondary victimisation (no visual contact with the defendant, no questioning on private life, no unnecessary repetition of the testimony etc.), police protection of victims, legal counselling also aimed to enable victims to claim compensation; special protective measures are envisaged for children such as the taking of interviews in a friendly environment; *Victims' support*, including national mechanisms for early identification and assistance to victims, based on cooperation between law enforcement and civil society organizations, providing victims with shelters, medical and psychological assistance, information, interpretation services. A victim shall be treated as such as soon as there is an indication that she/he has been trafficked, and will be provided with assistance before, during and after criminal proceedings.
3. *Prevention*, including measures aimed at discouraging the demand that fosters trafficking, i.e. employers hiring trafficked persons and clients buying sexual services from victims of trafficking, and training for officials likely to come in contact with potential victims.
4. *Monitoring*, providing for the establishment of National Rapporteurs or equivalent mechanisms, which should be independent bodies, in charge of monitoring the implementation of the measures foreseen by the Framework Decision. Such bodies should have further tasks including giving advice and addressing recommendations to governments.

The proposal to change the Framework Decision clearly shows that the current Decision has in many respects failed. It is perhaps not surprising that almost ten years of experience has shown the gaps in the current Decision and it is a welcome step that a new one is being considered. It is particularly important to recall that without sufficient attention to the trafficked persons there will not be an effective prosecution of the traffickers. It is however also important to keep in mind that at least the UNTOC and its Protocol focuses on “international organized crime” – that is not the smaller fish in the criminal sea... it thus has to be recalled that relatively few convictions of trafficking is not necessarily a huge failure as long as cases of exploitation are brought to justice and as long as sufficient attention is paid to the victims of such non-trafficking exploitation and their well established human rights.

Implementation in Europe

The European Court of Human Rights

The first question which arises when considering trafficking within the framework of the European Convention on Human Rights is whether the eventual case falls within the ambit of Article 4. The Court has recalled that Article 4 makes no mention of trafficking, proscribing “slavery”, “servitude” and “forced and compulsory labour”. The Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein (*Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, 12 November 2008). It has long stated that one of the main principles of the application of the Convention provisions is that it does not apply them in a vacuum.⁹² As an international treaty, the Convention must be interpreted in the light of the

⁹² see *Loizidou v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *Öcalan v. Turkey* [GC], no. 46221/99, § 163, ECHR 2005-IV

rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties. Under that Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn.⁹³ The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.⁹⁴ Finally the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.⁹⁵

In *Siliadin* (below), considering the scope of “slavery” under Article 4, the Court referred to the classic definition of slavery contained in the 1926 Slavery Convention, which required the exercise of a genuine right of ownership and reduction of the status of the individual concerned to an “object” (*Siliadin*, § 122). With regard to the concept of “servitude”, the Court has held that what is prohibited is a “particularly serious form of denial of freedom”.⁹⁶ The concept of “servitude” entails an obligation, under coercion, to provide one’s services, and is linked with the concept of “slavery”.⁹⁷ For “forced or compulsory labour” to arise, the Court has held that there must be some physical or mental constraint, as well as some overriding of the person’s will (*Van der Mussele v. Belgium*, 23 November 1983, § 34, Series A no. 70; *Siliadin*, below, § 117).

The absence of an express reference to trafficking in the ECHR is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited “slavery and the slave trade in all their forms”. However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies.⁹⁸

The Court is not regularly called upon to consider the application of Article 4 and, in particular, has had only two occasions to date to consider the extent to which treatment associated with trafficking fell within the scope of that Article (*Siliadin and Rantsev*, below). In the first case, the Court concluded that the treatment suffered by the applicant amounted to servitude and forced and compulsory labour, although it fell short of slavery. In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considered it appropriate in *Rantsev v. Cyprus and Russia* to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered

⁹³ see *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Loizidou*, cited above, § 43; and Article 31 § 1 of the Vienna Convention

⁹⁴ see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara*, cited above, § 67; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-...; and Article 31 para. 3 (c) of the Vienna Convention

⁹⁵ see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37

⁹⁶ see *Van Droogenbroeck v. Belgium*, Commission’s report of 9 July 1980, §§ 78-80, Series B no. 44

⁹⁷ see *Seguin v. France* (dec.), no. 42400/98, 7 March 2000; and *Siliadin*, below, § 124

⁹⁸ see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 71, ECHR 2002-VI; and *Siliadin*, § 121

by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in a case. In the latter case the Court noted that the International Criminal Tribunal for the Former Yugoslavia concluded that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership. In assessing whether a situation amounts to a contemporary form of slavery, the Tribunal held that relevant factors included whether there was control of a person’s movement or physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour. Trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed and involves the use of violence and threats against victims, who live and work under poor conditions. Thus the Court has recognised that trafficking can be considered under Article 4 for the ECHR.

Siliadin v. France

The first case within the framework of the European Court of Human Rights (ECtHR) was thus *Siliadin v. France* (application no. 73316/01) Judgement of 26.07.2005, which was specifically on forced labour. The applicant, Ms. Siliadin, was a Togolese national who was born in 1978 and lives in Paris. In January 1994 the applicant, who was then fifteen and a half years old, arrived in France with a French national of Togolese origin, Mrs D. The latter had undertaken to regularise the girl’s immigration status and to arrange for her education, while the applicant was to do housework for Mrs D. until she had earned enough to pay her back for her air ticket. The applicant effectively became an unpaid servant to Mr and Mrs D. and her passport was confiscated. In around October 1994 Mrs D. “lent” the applicant to a couple of friends, Mr and Mrs B., to help them with household chores and to look after their young children. She was supposed to stay for only a few days until Mrs B. gave birth. However, after her child was born, Mrs B. decided to keep the applicant on. She became a “maid of all work” to the couple, who made her work from 7.30 until 22.30 p.m. every day with no days off, giving her special permission to go to mass on certain Sundays. The applicant slept in the children’s bedroom on a mattress on the floor and wore old clothes. She was never paid, but received one or two 500-franc notes, the equivalent of 76.22 EUR, from Mrs B.’s mother. In December 1995 the applicant was able to escape with the help of a Haitian national who took her in for five or six months. She looked after the latter’s two children, was given appropriate accommodation and food, and received FRF 2,500 per month. Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple’s children. She slept on a mattress on the floor of the children’s bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularised, she was not paid and did not attend school. On an unspecified date, the applicant managed to recover her passport, which she entrusted to an acquaintance of Mr and Mrs B. She also confided in a neighbour, who alerted the Committee against Modern Slavery (*Comité contre l’esclavage moderne*), which in turn filed a complaint with the prosecutor’s office concerning the applicant’s case.

Criminal proceedings were brought against Mr and Mrs B. for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person, an offence under Article 225-13 of the Criminal Code, and for subjecting that person to working or living conditions incompatible with human dignity, an offence under Article 225-14 of the Code. The defendants were convicted at first instance and sentenced to, among other penalties, 12 months’ imprisonment (seven of which were suspended), but were acquitted on appeal on 19 October 2000. In a judgment of 15 May 2003 Versailles Court of Appeal, to which the case had subsequently been referred by the Court of Cassation, found Mr and Mrs B. guilty of making the applicant, a vulnerable and dependent person,

work unpaid for them but considered that her working and living conditions were not incompatible with human dignity. It accordingly ordered them to pay the applicant damages. In October 2003 an employment tribunal awarded the applicant salary arrears.

Whether or not the case was a case of “forced or compulsory” labour was examined taking into consideration that what there has to be is work

“exacted ... under the menace of any penalty” and also performed against the will of the person concerned, that is work for which he “has not offered himself voluntarily”.⁹⁹

The Court noted that, in the instant case, although the applicant was not threatened by a “penalty”, the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat; she was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised. Accordingly, the Court considered that the first criterion was met, *especially since the applicant was a minor at the relevant time*, a point which the Court emphasised. As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice. In these circumstances the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.

The French State claimed that Ms Saladin could no longer claim to be the victim of a violation of the Convention (Article 34). They stated at the outset that they did not contest that the applicant had been the victim of particularly reprehensible conduct on the part of the couple who had taken her in, or that the Paris Court of Appeal’s judgment of 19 October 2000 had failed to acknowledge the reality of that situation as a matter of law. However, they noted that the applicant had not appealed against the first-instance judgment which had convicted her “employers” solely on the basis of Article 225-13 of the Criminal Code and that it should be concluded from this that she had accepted their conviction under that Article alone. Accordingly, the applicant could not use the absence of a conviction under Article 225-14 of the Criminal Code to argue that she still had victim status.

It is a clearly established principle that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention.¹⁰⁰ Article 34 of the Convention provides that “[t]he Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto ...”. Furthermore it is the settled case-law of the Court that the word “victim” in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention.¹⁰¹ The Government’s argument alleging that the applicant had lost her status as a victim raised questions about the French criminal law’s provisions on slavery, servitude and forced or compulsory labour and the manner in which those provisions were interpreted by the domestic courts. Those questions were considered to be closely linked to the merits of the applicant’s complaint. The

⁹⁹ see *Van der Mussele, Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 17, § 34

¹⁰⁰ see *Karahalios v. Greece*, no. 62503/00, § 21, 11 December 2003, and *Malama v. Greece* (dec.), no. 43622/98, 25 November 1999

¹⁰¹ (see, among other authorities, *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 846, § 36; ¹⁰¹ *Eckle v. Germany*, judgment of 15 July 1982, Series A no. 51, pp. 30-32, §§ 66 and 69; *Inze v. Austria*, judgment of 28 October 1987, Series A no. 126, p. 16, § 32; the *Lüdi v. Switzerland* judgment of 15 June 1992, Series A no. 238, p. 18, para. 34; *Association Ekin v. France* (dec.), no. 39288/98, 18 January 2000, and the judgment in the same case, cited above, §§ 37-38)

Court consequently decided that they should be examined under the substantive provision of the Convention relied on by the applicant.¹⁰²

The Government's preliminary objection in fact also raised issues concerning the effectiveness of the criminal investigation in uncovering the facts and responsibility for the attack of which the applicant complained.

The applicant considered that the exploitation to which she had been subjected while a minor amounted to a failure by the State to comply with its positive obligation to put in place adequate criminal law provisions to prevent and effectively punish the perpetrators. In the absence of rulings on this matter in respect of Article 4, the Court's case-law on States' positive obligations with regard to Articles 3 and 8¹⁰³ have particular relevance: "Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection."¹⁰⁴ As regards Article 3 of the Convention, the Court has found on numerous occasions that "... the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals."¹⁰⁵ It has further developed that "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."¹⁰⁶ In the various cases in question, the respondent States had been held to be responsible on account of their failure, in application of Article 1 of the Convention, to set up a system of criminal prosecution and punishment that would ensure tangible and effective protection of the rights guaranteed by Articles 3 and/or 8 against the actions of private individuals. This obligation covers situations where the State authorities were criticised for not having taken adequate measures to prevent the existence of the impugned situation or to limit its effects. In addition, the scope of the State's positive obligation to protect could vary on account of shortcomings in its legal system, depending on factors such as the aspect of law in issue, the seriousness of the offence committed by the private individual concerned or particular vulnerability on the part of the victim. This was precisely the subject of the *Saliadin* application, in the specific context of protection of a minor's rights under Article 4.

The Court underlined that it had already been established that, with regard to certain Convention provisions, the fact that a State refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention.

¹⁰² see, in particular, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32; *Gnahoré v. France*, no. 40031/98, § 26, ECHR 2000-IX; and *Isayeva v. Russia*, no. 57950/00, § 161, 24 February 2005

¹⁰³ see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91; *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI; and *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII

¹⁰⁴ *X and Y v. the Netherlands*, pp. 11-13, §§ 23, 24 and 27; *August v. the United Kingdom* (dec.), no. 36505/02, 21 January 2003; and *M.C. v. Bulgaria*, § 150

¹⁰⁵ see *A. v. the United Kingdom*, cited above, p. 2699, § 22; *Z and Others v. the United Kingdom*, cited above, §§ 73-75; *E. and Others v. the United Kingdom*, no. 33218/96, 26 November 2002; and *M.C. v. Bulgaria*, cited above, § 149

¹⁰⁶ see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, pp. 11-13, §§ 21-27; *Stubbings and Others v. the United Kingdom*, 22 October 1996, Reports 1996-IV, p. 1505, §§ 62-64; and *A. v. the United Kingdom*, cited above, as well as the United Nations Convention on the Rights of the Child, Articles 19 and 37

Thus, with regard to Article 8 of the Convention, it held already in 1979 that: "... it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for family life. This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2. ..." (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 14-15, § 31). It could also be argued that a Government's responsibility was engaged to the extent that it was their duty to ensure that the rules adopted by a private association did not run contrary to the provisions of the Convention, in particular where the domestic courts had jurisdiction to examine their application.¹⁰⁷ In this connection, Article 4 § 1 of the Forced Labour Convention, adopted by the International Labour Organisation (ILO) on 28 June 1930 and ratified by France on 24 June 1937, provides: "The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations." Furthermore, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which came into force in respect of France on 26 May 1964, states:

"Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention signed at Geneva on 25 September 1926: ... [d]ebt bondage, ... [a]ny 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." In addition, with particular regard to children, Article 19 § 1 of the International Convention on the Rights of the Child of 20 November 1989, which came into force in respect of France on 6 September 1990, provides: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, ..., maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." And Article 32 provides: "1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article."

Considering past caselaw and relevant international law the Court considered that

limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt

¹⁰⁷ see *X v. the Netherlands*, no. 9327/81, Commission decision of 3 May 1983, Decisions and Reports (DR) 32, p. 180

criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice.¹⁰⁸

In interpreting Article 4 of the European Convention, the Court had already in a previous case taken into account the ILO conventions, which are binding on almost all of the Council of Europe's member States and especially the 1930 Forced Labour Convention (notably *Van der Mussele v. Belgium*, cited above p. 16, § 32). There is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that “for the purposes” of the latter convention, the term “forced or compulsory labour” shall mean “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”

In the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it cannot not be maintained by a State that civil proceedings to afford reparation of the damage suffered are sufficient to provide an individual with adequate protection against possible assaults on her integrity. The Court's case-law, and especially *Calvelli and Ciglio v. Italy* ([GC], no. 32967/96, ECHR 2002-I); *A. v. the United Kingdom*, cited above; and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, § 109, ECHR 2001-V), as well as the decision in *G.G. v. Italy* ((dec.), no. 34574/97, 10 October 2002) in which the Court had noted in connection with Article 3 that

“criminal proceedings did not represent the only effective remedy in cases of this kind, but civil proceedings, making it possible to obtain redress for the damage suffered must in principle be open to children who have been subjected to ill-treatment”

should thus not be understood to understand that civil damages are in all cases enough to fulfil the State's obligation to protect.

When it came to finding on Article 4 the Court stated that as to whether she performed this work of her own free will, it was clear from the facts of the case that it could not seriously be maintained that she did. On the contrary, it was evident that she was not given any choice. ***In supporting its finding of servitude, the Court identified the following factors:***

- Siliadin's labour lasted almost fifteen hours a day, seven days a week.
- She had not chosen to work for Mr. and Mrs. B.
- As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr. and Mrs. B.
- She was entirely at Mr. and Mrs. B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularized, something that had never occurred. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus she had no freedom of movement and no free time. As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr. and Mrs. B.

The factors which decided the Court; working conditions, choice, vulnerability and dependency have been most important also in national case law as will be seen below. The decision is particularly important in establishing what constitutes forced labour/servitude and to what degree the applicants vulnerability (as a child) had in impact on the decision. The emphasis on dependency is to be found also in national decisions and shows how courts are moving from a discourse of ownership to a

¹⁰⁸ see also *M.C. v. Bulgaria*, cited above, § 153

discourse which may appear more “soft” but which in reality constitutes the same form of relationship – of lack of choice and freedom and dependency on another person who exercises power over the concerned possible “victim”.

Rantsev v. Cyprus and Russia

In *Rantsev v. Cyprus and Russia* (application no. 25965/04) Judgement 7 June 2010, the applicant was the father of a young woman who died in Cyprus where she had gone to work in March 2001. The applicant complained under Articles 2, 3, 4, 5 and 8 of the Convention about the lack of sufficient investigation into the circumstances of the death of his daughter, the lack of adequate protection of his daughter by the Cypriot police while she was still alive and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter’s death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. Finally, he complained under Article 6 of the Convention about the inquest proceedings and an alleged lack of access to court in Cyprus.

Oxana Rantseva arrived in Cyprus on 5 March 2001. On 13 February 2001, X.A., the owner of a cabaret in Limassol, had applied for an “artiste”¹⁰⁹ visa and work permit for Ms Rantseva to allow her

¹⁰⁹ In November 2003, the Cypriot Ombudsman published a report on “artistes” in Cyprus. In her introduction, she explained the reasons for her report as follows: “Given the circumstances under which [Oxana] Rantseva had lost her life and in the light of similar cases which have been brought into publicity regarding violence or demises of alien women who arrives in Cyprus to work as ‘artistes’, I have decided to undertake an *ex officio* investigation ...” As to the particular facts of Ms Rantseva’s case, she noted the following: “After formal immigration procedures, she started working on 16 March 2001. Three days later she abandoned the cabaret and the place where she had been staying for reasons which have never been clarified. The employer reported the fact to the Aliens and Immigration Department in Limassol. However, [Oxana] Rantseva’s name was not inserted on the list comprising people wanted by the Police, for unknown reasons, as well.” She further noted that: “The reason for which [Oxana] Rantseva was surrendered by the police to her employer, instead of setting her free, since there were [neither] arrest warrant [nor] expulsion decree against her, remained unknown.” The Ombudsman’s report considered the history of the employment of young foreign women as cabaret artistes, noting that the word “artiste” in Cyprus has become synonymous with “prostitute”. Her report explained that since the mid-1970s, thousands of young women had legally entered Cyprus to work as artistes but had in fact worked as prostitutes in one of the many cabarets in Cyprus. Since the beginning of the 1980s, efforts had been made by the authorities to introduce a stricter regime in order to guarantee effective immigration monitoring and to limit the “well-known and commonly acknowledged phenomenon of women who arrived in Cyprus to work as artistes”. However, a number of the measures proposed had not been implemented due to objections from cabaret managers and artistic agents. The Ombudsman’s report noted that in the 1990s, the prostitution market in Cyprus started to be served by women coming mainly from former States of the Soviet Union. She concluded that: “During the same period, one could observe a certain improvement regarding the implementation of those measures and the policy being adopted. However, there was not improvement regarding sexual exploitation, trafficking and mobility of women under a regime of modern slavery.” As regards the living and working conditions of artistes, the report stated: “The majority of the women entering the country to work as artistes come from poor families of the post socialist countries. Most of them are educated ... Few are the real artistes. Usually they are aware that they will be compelled to prostitute themselves. However, they do not always know about the working conditions under which they will exercise this job. There are also cases of alien women who come to Cyprus, having the impression that they will work as waitresses or dancers and that they will only have drinks with clients (‘consommation’). They are made by force and threats to comply with the real terms of their work ... Alien women who do not succumb to this pressure are forced by their employers to appear at the District Aliens and Immigration Branch to declare their wish to terminate their contract and to leave Cyprus on ostensible grounds ... Consequently, the employers can replace them quickly with other artistes ... The alien artistes from the moment of their entry into the Republic of Cyprus to their departure are under constant surveillance and guard of their employers. After finishing their work, they are not allowed to go wherever they want. There are serious complaints even about cases of artistes who remain locked in their residence place. Moreover, their passports and other personal documents are retained by their employers or artistic agents. Those who refuse to obey are punished by means of violence or by being imposed fees which usually consist in deducting percentages of drinks, ‘consommation’ or commercial sex. Of course these amounts are included in the contracts signed by the artistes. ... Finally, it is noted that at the point of their arrival in Cyprus alien artistes are charged with debts, for instance with traveling expenses, commissions deducted by the artistic agent who brought them in Cyprus or with commissions deducted by the agent who located them in their country etc. Therefore,

to work as an artiste in his cabaret. In line with a procedure introduced in 1987, applications for entry, temporary residence and work permits had to be submitted by the prospective employer (the cabaret manager) and the artistic agent, accompanied by an employment contract recording the exact terms agreed between the parties and photocopies of relevant pages of the artiste's passport. After some time Ms Rantseva, escaped from the club where she was working, but her "employers" found her and brought her to a police station in order to have her deported for violating the terms of her visa. She spent several hours at the police station; the police, not intending to deport her, contacted the alleged traffickers to come and pick her up, which they did. Several hours later Ms Rantseva was found dead on the pavement outside the apartment building of one of the men concerned.

The applicant contended that there had been a violation of Article 2 of the Convention by both the Russian and Cypriot authorities on account of the failure of the Cypriot authorities to take steps to protect the life of his daughter and the failure of the authorities of both States to conduct an effective investigation into her death. Relying on *Osman v. the United Kingdom*, 28 October 1998, Reports 1998-VIII, the applicant referred to the positive obligations arising under Article 2 which required States to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another private individual where the State knew or ought to have known of a real and immediate threat to life. The applicant argued that in failing to release Ms Rantseva and handing her over instead to her employers, the Cypriot authorities had failed to take reasonable measures within their powers to avoid a real and immediate threat to Ms Rantseva's life.

Legislation on human trafficking was introduced in Cyprus under Law No. 3(1) of 2000 on the Combating of Trafficking in Persons and Sexual Exploitation of Children.¹¹⁰ Articles 11 and 12 of the Criminal Code of the Russian Federation set out the territorial application of Russian criminal law.¹¹¹ In December 2003, an amendment was made to the Russian Criminal Code by the insertion of a new Article 127.1 on human trafficking.¹¹²

(Contd.)

they are obliged to work under whichever conditions to pay off at least their debts." Concerning the recruitment of women in their countries of origin, the report noted: "Locating women who come to work in Cyprus is usually undertaken by local artistic agents in cooperation with their homologues in different countries and arrangements are made between both of them. After having worked for six months maximum in Cyprus, a number of these artistes are sent to Lebanon, Syria, Greece or Germany."

¹¹⁰ Section 3(1) prohibits: "a. The sexual exploitation of adult persons for profit if: i. it is done by the use of force, violence or threats; or ii. there is fraud; or iii. it is done through 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-treatment; b. the trafficking of adult persons for profit and for sexual exploitation purposes in the circumstances referred to in subsection (a) above; c. the sexual exploitation or the ill-treatment of minors; d. the trafficking of minors for the purpose of their sexual exploitation or ill-treatment." Section 6 provides that the consent of the victim is not a defence to the offence of trafficking. Under section 5(1), persons found guilty of trafficking adults for the purposes of sexual exploitation may be imprisoned for up to ten years or fined CYP 10,000, or both. In the case of a child, the potential prison sentence is increased to fifteen years and the fine to CYP 15,000. Section 3(2) provides for a greater penalty in certain cases: "For the purposes of this section, blood relationship or relationship by affinity up to the third degree with the victim and any other relation of the victim with the person, who by reason of his position exercises influence and authority over the victim and includes relations with guardian, educators, hostel administration, rehabilitation home, prisons or other similar institutions and other persons holding similar position or capacity that constitutes abuse of power or other kind of coercion: a. a person acting contrary to the provisions of section 1(a) and (b) commits an offence and upon conviction is liable to imprisonment for fifteen years; b. a person acting contrary to the provisions of section 1(c) and (d) commits an offence and upon conviction is liable to imprisonment for twenty years." Section 7 imposes a duty on the State to protect victims of trafficking by providing them with support, including accommodation, medical care and psychiatric support.

¹¹¹ Article 11 establishes Russian jurisdiction over crimes committed in the territory of the Russian Federation. Article 12(3) provides for limited jurisdiction in respect of non-Russian nationals who commit crimes outside Russian territory where the crimes run counter to the interests of the Russian Federation and in cases provided for by international agreement.

¹¹² 1. Human beings' trafficking, that is, a human being's purchase and sale or his recruiting, transportation, transfer, harbouring or receiving for the purpose of his exploitation ... shall be punishable by deprivation of liberty for a term of up to five years.
2. The same deed committed: a) in respect of two or more persons; d) moving the victim across the State Border of the Russian Federation or illegally keeping him abroad; f) with application of force or with the threat of applying it; shall be

In the report of 12 December 2008 by the Council of Europe Commissioner for Human Rights on his visit to Cyprus on 7-10 July 2008 (CommDH(2008)36) the Commissioner noted that the Government had passed comprehensive anti-trafficking legislation criminalising all forms of trafficking, prescribing up to 20 years' imprisonment for sexual exploitation and providing for protection and support measures for victims. He also visited the new government-run shelter in operation since November 2007 and was impressed by the facility and the commitment shown by staff.¹¹³

The report drew the following conclusions in respect of the artiste permit regime in Cyprus: "The Commissioner reiterates that trafficking in women for the purposes of sexual exploitation is a pressing and complex human rights issues faced by a number of Council of Europe member States, including Cyprus. A paradox certainly exists that while the Cypriot government has made legislative efforts to fight trafficking in human beings and expressed its willingness through their National Action Plan 2005, it continues to issue work permits for so-called cabaret artistes and licences for the cabaret establishments. While on paper the permits are issued to those women who will engage in some type of artistic performance, the reality is that many, if not most, of these women are expected to work as prostitutes. The existence of the 'artiste' work permit leads to a situation which makes it very difficult for law enforcement authorities to prove coercion and trafficking and effectively combat it. This type of permit could thus be perceived as contradicting the measures taken against trafficking or at least as rendering them ineffective. The Commissioner regretted that the 'artiste' work permit continued to be in place despite the fact that the government has previously expressed its commitment to abolish it and called upon the Cypriot authorities to abolish the current scheme of cabaret 'artistes' work permits ..."

The Court emphasised the serious nature of the allegations of trafficking in human beings made in the case, which raised issues under Articles 2, 3, 4 and 5 of the Convention. In this regard, it was noted that awareness of the problem of trafficking of human beings and the need to take action to combat it has grown in recent years, as demonstrated by the adoption of measures at international level as well as the introduction of relevant domestic legislation in a number of States. The reports of the Council of Europe's Commissioner for Human Rights and the report of the Cypriot Ombudsman highlight the acute nature of the problem in Cyprus, where it was widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern.

The Court drew attention to the lack of case-law on the interpretation and application of Article 4 of the Convention in the context of trafficking cases. It is particularly significant that the Court had yet to rule on whether, and if so to what extent, Article 4 requires member States to take positive steps to protect potential victims of trafficking outside the framework of criminal investigations and prosecutions.

The applicant's complaints against Russia concerned the latter's alleged failure to take the necessary measures to protect Ms Rantseva from the risk of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and her subsequent death. The Court observed that such complaints are not predicated on the assertion that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities. In light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking, it was not considered outside the Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own

(Contd.)

punishable by deprivation of liberty for a term from three to 10 years. 3. The deeds provided for by Parts One and Two of this Article: a) which have entailed the victim's death by negligence, the infliction of major damage to the victim's health or other grave consequences; b) committed in a way posing danger to the life or health of many people; c) committed by an organized group- shall be punishable by deprivation of liberty for a term from eight to 15 years.

¹¹³ The Commissioner was assured that allegations of trafficking-related corruption within the police force were isolated cases. The authorities informed the Commissioner that so far, three disciplinary cases involving human trafficking/prostitution have been investigated: one resulted in an acquittal and two were still under investigation. In addition, in 2006, a member of the police force was sentenced to 14 months imprisonment and was subsequently dismissed from service following trafficking related charges.

jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked. Similarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia. As the Court has previously emphasised, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. Accordingly, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State's territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter's consent, invitation or acquiescence. Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction.¹¹⁴ Thus even if this crime is essentially international there are limits for State responsibility in prosecution from a human rights point of view.

In their written submissions, the Cypriot Government argued that there was no failure to protect the life of the applicant's daughter. On the information available to the police officers who had contact with Ms Rantseva on 28 March 2001, there was no reason to suspect a real or immediate risk to Ms Rantseva's life. It is clear that Article 2 enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction.¹¹⁵ In the first place, this obligation requires the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. However, it also implies, in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.¹¹⁶

The scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Osman*, cited above, § 116; *Paul and Audrey Edwards*, cited above, § 55; and *Medova*, cited above, § 96). In *Opuz*, the responsibility of the State was engaged because the person who subsequently went on to shoot and kill the applicant's mother had previously made death threats and committed acts of violence against the applicant and her mother, of which the authorities were aware (*Opuz*, cited above, §§ 133 to 136). Conversely, in *Osman*, the Court found that there was no violation of Article 2 as the applicant had failed to point to any stage in the sequence of events leading to the shooting of her husband where it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk (*Osman*, cited above, § 121). The Court Concluded in *Rantseva* that:

Although it is undisputed that victims of trafficking and exploitation are often forced to live and work in cruel conditions and may suffer violence and ill-treatment at the hands of their employers, in the absence of any specific indications in a particular case, the general risk of ill-treatment and violence cannot constitute a real and immediate risk to life.

¹¹⁴ see *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII

¹¹⁵ see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; and *Paul and Audrey Edwards*, cited above, § 54

¹¹⁶ see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III; and *Paul and Audrey Edwards*, cited above, § 54

In the case, even if the police ought to have been aware that Ms Rantseva might have been a victim of trafficking, there were no indications during the time spent at the police station that Ms Rantseva's life was at real and immediate risk. There had thus been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2 of the Convention.

The applicant further claimed that Cyprus and Russia had violated their obligations under Article 2 of the Convention to *conduct an effective investigation* into the circumstances of Ms Rantseva's death.

As the Court has consistently held, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.¹¹⁷ The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents.¹¹⁸ The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.¹¹⁹ For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence.¹²⁰ The investigation must be capable of leading to the identification and punishment of those responsible.¹²¹ A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention.¹²² In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests.¹²³

The Court acknowledged at the outset that there was no evidence that Ms Rantseva died as a direct result of use of force. However, this does not preclude the existence of an obligation to investigate her death under Article 2.¹²⁴ In light of the ambiguous and unexplained circumstances surrounding Ms Rantseva's death and the allegations of trafficking, ill-treatment and unlawful detention in the period leading up to her death, the Court considered that a procedural obligation did arise in respect of the Cypriot authorities to investigate the circumstances of Ms Rantseva's death. In the present case there were a number of elements of the investigation which were unsatisfactory. First, there was conflicting testimony from those present in the apartment which the Cypriot investigating authorities appear to have taken no steps to resolve, second, the verdict at the inquest recorded that Ms Rantseva had died in "strange circumstances" in an attempt to escape from the apartment in which she was a "guest". Despite the lack of clarity surrounding the circumstances of her death, no effort was made by the Cypriot police to question those who lived with Ms Rantseva or worked with her in the cabaret.

¹¹⁷ see *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, Reports 1998-I; *Medova v. Russia*, cited above, § 103

¹¹⁸ see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V

¹¹⁹ see, for example, *Đlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII; *Paul and Audrey Edwards*, cited above, § 69

¹²⁰ see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, ECHR 2001-III (extracts); and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001

¹²¹ see *Paul and Audrey Edwards*, cited above, § 71

¹²² see *Yasa v. Turkey*, 2 September 1998, §§ 102-104, Reports 1998-VI; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV; and *Kelly and Others*, cited above, § 97

¹²³ see, for example, *Güleç v. Turkey*, 27 July 1998, § 82, Reports of Judgments and Decisions 1998-IV; and *Kelly and Others*, cited above, § 98

¹²⁴ see also *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48 to 50, ECHR 2002-I; and *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 70 to 74, ECHR 2004-XII

Further, notwithstanding the striking conclusion of the inquest that Ms Rantseva was trying to escape from the apartment, no attempt was made to establish why she was trying to escape or to clarify whether she had been detained in the apartment against her will. Third, aside from the initial statements of the two police officers and passport officer on duty made on 28 and 29 March 2001, there was apparently no investigation into what had occurred at the police station, and in particular why the police had handed Ms Rantseva into the custody of M.A.. In light of the facts of the present case, the Court considers that the authorities were under an obligation to investigate whether there was any indication of corruption within the police force in respect of the events leading to Ms Rantseva's death. Fourth, despite his clear request to the Cypriot authorities, the applicant was not personally advised of the date of the inquest and as a consequence was not present when the verdict was handed down. Fifth, the applicant's continued requests for investigation, via the Russian authorities, appear to have gone unheeded by the Cypriot authorities. In particular, his requests for information as to further remedies open to him within the Cypriot legal order, as well as requests for free legal assistance from the Cypriot authorities, were ignored. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State.

The Court observed that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty. These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence. However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. Although Ms Rantseva died in 2001, the applicant is still waiting for a satisfactory explanation of the circumstances leading to her death. The Court accordingly found that there has been a procedural violation of Article 2 of the Convention as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death.

Since Ms Rantseva's death took place in Cyprus special features must be present which require a departure from the general approach that the obligation to ensure an effective official investigation applies to Cyprus alone (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 38, ECHR 2001-XI). The Court does not consider that Article 2 requires member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. Accordingly, the Court concluded that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death. In conclusion, the Court finds that there has been no procedural violation of Article 2 by the Russian Federation. It is an interesting point to make that even if a crime may be subject to universal jurisdiction (not the case of trafficking unless speaking of sale of children in the sense of the Optional Protocol to the Convention on the Right of the Child) the victims of such a crime cannot expect and should not expect of their state of which they are a national to follow up on such crimes committed extraterritorially. This actually makes perfect sense since it would be detrimental to cases and to law and order in general to have police forces from various countries operating all over the place outside of their usual national jurisdiction. It is however important to notice that international collaboration on issues of criminal justices is paramount to an effective implementation of laws with a trans-national dimension.

The applicant argued that a positive obligation arose in the present case to protect Ms Rantseva from ill-treatment from private individuals. He contended that the two forensic reports conducted following Ms Rantseva's death revealed that the explanation of her death did not accord with the injuries recorded. He argued that the witness testimony gathered did not provide a satisfactory response to the question whether there were injuries present on Ms Rantseva's body prior to her death. Despite this, no investigation was conducted by the Cypriot authorities into whether Ms Rantseva had been subjected to inhuman or degrading treatment. Further, no steps were taken to avoid the risk of ill

treatment to Ms Rantseva in circumstances where the authorities knew or ought to have known of a real and immediate risk. Accordingly, in the applicant's submission, there was a breach of Article 3 of the Convention. The Court noted that there was no evidence that Ms Rantseva was subjected to ill-treatment prior to her death. However, it is clear that the use of violence and the ill-treatment of victims are common features of trafficking. The Court therefore considered that, in the absence of any specific allegations of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantseva prior to her death was inherently linked to the alleged trafficking and exploitation. Accordingly, the Court concluded that it was not necessary to consider separately the applicant's Article 3 complaint and will deal with the general issues raised in the context of its examination of the applicant's complaint under Article 4 of the Convention.

The applicant alleged a violation of Article 4 of the Convention by both the Russian and Cypriot authorities in light of their failure to protect his daughter from being trafficked and their failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there. Referring to *Siliadin* and the Anti-Trafficking Convention, the applicant contended that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. He pointed to the reports of the Council of Europe's Commissioner on Human Rights (above), which he said demonstrated that there had been a deterioration in the situation of young foreign women moving to Cyprus to work as cabaret artistes. He concluded that the obligations incumbent on Cyprus to combat trafficking had not been met. In particular, the applicant pointed out that the Cypriot authorities were unable to explain why they had handed Ms Rantseva over to her former employer at the police station instead of releasing her. He contended that in so doing, the Cypriot authorities had failed to take measures to protect his daughter from trafficking. They had also failed to conduct any investigation into whether his daughter had been a victim of trafficking or had been subjected to sexual or other exploitation. Although Ms Rantseva had entered Cyprus voluntarily to work in the cabaret, the Court had established that prior consent, without more, does not negate a finding of compulsory labour (referring to *Van der Mussele v. Belgium*, 23 November 1983, § 36, Series A no. 70). This is clear since initial consent may even be part of the deceit, it is necessary to consider the entire process in order to understand whether there is a trafficking case or not (see also above).

In respect of Russia, the applicant pointed out that at the relevant time, the Russian Criminal Code did not contain provisions which expressly addressed trafficking in human beings. He argued that the Russian authorities were aware of the particular problem of young women being trafficked to Cyprus to work in the sex industry. Accordingly, the Russian Federation was under an obligation to adopt measures to prevent the trafficking and exploitation of Russian women but had failed to do so. In the present case, it was under a specific obligation to investigate the circumstances of Ms Rantseva's arrival in Cyprus and the nature of her employment there, but no such investigation had been carried out.

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in *light of present-day conditions*, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.

The Court noted that, like slavery, trafficking in people treated human beings as commodities to be bought and sold and put to forced labour; accordingly trafficking itself was prohibited by Article 4. The Court found that Cyprus had violated Article 4 because it had failed to put in place an appropriate legal and administrative framework to combat trafficking, and the police had failed to protect Ms Rantseva despite circumstances suggesting a credible suspicion that she might have been a victim of trafficking. There had also been a violation of Article 4 by Russia on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in her recruitment or the methods of recruitment used.

The decision emphasizes that trafficking is prohibited by Article 4 of the ECHR without the need to define it either as slavery, servitude or forced labour. However, the statement by the Court that trafficking may be very similar to slavery because traffickers exercise powers tantamount to ownership, and that “trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention” are both welcome in underlining the concern which must be shown towards the victims. The obligation under Article 4 of the ECHR extends beyond the duty to prosecute and penalize effectively anyone who has engaged in acts aimed at holding another in slavery, servitude or forced labour. That duty clearly includes having in place national legislation “... adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.” This is a recognition that the State’s obligation extends beyond the criminal law to include significant victim-protection measures, not only for those who have already been trafficked but also for those at risk of being trafficked in the future.

In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account.¹²⁵ The Court considered that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.¹²⁶ The importance of systematically assessing the impact of immigration legislation and policy on the prevention of trafficking and the protection of victims’ rights should not be underestimated, neither should the importance of effective labour laws addressing exploitation in the labour market and labour related rights as found in the ILO instruments.

The applicant submitted that his daughter’s treatment at the police station and subsequent confinement to the private apartment violated Article 5 § 1 of the Convention. He emphasised the importance of Article 5 in protecting individuals from arbitrary detention and abuse of power.

The applicant was taken by M.A. to the police station where she was detained for about an hour. There is no evidence that Ms Rantseva was informed of the reason for her detention; there is no record that she was interviewed by the police at all during her time at the police station. Despite the fact that the police concluded that Ms Rantseva’s immigration status was not irregular and that there were no grounds for her continued detention, she was not immediately released. Instead, at the request of the person in charge of the Aliens and Immigration Service (“AIS”), the police telephoned M.A. and requested that he collect her and take her to the AIS office at 7 a.m. for further investigation. M.A. was advised that if he did not collect her, she would be allowed to leave. Ms Rantseva was detained at the police station until M.A.’s arrival, when she was released into his custody. The facts surrounding Ms Rantseva’s subsequent stay in M.P.’s apartment were unclear. In his witness statement to the police, M.A. denied that Ms Rantseva was held in the apartment against her will and insists that she was free to leave. The Court noted that Ms Rantseva died after falling from the balcony of the apartment in an apparent attempt to escape and that it would be reasonable to assume that had she been a guest in the apartment and was free to leave at any time, she would simply have left by the front door.¹²⁷

¹²⁵ see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 93, ECHR 2005-VII

¹²⁶ see, *mutatis mutandis*, *Guerra and Others v. Italy*, 19 February 1998, §§ 58 to 60, *Reports of Judgments and Decisions* 1998-I; *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 73 to 74, ECHR 2001-V; and *Nachova and Others*, cited above, §§ 96 to 97 and 99-102

¹²⁷ see *Storck v. Germany*, no. 61603/00, §§ 76-78, ECHR 2005-V

Accordingly, the Court considered that Ms Rantseva did not remain in the apartment of her own free will. The Court found that the detention of Ms Rantseva at the police station and her subsequent transfer and confinement to the apartment amounted to a deprivation of liberty within the meaning of Article 5 of the Convention. This conclusion which may on face value appear slightly controversial is less so if the facts are considered in more depths.

Taken in the context of the general living and working conditions of cabaret artistes in Cyprus, as well as in light of the particular circumstances of Ms Rantseva's case, the Court considered that it is not open to the police to claim that they were acting in good faith and that they bore no responsibility for Ms Rantseva's subsequent deprivation of liberty in M.P.'s apartment. It is clear that without the active cooperation of the Cypriot police in the present case, the deprivation of liberty could not have occurred. The Court therefore considered that the national authorities acquiesced in Ms Rantseva's loss of liberty. The policy should have known and thus prevented Ms Rantseva's confinement by the private individuals.

Rantseva obviously has its main importance in the application of the ECHR to a case which is labelled "trafficking" for the first time in the Convention's lifetime. It underlines what the ECtHR has established a number of times; that the Convention is a living instrument which must be interpreted in the light of current circumstances and new developments in law as well as in life.

Furthermore *Rantseva* applies the honoured principle of obligation to protect to cases of trafficking showing that States have a positive obligations towards possible victims of trafficking, which in policies may be taken further to have programmes relevant for potential and actual victims which address their human rights – first and foremost that to life and physical integrity but not only.

Conclusions

Siliadin is especially important in its analysis of what constitutes forced labour – what is dependency on the employer and what is choice. The Court noted that although the girl was not threatened by a 'penalty', the fact remained that she was in an equivalent situation in terms of the perceived seriousness of the threat and that she could not get out of her situation. It is also significant how the Court took into consideration the girl's age. Both in *Salid'in* and in *Rantseva* very importantly, the Court did not only find that Article 4 covers human trafficking but also held that states have a positive duty to prevent human trafficking and to protect victims. This positive obligation gives rise to an obligation to effectively investigate situations where there is a suspicion of trafficking and to co-operate with the investigations of other states. This is analogous to the positive obligations that have developed under Article 2 (right to life), for example, as a means of ensuring effective realisation of Convention rights. Importantly, it also attempts to create a bulwark against the all too often realised situations where cases of potential trafficking are effectively ignored by law enforcement authorities or treated as situations of prostitution in which the people who are actually in need of protection become the investigated and sometimes criminalised parties. The obligation for cross-border co-operation in investigations is clearly important in trafficking, particularly taking into account the fact that there is a significant amount of cross-border human trafficking within the member states of the Council of Europe itself.

The obligation to prohibit trafficking is strengthened when the right to life is involved, as it may often be. In *Osman v. United Kingdom*,¹²⁸ the European Court of Human Rights held that states' primary duty to secure the right to life include putting in place effective criminal law provisions to deter the commission of offences against the person,¹²⁹ this obligation may well extend to other serious

¹²⁸ Case 87/1997/871/1083. The Court's case-law referred to 21.2.1975, *Golder v. the United Kingdom*; 18.1.1978, *Ireland v. the United Kingdom*; 27.9.1995, *McCann and Others v. the United Kingdom*; 9.6.1998, *L.C.B. v. the United Kingdom*; 10.7.1998, *Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom*

¹²⁹ Judgement of 28 October 1998

offences against the person. States are also under a clear obligation to prohibit acts amounting to torture, inhuman or degrading treatment.¹³⁰ In *A v. United Kingdom*¹³¹ the ECHR found that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.¹³²

For years already, it has been established case law of the European Court of Human Rights that the European Convention on Human Rights entails not only negative, but also positive obligations for the state parties to the Convention.¹³³ According to this principle, state parties should not only refrain from any action that might conflict with or cause a violation of the protected rights, but are also obliged to take all measures necessary to guarantee the undisturbed enjoyment of the rights granted. Earlier these positive obligations were defined per separate article, but since 2001, it is case law that positive obligations exist under all substantive provisions of the Convention.¹³⁴ The European Court of Human Rights has also elaborated this issue considerably in its jurisprudence and it has read certain positive obligations into the ECHR, mainly because it has held that the ECHR is designed to safeguard the right in it in a “real and practical way” (see *Airey* case, ECtHR judgment 9.10.1079, Ser. A 32, § 26.) and that the respect for human rights on part of the state must be “effective” (see *Marckx* case, ECtHR judgment 13.6.1979, Ser. A 31, § 31.). The Court has used the concept of implied positive obligations for indirectly attributing a certain effect in private relations, and accepted an obligation on part of the authorities to take measures to guarantee respect for human rights in relations between private actors (see especially *X and Y v. Netherlands*, where the Court held that “there may be positive obligations

¹³⁰ According to the Convention Against Torture, ICCPR Art. 7, ECHR Art. 3, Art 5.2 of the ACHR, Art. 5 of the African Charter.

¹³¹ The applicant was a British citizen, born in 1984. In May 1990 he and his brother were placed on the local child protection register because of “known physical abuse”. The cohabitant of the boys’ mother was given a police caution after he admitted hitting A. with a cane. Both boys were removed from the child protection register in November 1991. The cohabitant subsequently married the applicant’s mother and became his stepfather. In February 1993, the head teacher at A.’s school reported to the local Social Services Department that A.’s brother had disclosed that A. was being hit with a stick by his stepfather. The stepfather was arrested on 5 February 1993 and released on bail the next day. On 5 February 1993 the applicant was examined by a consultant paediatrician, who found the following marks on his body, *inter alia*: (1) a fresh red linear bruise on the back of the right thigh, consistent with a blow from a garden cane, probably within the preceding twenty-four hours; (2) a double linear bruise on the back of the left calf, consistent with two separate blows given some time before the first injury; (3) two lines on the back of the left thigh, probably caused by two blows inflicted one or two days previously; (4) three linear bruises on the right bottom, consistent with three blows, possibly given at different times and up to one week old; (5) a fading linear bruise, probably several days old. The paediatrician considered that the bruising was consistent with the use of a garden cane applied with considerable force on more than one occasion. The stepfather was charged with assault occasioning actual bodily harm and tried in February 1994. It was not disputed by the defence that the stepfather had caned the boy on a number of occasions, but it was argued that this had been necessary and reasonable since A. was a difficult boy who did not respond to parental or school discipline. The jury found by a majority verdict that the applicant’s stepfather was not guilty of assault occasioning actual bodily harm. A. applied to the Commission on 15 July 1994. He complained that the State had failed to protect him from ill-treatment by his step-father, in violation of Articles 3 and/or 8 of the Convention; that he had been denied a remedy for these complaints in violation of Article 13; and that the domestic law on assault discriminated against children, in violation of Article 14 in conjunction with Articles 3 and 8.

¹³² *A v. The UK* App 25599/94 Judgement of 23/9/98, para. 22 (see, *mutatis mutandis*, the *H.L.R. v. France* judgment of 29 April 1997, *Reports* 1997-III, p. 758, § 40). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see, *mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, pp. 11–13, §§ 21–27; the *Stubbings and Others v. the United Kingdom* judgment of 22 October 1996, *Reports* 1996-IV, p. 1505, §§ 62–64; and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

¹³³ See Touzenis, K. Op cit

¹³⁴ ECHR, case no. 41340/98, 41342/98, 41343/98, and 41344/98, 31 July 2001, *Refah Partisi et. al., v. Turkey*.

inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.” (§ 23)) In *L.C.B. v. UK* (ECtHR judgment 9.6.1998, Reports 1998-III)¹³⁵ the court held that the first sentence of Article 2(1) “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”

Notwithstanding that ECHR Article 3 only prohibits ill-treatment of a serious nature, the provision has been shown to have clear potential to protect children from abuse. In particular, the Court has held that the State has the responsibility to protect all children from all abuse which falls within the scope of Article 3, inevitably bringing the Convention into the private sphere. In the educational context, the Court established in *Costello-Roberts v. United Kingdom*, (Series A, No.247-C, (1995) 19 E.H.R.R. 112) that the State is obliged to protect all children from ill-treatment, regardless of whether they attend public or private schools. Moreover, the Court expanded the obligation further in *A. v. United Kingdom* (A v. United Kingdom, (1999) 27 E.H.R.R. 959 at § 21) by finding that Article 3 requires the taking of measures designed to ensure that everyone is free from ill-treatment, even where it is administered by private individuals. According to the Court, the particular vulnerability of children means that they must have state protection against any treatment which constitutes a serious breach of personal integrity and so a legal system which acquits those who have inflicted ill-treatment contrary to Article 3 will be found to have failed to provide adequate protection as required by that provision. The core conclusion in *A v. United Kingdom* was that the obligation on States under Article 1 of the Convention to secure to everyone within their jurisdiction Convention rights, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subject to torture and inhuman or degrading treatment, including such ill-treatment administered by private individuals. According to the Court, these measures should provide effective protection to children in particular and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have knowledge.¹³⁶

The scope of this obligation was clarified further by the Court in *Z. and Others v. United Kingdom* in 2001.¹³⁷ The applicants in this case were four children who suffered abuse and neglect at the hands of their parents over a period of several years. Their claim under the Convention was that the local authority, which was aware of their situation, had failed to take effective steps to bring it to an end, giving rise to a violation of their right to protection under Article 3. The Court found without difficulty that the appalling neglect, physical and psychological injury suffered by the children reached the level of severity required to bring it inside the scope of Article 3, a fact which was undisputed by the UK Government before the Court. The Court then went on to note that the local authority was aware of this treatment and had both a statutory duty and a range of powers available to them to protect the children. It concluded unanimously that Article 3 had been violated.¹³⁸ The Court also considered that the children had been denied an effective remedy with respect to the breach of their Article 3 rights, contrary to Article 13.

In particular, the Court noted that where a right as fundamentally important as the prohibition on torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to an investigation

¹³⁵ *L.C.B. v. United Kingdom*, ECtHR judgment 9.6.1998, Reports 1998-III, para. 36. The HRC found a very similar claim concerning the French nuclear tests on the Mururoa atolls in 1995-1996 inadmissible as the claimants were not ‘victims’. *Communication No. 645/1995*, 30.7.1996.

¹³⁶ See further *Osman v. United Kingdom*, (1998) 29 E.H.R.R. 245, Reports 1998-VIII, at para. 116.

¹³⁷ *Z & Ors v. United Kingdom* (2002) 34 E.H.R.R. 97.

¹³⁸ *Z. & Ors v. United Kingdom* (2002) 34 E.H.R.R. 97 at paras. 69-75

procedure. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should however be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Article 3, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress. As such a mechanism was not available in this case,¹³⁹ a violation of Article 13 had occurred as a result.

A positive obligation therefore also comes into play for Article 4 stating that '[n]o one shall be held in slavery or servitude' and 'no one shall be required to perform forced or compulsory labour'. This was for the first time confirmed in *Siliadin* case and was clearly underlined in *Rantseva*. What can be concluded from this case is that the Court emphasised that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. If a state does not fulfil this obligation, in the sense that trafficking (in all its forms) is not adequately forbidden in criminal law or is not effectively fought, this may lead to state liability when trafficking is established. The scope of the state obligation in this respect is not fully clear. What exactly can be expected from a state in relation to the fight against trafficking, in order to conclude that state liability exists when the crime is not adequately addressed? Since the judgment does not go into the actual prevention of trafficking, nor into the active prosecution of this crime, this matter is still open to interpretation. It is a matter of time whether the rights protected in the European Convention and *mutatis mutandis*, in other human rights instruments, entail an obligation for the state parties to only an effort to be made, or to a result to be achieved, with likewise implications for state liability. The judgments here considered may be seen as an adoption of the latter.¹⁴⁰

The duty to investigate and to bring to justice perpetrators of human rights crimes has been emphasised by international human rights bodies from the outset. The protection of the right to life includes an obligation on States to take all appropriate and necessary steps to safeguard the lives of those within their jurisdiction. As part of this obligation, States must put in place effective criminal justice and law enforcement systems, such as measures to deter the commission of offences and investigate violations where they occur; ensure that those suspected of criminal acts are prosecuted; provide victims with effective remedies; and take other necessary steps to prevent a recurrence of violations.¹⁴¹ In addition, international and regional human rights law has recognized that, in specific circumstances, States have a positive obligation to take preventive operational measures to protect an individual or individuals whose life is known or suspected to be at risk from the criminal acts of another individual,¹² which certainly includes terrorists. Also important to highlight is the obligation on States to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist.¹⁴²

It has been clear that the obligation to do so is a clear part of States' duties and if they do not they are at fault. In *Minanga v. Zaire* (Communication No. 366/1989, U.N. Doc.

¹³⁹ The Court (at para. 10) did not consider it necessary to make any findings as to whether only court proceedings could furnish effective redress, although it did acknowledge that judicial remedies furnish strong guarantees of independence, access for the victim and family and enforceability of awards.

¹⁴⁰ See also Rijken, C.; Koster, D.: A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice, p 22 on *Siliadin*

¹⁴¹ See, for example, "Updated Set of principles for the protection and promotion of human rights through action to combat impunity" (E/CN.4/2005/102/Add.1). See also Human Rights 49 Committee, views on communication N° 195/1985, *Delgado Páez v. Colombia*, 12 July 1990 (A/45/40 (vol. II), annex IX, sect. D).

¹⁴² Touzenis, K.: Children on trial: Human rights and criminal law, Presentation made at the Conference "Children and War, past and present", Salzburg, 30Sep-2Oct 2010. Forthcoming article

CCPR/C/49/D/366/1989 (1993)) the Human Rights Committee held that the State party should investigate the events complained of and bring to justice those held responsible for the plaintiff's treatment, as happened in the European Context (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). In *Kaya vs. Turkey* application 22729/93 Judgment in 1998 where the European Court of Human Rights (ECtHR) concluded that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant's brother and that there had accordingly been a violation of Article 2 of the ECHR on the right to life in that respect. Similarly in forced disappearance cases both before the Human Rights Committee and the Inter-American Court (especially the Velasquez Rodriguez Case (Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)) and at the European Court of Human Rights (see e.g. *Timurtas vs. Turkey* (Application 23531/94) ECHR 2000) and *Salman vs. Turkey* (Application 21986/93, ECHR 2000)).¹⁴³

The Court reiterated in *Rantseva* that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.¹⁴⁴ Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.¹⁴⁵

National Case Law – Selected States

Belgian case law

By Law of 10 August 2005, Belgium added a new chapter to the Criminal Code, consisting of Articles 433d to 433h. Previously, Belgian law had limited the application of the offence of “trafficking” to foreigners and did not make any distinction between “trafficking” and “smuggling”. The new definition of trafficking is provided in Article 433d. The “acts” section of the definition is based on the UN Trafficking Protocol and the EU Framework Decision. Several “purposes” are listed, including “to employ these persons in conditions incompatible with human dignity or to allow them thus to be employed”. “Means” or *modi operandi* – such as coercion, threats, violence or abuse of vulnerability – are not an element of the offence of trafficking under Belgian law. They are, however, listed separately as aggravating circumstances. The legislative intent behind removing the ‘means’ from the definition of trafficking was to make offences easier to prosecute. The *travaux préparatoires* of the Law of 10 August 2005 indicate that the drafters disagreed with a 2001 decision by the Court of Appeal of Liège (Liège Court of Appeal, 25 April 2001) acquitting a couple of employing a young African girl as a domestic worker. In that case, the Court found that the defendants had not abused the worker's vulnerability, despite the fact that she received minimal payment and her passport was kept in a safe to which she did not have access. In response, the new law was intended to focus the offence on the exploitation rather than the means. It is debatable whether the Belgian law extends the reach of the UN Trafficking Protocol's definition. Although the Trafficking Protocol and the EU Framework Decision offer non-exhaustive definitions of ‘exploitation’, some observers expressed concern that the Belgian law was potentially more limited. Rather than “sexual exploitation”, the Belgian law limits the purpose to prostitution and child pornography. Rather than forced labour generally, the Belgian law

¹⁴³ Ibid.

¹⁴⁴ see *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; and *Karner v. Austria*, no. 40016/98, § 26, ECHR 2003-IX

¹⁴⁵ see *Karner*, cited above, § 26; and *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII

covers “employment in conditions incompatible with human dignity”,¹⁴⁶ which is potentially broader. The new legislation makes a clear distinction between trafficking and smuggling and covers exploitation of both foreign and Belgian workers. Charging unreasonably high rents for housing by “slum landlords” is defined as a separate offence. At the same time, a number of bodies have been established to ensure cooperation and co-ordination between the relevant agencies, such as police, the Public Prosecutors Office, the judiciary and specialized NGOs. Under the old law, prosecutions for both smuggling and trafficking were based on the article that prohibited helping a foreigner to obtain residence and thereby abusing his or her “position of vulnerability”. In practice the latter concept appeared to give rise to different interpretations by the courts.

The law is intended to cover forced labour and slavery, but also situations of very low salaries or of obviously unhealthy or dangerous conditions of labour. Nevertheless, the concept of “human dignity” may prove difficult. The Centre for Equal Opportunities and Opposition to Racism (CEEOR) has, for example, criticized the use of the term “incompatible with human dignity” because it “is not a legal concept that is more effectively defined than the “abuse of a vulnerable position”. It is thus necessary to use established standards (especially ILO standards) to fill the concept with real value, and to see what the Courts actually define as “human dignity” in work. In a 2006 case, the District Court of Bruges found conditions “incompatible with human dignity” where one or more persons worked in conditions that did not comply with the standards set forth in the Act of 4 August 1996, an act of social legislation. In that case, Lithuanian workers worked for long hours for very low wages in unsafe and unhealthy living conditions and were accommodated in a hanger that was not designed for human habitation (see immediately below).¹⁴⁷

In the case of a Guinean woman exploited as domestic worker, the Magistrate Court accepted abuse of a vulnerable position because at a certain point she found herself in Belgium without a valid residence and work permit. Her passport and other papers were taken from her so that she felt she could not move around freely without the risk of being arrested, and she lived and worked under ‘intolerable conditions’, notably without any form of social protection against accidents and illness. The judgement, however, was overruled by the Court of Appeal (*Liege Court of Appeal, 25 April 2001*) on the arguments that it was not established that she would not have been given her passport if she had asked for it, that the couple had undertaken steps to legalize her stay, that she enjoyed benefits in kind and received money for dental treatment, and, most notably, because, although she worked long hours, ‘this was in line with the usual domestic tasks of a housekeeper’. Moreover, the Court noted that she might have exaggerated her claims in order to obtain the right to stay in Belgium under the trafficking statute. This case was not presented before the European Court on Human Rights. Otherwise, the decision would probably have been different, as this case is very similar to the case of *Siliadin vs. France*. Another case concerned an Indian accused of forcing fellow compatriots to work for him as flower sellers. In this case, the Court of Appeal accepted abuse of a position of vulnerability in light of the illegal administrative status of the workers, the precarious situation with respect to accommodation, the complete subservience of the workers through the use of violence and the obligation of the workers to hand over all their earnings. The new law establishes behaviour ‘aimed at undermining human dignity’ as an offence, regardless of the means used. Abuse of a position of vulnerability is removed from the basic charge and classified as an aggravating circumstance. This leaves considerable discretion to the judge to decide whether or not a person has been put to work under conditions contrary to human dignity. This can, for example, include the performance of work without remuneration or for a remuneration which is disproportionate to the number of hours worked, or the presence of substandard working conditions without health and safety protections. The concept of trafficking in the area of labour exploitation is thus very extensive and is defined by its aim, i.e.

¹⁴⁶ Deputy General Public Prosecutor, Frédéric Kurz, *Lutte contre le travail forcé, l’exploitation économique et la traite des êtres humains: des concepts légaux à l’application judiciaire*, *Chroniques de droit social*, 2008, 317-330

¹⁴⁷ ILO: *Forced Labour and Human Trafficking Casebook of Court Decisions*, p 58

exploitation through employment under conditions contrary to human dignity. It includes not only actual employment under these conditions but also the intention to do so, and the *modus operandi* (such as abuse of a position of vulnerability) only come into play as aggravating circumstances.

The Belgian landmark case (District Court (*Correctionele rechtbank van Brugge, 14e Kamer*, 25 April 2006)) required “movement” and constructed “exploitation” in a very useful and operationally sensible manner – which is in concordance with the Palermo Protocol’s definition. Victims who entered the country on their own by various means – some legally – were thought to be “moved” to Belgium. That is, some were invited on tourist visas, some were literally given visas and others were helped in requesting visas. The element of exploitation required the afore mentioned “conditions incompatible with human dignity” and required two stipulations: (a) “intended and actual exploitation” and (b) that one or more persons had to work in conditions that were incompliant with the norms as settled in the Act of 4 August 1996 concerning the well being of employees, and the payment of the minimum wages. This seems a fairly reasonable way of judging working conditions. With regards to exploitation, case law mirrors the legislation in requiring the perpetrator’s intent to gain from the activity and actual gain of profit. Intended gain has been found proven on the basis of calculations indicating labour costs savings. Actual gain has been proved by grant profits as calculated by the court. The requirement on working conditions was met due to the nature of the work, the working conditions per se, and also on the basis of the applicant’s living conditions. The first consisted of long working days for very low wages and with hardly any time off per week on construction work. Working conditions were neither healthy nor safe, and there was, *inter alia*, a lack of protection against welding fumes, fencing of dangerous holes, secure machines and rescue equipment. The living conditions were also incorporated in the judgment; the victims stayed in a hangar that was clearly not suitable for living. The Court also considered the fact of non-payment in relation to violations of social legislation and made the link between labour exploitation, a violation of working conditions – and possibly also living conditions – and saw it as an infringement of social legislation.

The court also concluded that the means used to obtain “consent” from the trafficked persons constituted aggravating circumstances. The perpetrators gave false expectations to those in a vulnerable position. The “vulnerable position” was proven on the basis of factual circumstances of unemployment and low wages in Lithuania, the country of origin.

Earlier Belgian case law did not require the element of movement, which may be due to the only recent influence of an international definition of trafficking, whereas previously the focus was on exploitation “only”. As long as this is not to the detriment of non-national victims it may not be too serious but it does run the risk of ignoring the particular needs and situation of people who have been exploited and who need subsequent support both in the country of destination as well as in eventual returns.

Earlier case law often explained “exploitation” as “multiple dependencies” on trafficker – such as dependence for shelter, food, and/or transport often combined with low or no payment. The extreme of this dependence being the total control of one person and his/her movements by another as found in District Court Brussel (52ste kamer, 20 December 2001), District Court Veurne (11de kamer, 13 September 2002) on domestic work and District Court Brussel (51ste kamer, 7 April 2004) in which one of three girls who were forced to sell handicraft objects and do domestic work came back to her exploiters after she had escaped because she was threatened that the others would be killed if she did not. Physical violence also constituted “dependence” on traffickers as in District Court Hasselt (18de kamer, 25 April 2003) where the victims were severely beaten and in District Court Liège (14ème chambre, 1 December 2003) subsequent Appeal at Court of Appeal Liège (28 April 2004) in which rape was considered severe violence.

Also less evident forms of “dependencies” such as deceit has been found to suffice. In one case a victim was made to believe that the trafficker knew a judge who could legalise her papers District Court Liège (11ème chambre bis, 18 January 2002), something which was false, also a case of debt bondage whilst being under threat of declaration to authorities consisted grounds for conviction in

District Court Liège (*11ème chambre bis*, 18 January 2002) and the confiscation of passports reached the threshold required for exploitation District Court Namen (*13de kamer*, 19 December 2002).

Living circumstances have also always been evidence for exploitation. In cases where accommodation was provided as in District Court Gent (*20ste kamer*, 20 December 2000) and where the conditions were inhumane or extremely unhygienic District Court Nivelles (*6ème chambre*, 14 June 2001), District Court Liège (*chambre 11 bis*, 26 January 2001), District Court Luik (*11de kamer bis*, 28 June 2002), District Court Hasselt (*18de kamer*, 28 June 2002).

“Multiple” dependency has however not always been required: terrible working circumstances in combination with low payment has rightly been sufficient to establish exploitation District Court Bruxelles (*44ème chambre*, 27 June 2003). Belgian case law indicates two more types of forced labour: “compelled committing of crimes” and “forced begging”, one case concerned the forced selling of drugs District Court Namur (*16ème chambre*, 16 December 2002) another involved a pregnant woman who was forced to beg, after having worked involuntarily as domestic worker and in a forced marriage District Court Charleroi (*8ste kamer*, 21 January 2004).

In *Public Ministry v. Wang Li Kang, Wang Qi et al.* at the Court of Appeal of Liège, Decision No. 2007/245 (24 January 2007) a Chinese couple bought a property that they intended to open as a restaurant. They relied on two other individuals, both surnamed Wang, who recruited two irregular Chinese migrants to do the work. At the time these men were hired, the restaurant building was still an open and unfinished construction site. The men lived at the construction site with nothing but a mattress on which to sleep. They ate off the ground and had no bathroom or hot water. They worked 12 to 13 hours per day every day, including weekends. They were paid irregularly and the amount of pay was disputed. The Court found that all the elements of trafficking were present in this case. The workers were accommodated in extremely undignified and unsanitary living conditions. They were subjected to physical and moral mistreatment. One worker was furthermore hit several times. In addition the workers had no identity papers and were under pressure never to leave the building.

In *Public Ministry v. Cengiz Yönel and Abdellah Bouassam*, Penal Court of Verviers, Decision No. 69.98.954/06 (15 January 2007) the abuse of a condition of vulnerability was considered an aggravated circumstance; For a two-month period, Ormanci Mehmet, an irregular migrant from Turkey, worked for Cengiz Yönel and Abdellah Bouassam in their bakery. His work consisted of emptying bags of flour and cleaning and sweeping the bakery. On the 24 January 2006, an inspector from social services discovered that Ormanci was working without authorization and that he was not being paid, receiving only unsold food as a form of remuneration. The defendants were charged with violating the Law of 10 August 2005 by “recruiting, transporting, transferring, accommodating or receiving Ormanci Mehmet in order to put him to work or permit him to be put to work in conditions contrary to human dignity”. Specifically, they recruited him to work in unsanitary conditions and at a wage that was below the guaranteed minimum wage. In fact, payment consisted exclusively of old fruit and vegetables. They committed this violation with the aggravated circumstance of abusing Ormanci’s vulnerability, which was due to his irregular status and precarious social situation. The defendants admitted that they had recruited Ormanci to help bake bread, first under the supervision of Yönel and later under the supervision of Bouassam. The Court recognized that under the Law of 10 August 2005, employment in conditions contrary to human dignity could be established regardless of the consent of the worker. Ormanci stated that he worked 3 or 4 times per week, from 5 a.m. until noon or 1 p.m. He received as payment unsold food. Although Bouassam maintained that he had paid Ormanci 30 euros, the Court noted that there was no evidence of this and that such an amount was manifestly insufficient for the work performed. The Court found that these elements “incontestably” established economic exploitation and that Ormanci was, furthermore, in a vulnerable situation. His demand for asylum had been refused, he had no longer the right to any social aid, and he had a wife and three children, one of whom was sick. “It is evident that this situation made him particularly docile to his employers.” The Court also emphasized that one of the defendants, Bouassam, had admitted to the social service inspectors that he did not think Ormanci would work for Yönel anymore

if he had the choice. The Court found that a violation of the law of 10 August 2005 had been established with regard to both defendants.

A list of indicators, developed by a trafficking working group, was attached to Ministerial Directive COL 20/06, which came into effect in January 2007. These indicators clearly reflect what established case law has concluded on what circumstances are to be considered when deciding upon what constitutes exploitation. It was intended as a non-exhaustive list to allow investigators and prosecutors to conclude that a trafficking investigation should be opened. The indicators are grouped into topics related to movement, identity and travel documents, working conditions, housing, physical integrity, freedom to circulate and country of origin. The following is an excerpt from the list related to working conditions/exploitative situations:

- working in very poor conditions or for long periods of time
- lack of social protection and benefits
- confiscation of identity papers by the employer
- threats, intimidation, insults and violence towards workers
- lack of sanitation facilities, heating or electricity in workplace
- living and working in the same place
- living in overcrowded and unhygienic places
- lack of a place to eat meals
- no salary, or very low salary
- deductions for equipment, work clothing, food and housing
- unpaid overtime
- debts to employer

As can be seen these criteria are rather objective points on which to pin “conditions incompatible with human dignity” one or, more probable, more of which may be present in each case of probable/alleged trafficking/exploitation. The added “dependency” on the exploiter is important since it may well in certain cases clinch the trafficking case as opposed to remaining within the framework “only” on exploitation.

Dutch case law

In January 2005, the previous trafficking provision of the Dutch Criminal Code was replaced by a new and extended Article 273a. Its purpose was to implement obligations under the UN Trafficking Protocol and the EU Framework Decision. The “means” portion of the new act is similar to the Trafficking Protocol and “exploitation” is defined as comprising “at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery-like practices or servitude”. According to the Dutch National Rapporteur, Article 273f does not cover “all wrongs” in an employment relationship. Insofar as there is no excessive abuse, the matter will have to be dealt with by means other than the trafficking provision. When assessing whether or not there has been excessive abuse, the determining factors are the circumstances in which the victim finds himself or herself, and under which he or she is put to work. The nature of the forced work is also relevant. In the light of international legislation, it is important whether the fundamental human rights of the victim have been violated (or are under threat of violation) by the conduct in question. If that is the case, then there is excessive abuse that can be classified as exploitation within the meaning of trafficking in human beings.¹⁴⁸

¹⁴⁸ Trafficking in Human Beings: Fifth Report of the Dutch National Rapporteur (2007) at 12.

The exact meaning of exploitation is still being debated by the courts, but it appears that the standard for exploitation is more exacting than either France or Belgium. Exploitation in Dutch case law appears to require serious abuses constituting violations of fundamental human rights. Thus in the case of Bulgarians who worked as hemp cutters, the District Court found no exploitation despite finding that the Bulgarians were treated poorly, were paid far below minimum wage and were performing illegal work (see below).

In case law in the Netherlands, the cases concerned work under very poor conditions in a restaurant, the production of hemp, a tofu factory, cleaning and domestic work, and an imported bride. The workers involved were men and women and in one case children from Bulgaria, China, Poland, India, Morocco and the Netherlands. Some of them resided in the Netherlands irregularly; others were employed illegally, while some Dutch victims had mental or psychological problems. It is interesting to notice that the courts consider an undocumented worker to be in a position of vulnerability. The case law clearly confirms that trafficking concerns excessive abuse in employment situations and that this is a core concern and criteria. However, what prosecutors and judges most seem to grapple with is exactly how excessive the facts and circumstances need to be in order to qualify them as a trafficking case. In relation to the trafficking question, some courts considered it relevant whether or not the initiative to enter into an employment relationship has come from the accused. A court at first instance and later confirmed by the Court of Appeal, in one case had determined that the victims had asked, even begged for work. The court confirmed that the defendant had taken advantage of the vulnerable position of the victims, but even so the fact that it was not the defendant who had taken the initiative to employ the alleged victim proved to be the decisive factor. The court also stated that there was no evidence that the workers did not have a choice as to whether to leave or not which may also have had a bearing on the outcome. Considering their irregular status a different opinion could however also be feasible. Cases that have led to convictions in the first instance mainly concerned exploitation by private persons in the private home and the use of violence. In one case, the victims were undocumented, live-in migrant domestic workers who were highly dependent on their employers.

In District Court-Gravenhage, *LJN AZ2707* the Court predictably set the requirements for a conviction of a trafficking case to (1) coercion and (2) exploitation.

The first condition on “coercion” was not retained to be met mainly because the two applicants came to the agreed place for transport on an “apparently voluntary” basis. The second criteria required more than “indecent treatment”, which was found in itself to be present because transport to and from work was dangerous, setting a rather low threshold for such treatment. “Exploitation” further required (a) serious abuses in work and/or living conditions constituting violations of fundamental human rights, and (b) dependency on the traffickers for more than work. Again it is clear that dependency and working conditions are considered together and that in most cases working conditions in themselves will not be enough to convict for trafficking, even if they may constitute basis for a conviction based on national labour law.

The case reads as if the fact that the applicants had to work for wages approximately 25% under the minimum wage, had to work contrary to labour laws doing the evening and night including doing illegal work, while seated on crates and in the stench of hemp plants, not knowing where they were, not allowed to communicate with others, without possibilities to leave the place of employment once arrived there, did not constitute exploitation. This may however be because the Court wanted to emphasise the “dependence” element in trafficking cases and not because it wanted to dismiss these working conditions as exploitative.

In another case, the Court required that the traffickers (1) took the initiative to start the exploitation and (2) were to blame for activities connected with the exploitation, and, at least implicitly, (3) there had to be what was determined “multiple dependencies” on the alleged traffickers much as in Belgian case law (District Court’s-Hertogenbosch, *LJN BA0145* and *BA0141*). Even though the Court in this case held that the Chinese restaurant owners abused the Chinese workers’ vulnerable position, it found

it crucial that the victims approached the accused themselves. The court mentioned that the workers had to work long hours, 11 to 13 per day, with five free days a month. It concluded that some slept and worked not for payment, but for residence and food. It, however, found it determining that the Chinese workers “voluntarily” came to the Netherlands and approached the restaurant themselves; some requested work in return for food and residence. Implicitly, the court required “multiple dependencies” whereas it argued that the victims had no debts or other obligations; they were free to spend the money they earned (when they earned anything) as they liked and could leave if they wanted.

The requirements in these two cases, especially the case on initiative and activities, but also perhaps the restrictive interpretation of exploitation as violations of fundamental human rights, seems rather limitative and probably overly lenient towards defendants. Moreover, compared with Belgian case law and legislation, the Dutch court appears not to weigh the criminal nature of the work in the cases (Supreme Court, LJN AX9215), this may, in the cases of sexual exploitation, be connected to Dutch legalised prostitution policy that provided another interpretation on case law for such exploitation. In essence, the latter appears defined, to distinguish it from legal prostitution either “negatively” in the sense that the victim does not wholly control his or her choices - leaving some degree of freedom of choice, absolute lack of control is not required (Supreme Court, LJN AX9215), or “positively”, in the sense that a situation of dependence stemming from dominance from the accused over the victim leaves the latter little choice. Both situations are those in which a “normal outspoken prostitute” would not end up. The victim does not have to be exploited; intention to exploit suffices to convict (Advocate-General’s statement for the Supreme Court’s verdict LJN AX9215) as would be expected from a criminal law perspective.

Cross-border movement is not a requirement in Dutch cases. It may also not be a requirement in other national case law where such cases have yet to be decided. It is certainly not required in cases with national victims. Such cases are deemed “lover-boy” cases in which young men usually seduce Dutch women and force them into prostitution. Movement thus might also constitute transportation within the country. This is in line with UNODC’s approach and also on what can be deducted if looking carefully at the Palermo Protocol. There is a discussion as to whether the Protocol is applicable to internal trafficking since it does not – contrary to the Smuggling Protocol – mention borders in its definition. During the drafting stage of the Protocol, a discussion arose as to whether or not trafficking should be confined to international movements. All drafts of the Protocol refer to “international trafficking”(UN DOC A/AC.254/Add.3/Rev.1 through 7). Many delegates felt the necessity for this inclusion in order to make the Protocol compatible with the TOC(UN DOC A/AC.254/4/Add.3/Rev.5). Nevertheless the view was increasingly taken that inclusion of the term “international” limited the scope of the instrument and that it failed to protect all persons who were victims of trafficking(UN DOC A/AC.254/4/Add.3/Rev.5). This view prevailed.¹⁴⁹

¹⁴⁹ It has however to be taken into consideration that the Protocol is a protocol to the Convention on *International Organised Crime* and therefore cannot be seen outside the scope of this Convention. But the Convention and the Protocol must be interpreted together. In interpreting the various instruments, all relevant texts should be considered and provisions using similar or parallel language should be given generally similar meaning. In interpreting a Protocol, the purpose of that Protocol must also be considered, which may modify meanings applied to the Convention in some cases. Article 4 of the Protocol mentions the “transnational” aspect of the crime and seems to create confusion when considering that “international” was taken out of the drafts.

If the former approach is taken, however, and internal trafficking is included, the category of exploited workers considered the definition not only of “exploited workers” but of “trafficked person” may be extended to people who are actually not trafficked, and with the confusion already existing around the definition this seems undesirable. If the latter, narrower definition is applied it may risk being under-inclusive and risk taking away focus from the exploitation which is non-international, this approach has also been criticised for ultimately focusing only on border security, and even for trying to promote the legalisation of prostitution (from those who see trafficking only as a sexual exploitation problem). Both approaches have pros and cons – it is true that the Protocol does not mention international borders, and that its “twin” the Smuggling Protocol does – it is also true that the Protocol cannot be taken out of context – the Convention. From a practical aspect both ways of looking at trafficking may be legitimate – the important thing is not to include exploitation which does not contain all the elements in the definition as trafficking and also to keep in mind that focusing

In cases of cross-border movement, recruitment in the source country has been defined broadly by the Dutch courts. Crucial is the *mens rea* of the trafficker to intend exploitation after recruitment and transport (Court of Appeal Arnhem, LJN AX3969, AX5818, AX5818, and AX3978), taking someone cross border by car or plane is sufficient for recruitment (District Court Alkmaar, LJN AZ7515), deceit may accompany this (promising work of one sort or another often as models or dancers) (District Court Zwolle, LJN AS2978). Where cross-border movement exists, some degree of agreement between the defendant and applicant does not mean that trafficking cannot exist; the rationale is that victims do not consent to exploitation, not even when they come on their own initiative. It is obviously important that such reasoning is not confined to cases of forced sexual exploitation but is applied in all cases of exploitation.

Trafficking and coercion was found in cases of non-national victims who were moved to the Netherlands, housed, and multiply sexually abused with gross perversities and excessive violence, (Court of Appeal Arnhem, LJN AX3969, AX5818, AX5818, and AX3978); in cases with forced use of drugs, confiscated passports, induced indebtedness, and in one case the victim was clearly actually sold (District Court Leeuwarden, LJN AZ5824). Trafficking was further found in a case where a victim was kept prisoner in a club and another threatened that her friend would be hurt if she did not obey her traffickers (Court of Appeal Amsterdam, LJN AT7235). Also induced indebtedness combined with strict confinement and guarding (District Court Alkmaar, LJN AZ7515) has been grounds of conviction. In one case a Dutch girl was accommodated by the defendant and given means of sustenance, but she was also prohibited to leave the house, prevented from contacting others, and not allowed to quit her employment. It was further considered proved that she was subject to violence and threats of violence (Court of Appeal Arnhem, LJN AZ7029). In Court of Appeal Arnhem, LJN AZ3374, six Dutch victims forced into sexual exploitation were subjected to violence, had forced abortions and were made to have tattoos with the names of the defendants on their bodies. Threats were made to relatives. One victim accrued imposed debts since the defendants drew money from an account in her name. Interestingly the court concluded that the tattoos were actually a “marking of ‘property’” which is a typical component of traditional slavery.¹⁵⁰

Abuse of vulnerability but not exploitation was found in *The Public Prosecution Service v. The Accused*, No. 07.976405-06, District Court of Zwolle (29 April 2008). Indian workers, resident in the country irregularly, were employed in a tofu factory. They had incurred substantial debts to finance the trip from India, they did not speak Dutch, nor did they have any identity documents. They worked long hours and were not paid for overtime. They had no health insurance, and taxes and social security contributions were not paid for them. They had found employment by offering their services as labourers at a Sikh temple in Amsterdam. The issue before the court was whether the defendants, brothers who owned the factory, had violated Article 273f of the Criminal Code. The Court considered the charge as comprising two elements: (1) the means used; and (2) the exploitation. It framed the first issue as whether the defendants had abused the vulnerability of the workers because it did not see any evidence of coercion or deception in the record before it. In order to find that the defendants had abused the workers’ vulnerability, the Court stated that the defendants had to act intentionally. *This presupposes a certain degree of initiative and activity by the perpetrator or perpetrators whereby they deliberately abuse the weaker or more vulnerable position of the victims.* The Court noted that the workers were vulnerable by reason of their irregular presence in the Netherlands. They did not speak Dutch and carried no identity papers. It found that the accused “took initiative and acted with determination by transporting, housing, taking in (in their living and work environment) the illegal migrants, abusing [their] vulnerable position... with the intended object to thus gain advantage by recruiting cheap labourers for their factory”.

(Contd.) _____

on international trans-border trafficking does not suggest that other forms of exploitation should not be addressed, nor that there are no international framework for doing so. UN agencies consider both internal and international trafficking.

¹⁵⁰ See also District Court Almelo, LJN AU8378 and AU8380 (eight victims), LJN AU8381 (one victim), LJN AU8396 (four victims).

The second issue regarding exploitation was considered more difficult. The Court relied on criteria set forth in the Fifth Report of the Dutch National Rapporteur on Trafficking in Human Beings. This listed potential indicators of trafficking and then stated: “A situation amounts to exploitation if one of these problems exists and the victim is not free to leave the situation, or reasonably thinks that he or she is not free to do so.”¹⁵¹ Citing this language with approval, the Court noted that the National Rapporteur had drawn on internationally accepted definitions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ILO Forced Labour Convention. The Court then held that the situation, although “socially undesirable”, did not amount to exploitation within the meaning of Article 273f. Specifically, the Court found that there was no evidence of “an excess to such an extent that it would constitute a violation of fundamental human rights and freedoms”. The Court also noted that: “[A]lthough the Indians had incurred debts that are related to their coming to the Netherlands, they did not owe these debts to the accused, so that there was no debt-labour relationship. Nor did the accused or his brothers have the Indians’ identity documents at their disposal. Therefore this case cannot be said to constitute an excessive labour relationship, multiple dependence relationship or lack of freedom to such an extent that the Indians did not have any other choice but to work in the company of the accused and his brothers.” The defendant was convicted of offences relating to the facilitation of illegal residence and the commission of a criminal act by a legal entity.

It is interesting to note how the abuse of vulnerability can be separated from the issue of whether there is a case of exploitation or not.

The “Sneep” case (BD6972, Almelo District Court, 08/963001-07) concerned six defendants, all of whom were individually found guilty of trafficking in women with respect to one or more women. The Court stated that the case file presented an image of defendants who were involved in trafficking in human beings in an *organised* context. There had been surveillance operations, transactions, and intercepted telephone calls during which working hours, sums of money and transport to and from the Wallen (red-light district of Amsterdam) and Zandpad (red-light district of Utrecht) were discussed, and there were also witness statements that spoke of a violent and intimidating group of men who had women working for them in prostitution. Only a very limited number of these women made an official report to the police concerning a specific suspect.

It appeared that the defendants misled the victims or that the defendants had authority over the victims because the latter had no papers or housing, or was fleeing from a violent pimp or had huge debts. In a number of incidents, the documents showed that violence was used against the women.

This case is particularly useful also to see what the Dutch Court considered and “organised group”.

According to Article 2 and 3 of the UNTOC which determines who can be prosecuted as an “transnational organised criminal group”: 2(a) Organised criminal group shall mean a structured group¹⁵² 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 [by] the Convention [or Trafficking Protocol], in order to obtain, directly or indirectly, a financial or other material benefit.

3.2 ... an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, directing or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

¹⁵¹ *Fifth Report of the Dutch National Rapporteur*, op cit., at 158.

¹⁵² In Europe, groups operating in the field of human trafficking are mainly loose networks rather than mafia-type, hierarchical organizations. They include different nationals operating in their area of competence and, while they specialize in human trafficking, they also operate in related crimes such as pimping, forgery of documents, smuggling of migrants and money-laundering. UNGIFT: Trafficking an overview. p 23

It is important to note that they do not cover trafficking by one or two persons. For example, “traffickers” of domestic workers are often a wife and husband who bring a worker from abroad and force her to work in a foreign country with little or no pay or freedom. They would not be covered by 2(a). Also not clearly covered is trafficking that is done entirely within a country by nationals of the country. From the perspective of the victims, the harm can be just as great no matter whether there are one or ten traffickers and whether the trafficking is cross-border or internal. So the punishments for the traffickers and the protections for the rights of trafficked persons should be the same regardless of whether the trafficking is internal or across borders and whether there are one or twenty traffickers.¹⁵³ It is however important to keep in mind, that for the victim it is less relevant whether the exploiter is prosecuted for the crime of trafficking or for labour exploitation may not be crucial as long as the crime is prosecuted/punished. It is very often overlooked that it is not always necessary to prove trafficking in order to effectively protect people in exploitative situations and effectively repress offenders. Most of the components of the trafficking crime is punishable without trafficking as a whole taking place. What may be problematic is if trafficking has not taken place and the victim therefore is not granted proper protection in form of e.g. an offer to remain in the country of origin but is repatriated without concern for his/her safety and well-being.¹⁵⁴

A structured group means 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, while serious crime is conducting an offence punishable by a maximum deprivation of liberty of at least for years or a more serious penalty.¹⁵⁵ The Travaux Préparatoires mention that “structured group” can be used in a broad way to include both the groups organised with a hierarchical or other kind of elaborate structure and this where the roles of its members are not formally defined. Moreover the “financial or other” benefit should also be interpreted broadly.¹⁵⁶

In the present Dutch “Sneep” case it was considered by the Court to have been shown in the case file that the defendants on trial had frequent contact with each other and with others on the telephone. Many of these conversations related to prostitution, in the light of the context and the subject of discussion. In this way, instructions to bodyguards were given, an eye was kept on prostitutes and arrangements were made for the transport of the prostitutes and rooms. This all took place in an organised context, during which the bodyguards offered protection to the women and kept an eye on the women belonging to the group, money for the bodyguards was collected, joint transport for the prostitutes arranged and care was taken that rented rooms were in continuous use by the prostitutes in the group. The statement of one woman indicates that a group existed: when she was shown names and photos, she said on her own initiative: “that person belongs to *our group*” and “that person is not one of *our group*”. In addition, there was a discussion in an intercepted telephone call between two defendants concerning a “community” that apparently could not be easily joined by a third person, who wanted to come to the Netherlands with a number of girls. There were also conversations between two defendants and a bodyguard in which mention is made of part of the costs that “we as company” must bear in a discussion of the purchase of bullet-proof vests. It was considered proven that this group could be linked to many violent incidents during which violence and intimidation were inflicted on prostitutes, customers and rival pimps. Among these assaults one was on a prostitute, during which she was hit by two of the defendants to make it clear to her boyfriend/pimp that she had been taken off him, and the subsequent intercepted telephone calls which indicate that she had been “allocated” to someone else as a “present”. In addition, there was an assault on another prostitute by a defendant, during which the violence was linked to the fact that the former wanted the woman to find

¹⁵³ Jordan, A.D.: Op.cit p 13

¹⁵⁴ See Touzenis, K.: Op.cit

¹⁵⁵ TOC Arts 2(b) and (c)

¹⁵⁶ UN DOC A/55/383/Add.1 para 4

a “second girl” for him. An intercepted telephone call showed that one defendant instructed a bodyguard to hit “his girl”.

These practices involving the conscious infliction of violence for the sake of market protection were illustrated in the report made by one woman in which she reported an assault on the brother of her boyfriend and on herself by a group of pimps, including one defendant, because she was working independently as a prostitute and the group wanted to prevent her from doing her work or wanted to make her work for them. This last fact is also an indication that the group violence was part of a larger scale operation which could be defined as trafficking in human beings.

Furthermore, from the statement of one woman an incident appeared in which a shot was fired from a firearm or firearms when two defendants took a firearm against men wishing to sell condoms and drugs to prostitutes. She stated that before this shooting incident, she had sometimes seen the group with weapons that were hidden by three named defendants. The statement made by the woman, and related statements made by her relations and the statement of a witness, indicated that the family of this prostitute was threatened with, among other things, a bomb attack in Poland (her country of origin), because it was required that the woman withdraw her report to the police with regard to trafficking in human beings.

These factors were all considered as indicators of the existence of an organised criminal group as opposed to a looser network of occasional collaborators and this was taken into account during sentencing.

With respect to the punishment to be imposed, the Court took into account the duration of the period in which the acts took place as a circumstance that would work in aggravation or mitigation of the punishment. The Court took a custodial sentence of 12 months as its point of departure for membership of the criminal organisation, and for those who occupied a leading position a custodial sentence of 24 months.

In the “*Case concerning Mehak*”, LJN: BC1761, *The Hague District Court*, 09/900094-06 (*Indictment I*); 09/900594-07 (*Indictment II*) a child named Mehak was mistreated and affectively neglected in the latter days of her short life. Mehak was beaten often, resulting in serious bodily harm and ultimately in her death. The Defendant mistreated Mehak and incited her co-suspects to use violence against Mehak. Although the Court did not deem that it had been proven that the Defendant intended the death of Mehak on 28 January 2006, it was of the opinion that the role of the Defendant was great in the preceding period of neglect and escalating violence. The Defendant was convinced that Mehak was “bewitched” and blamed Mehak for every possible thing which went wrong in day to day life. Mehak “needed to be beaten” to subdue the spirit in her. The Defendant induced the parents of Mehak, either entirely or partly, to neglect their small daughter and also to actively beat her, seemingly all on the grounds of her being possessed by the “evil spirit”. The Court remarked here that the documents showed that Mehak’s mother was also convinced of the fact that there was an evil spirit in Mehak and that Mehak’s father regarded this as at least a possibility. The Court held all this strongly against the Defendant, the more so because the co-accused, Mehak’s parents and a resident housekeeper, found themselves in a *dependent* position with regard to the Defendant. They worked for the Defendant and her husband and lived in their house. The Defendant was considered to have seriously abused this position.

The circumstances under which Mehak’s parents and the housekeeper worked for and resided with the Defendant and her husband was found by the Court to qualify as trafficking in human beings. This was based on the facts that the Defendant, with her husband, has taken cheap workers into her home, and brought these people into a situation of *total dependency in all aspects*. This could not be mitigated by the fact that they probably thought they were doing these people a favour by allowing them to work for them in the Netherlands. Human trafficking outside the context of sexual exploitation has been a criminal offence in the Netherlands since 1 January 2005 pursuant to Article 273a (old), since then renumbered as Article 273f of the Criminal Code [*Wetboek van Strafrecht*]. According to

the second paragraph of this Article, exploitation comprises at least forced or compulsory labour or services, slavery or practices comparable with slavery or servitude. Insofar as particular terms are relevant in the current case, the Court has based its interpretation of those terms on the Explanatory Memorandum to the legislative proposal, on established case law insofar as it relates to the definition of the terms, on more recent judgements and references in literature, including the two reports from the Dutch National Rapporteur on Trafficking in Human Beings.

On that basis, the Court's underlying hypothesis is that a

presumption of exploitation in an employment situation must be supported by circumstances which can be objectively described as excessive, i.e. a situation which is unacceptable in terms of the standards and norms prevailing in Dutch society and in the national legal system. The violation of fundamental human rights - physical and mental integrity and personal freedom - is the benchmark to be applied. In assessing whether this is the case, the Court must consider the severity, duration and extent of the means of exerting pressure and the economic benefit to be derived from the situation. If any of the specified means of exerting pressure is used, whether or not the victim agreed to the situation becomes irrelevant. The subjective perception of the victim can, however, be relevant in answering the question of whether the victim could have removed him or herself from the sphere of influence of the Defendant.

Those employees who are not allowed to leave the house – i.e. those whose right to freedom of movement is violated - are not necessarily classified as caught up in involuntary servitude. Just as it is difficult to prove in some circumstances that the giving up of a passport to the employer is not voluntary, so it is also unclear to what extent the restriction of migrant domestic workers inside the household (even being locked in) is involuntary. It may be objectively against her interests, but there are cases where it is not seen as a problem by the worker, as long as they are treated decently otherwise. And even then, they may well prefer to endure the hardship for the money and future prospects. On the other hand, the essence of trafficking in human beings is that the victim is removed from their home environment, under the effective control of another, and exploited for the “gain of others”. However, control is mainly maintained because of “some illegal activity of the victim such as breaking immigration laws, or local employment laws, that make them vulnerable to exploitation.”¹⁵⁷ Now the question is if such cases constitute trafficking according to the Palermo Protocol and if this can provide an adequate answer to such cases. As has been examined above a major flaw in the Protocol is its silence on protection of victims who have themselves broken national laws in the course of the trafficking, which is part of why they are vulnerable. This does however not mean that the Protocol does not recognise such cases as cases of trafficking when the components of trafficking are present. And again it should not be forgotten that also non-slavery like situations can very well amount to exploitation in the sense of the definition. It should also be underlined that exploitation which does not amount to trafficking because e.g. the criminal organisation is absent – e.g. when a family is exploiting a domestic worker, can still be prosecuted according to national laws, and many human rights obligations would apply also to non-nationals which the State also has an obligation to protect so a number of international obligations would offer protection to such victims. It is always important to remember that the Palermo Protocol does not exist in a void – it is part of an international legal framework which consists of many instruments and many legal “systems” – criminal law, transnational, national, international; labour law, national and international; human rights law.

In examining the facts against the legislative framework, the Court has taken the following facts and circumstances into account:

- the agreed remuneration (at the most favourable rate of exchange) of EUR 47.50 per month each for Mehak's father and mother and EUR 23.75 to EUR 50 for the housekeeper, is very

¹⁵⁷ Jureidini, R.: “Trafficking and Contract Migrant Workers in the Middle East” and Piotrowicz, R.: Trafficking of Human Beings and their Human Rights in the Migration Context

low by Dutch standards, even if it were to be paid in full; this situation is not altered by the fact that they were given free board and lodging;

- the very long (and in the case of the housekeeper, extremely long) working days;
- the fact that payment was not made directly to Mehak's mother, father and the housekeeper, or not in full, so that they did not have their own financial resources and were thus utterly dependent on the married couple with whom they resided;
- the fact that the passports were kept together in an attaché case that could not be opened except by instruction or with permission;
- the fact that they were in the same environment day and night, whereby the housekeeper and Mehak's father had little contact and Mehak's mother had no contact at all with the outside world;
- the utter lack of any private life in that environment;
- the physical violence

Taking all these facts and circumstances, considered in their interrelationships, the Court felt that there was here an excessive situation, one in which the physical and mental integrity and the personal freedom of the three alleged victims were violated to an inordinate degree. The work that they had to carry out under these circumstances therefore became forced labour, since they did not have the means or the opportunity to remove themselves from the sphere of influence of the couple they were lodged with (the Defendant and her husband). It is clear that they came to the Netherlands voluntarily so that they could work, and in the case of Mehak's father and the housekeeper at least it must be assumed that they did not wish to return to India. Clearly, a certain “dualism” could be discerned in the situation. At the beginning of the investigation, it was clear from statements made by the housekeeper and Mehak's mother that there was gratitude and loyalty towards the married couple with whom they stayed, undoubtedly because these latter had made it possible for the former to fulfil their wishes to leave India. This does not, however, alter the fact that they found it impossible to actually remove themselves from the situation once they had arrived in the Netherlands. Even if they had considered leaving, they were completely dependent on the married couple to supply them with financial resources and practical assistance, while at the same time they were obliged to the couple for the journey out. The housekeeper's passport had even expired, so it is unclear how she could have returned to India without it being discovered that she had spent such a long time in the Netherlands as an irregular resident. In the Court's view, this was a hopeless and degrading situation which could be qualified as servitude as defined in Article 273a (2) (old) of the Criminal Code. Evidence of exploitation can be found in the extremely low remuneration in conjunction with the long working days and other circumstances.

Judging the abuse and subsequent death of Mehak, in favour of the Defendants, the Court took into consideration the fact that everything took place in an Indian setting, so that the housekeeper and Mehak's parents did not experience the degree of involuntariness that was certainly present according to Dutch standards. This may well be a somewhat dangerous relativistic approach, but if considered with care it is a judgement which can and should be made on a case by case basis. Against them, the Court takes into account the fact that the existing exploitative situation must be regarded as partly contributing to the creation of a feeding ground for the eventual acts of violence against Mehak, in particular those of Mehak's mother, who wanted to leave but had no opportunity of actually doing so, partly because of the lack of cooperation from Mehak's father and her family and her totally dependent position. A custodial sentence of 3 years and 9 months with deduction of time spent in pre-trial detention was given.

The similarities between the criteria on which cases are judged is encouraging and shows the penetration and actual implementation of international standards in national practices. It is also interesting to note how the Courts look again at objective factors such as work hours and conditions as well as the dependence and actual (and perceived) vulnerability of the potential victims – did they

actual feel that they could get out of the situation in which they had ended up? If not this is taken into account when the total of the circumstances are considered in either finding or not finding a case of trafficking. The case in which Dutch authorities considered the existence of an organized criminal group may be of special interest for other national systems who will have to deal with such cases and sooner or later determine what criteria and circumstances to look at in order to determine whether such a group exists or not.

UK case law

On 10 February 2003 a new set of offences of “traffic in prostitution” came into force in the UK, under section 145 of the *Nationality, Immigration and Asylum Act 2002*. These offences were essentially a stop-gap measure and were soon replaced by broader offences of “trafficking for sexual exploitation” created by sections 57-60 of the *Sexual Offences Act 2003* which came into force on 1 May 2004. The wording of the replacement offences was similar to that in the 2002 Act; they cover trafficking into, within or out of the UK for the purpose of committing sexual offences and attract a maximum sentence of 14 years’ imprisonment. This Act also defines offences involving the use of children in the sex industry (sections 47-50). These offences are paying for sexual services of a child, causing or inciting child prostitution or pornography, controlling a child prostitute or a child involved in pornography and arranging or facilitating child prostitution or pornography. Neither the 2002 Act nor the 2003 Act included any offences of trafficking for forms of exploitation other than sexual exploitation.

Section 4 of the *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* introduced a new offence of “trafficking people for exploitation”, i.e. forms of exploitation other than sexual exploitation, including forced labour, slavery and organ removal in violation of the *Human Organ Transplants Act*, 1989. It was couched in similar terms to the sexual trafficking offences, and covers trafficking to, within or out of the UK. Like the other trafficking offences it attracts a maximum penalty (on conviction on indictment) of 14 years’ imprisonment and/or a fine. Section 4 of the 2004 Act now contains the following definition of exploitation: “For the purposes of this section a person is exploited if (and only if)- (a) he is the victim of behaviour that contravenes Article 4 of the *Human Rights Convention*¹⁵¹ (slavery and forced labour), (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the *Human Organ Transplants Act* 1989 (c. 31) or the *Human Organ Transplants (Northern Ireland) Order* 1989 (S.I. 1989/2408 (N.I. 21)), (c) he is subjected to force, threats or deception designed to induce him. The UK anti-trafficking legislation is thus not contained in a single Act and the offences concerning human trafficking and other relevant offences are to be found in numerous different laws.

The issue is further complicated by the fact that, the UK has devolved certain executive and legislative responsibilities to Scotland¹⁵⁸ (*Scotland Act* 1998), Northern Ireland (*Northern Ireland Act*

¹⁵⁸ In Scotland, section 22 of the *Criminal Justice (Scotland) Act* 2003 introduced the specific offence of trafficking a person for the purpose of prostitution with a maximum penalty on conviction on indictment of 14 years’ imprisonment. Following a motion debated by the Scottish Government on 12 February 2004, the offence of trafficking people for other purposes (Section 4 and 5 of the *Asylum and Immigration (Treatment of Claimants) Act* 2004) applies in Scotland as well as other parts of the UK. It came into force on 1 December 2004. This legislation was amended by section 35 of the *Criminal Justice and Licensing (Scotland) Bill* in March 2009, extending the scope of current offence provisions so that they refer to facilitating the “entry into” as well as the “arrival in” the UK. Scotland has adopted several pieces of legislation relating to prostitution which are different to those in force in other parts of the UK. The *Prostitution (Public Places) (Scotland) Act* 2007 made it an offence to solicit, in a public place, the services of “a person engaged in prostitution”. By the end of March 2008 a total of 18 people were reported to have been convicted under this Act, significantly fewer convictions than under other, pre-existing legislation punishing soliciting. Section 4 of the *Sexual Offences (Scotland) Act* 2009 contains a new offence of “sexual coercion”, specifying that is unlawful to cause another person to participate in sexual activity if that person has not consented and without any reasonable belief that the person was consenting. The implication is that traffickers could be prosecuted with this offence; section 13 of the same law specifies “circumstances in which conduct takes place without free agreement”, including the use or threat of violence or

1998) and Wales (*Government of Wales Act 2006*, replacing the *Government of Wales Act 1998*). The remits of the three vary, with only Scotland having devolved responsibility for justice and policing by the end of 2009, while all three have devolved responsibility for social services. The result is that laws and procedures vary between England, Scotland, Wales and Northern Ireland. On the issue of human trafficking, all legislation adopted in the UK's Parliament is in force in Wales as well as England. As of the beginning of 2010, the same provisions were also in force in Northern Ireland, although sometimes contained in different Acts. (i) to provide services of any kind, (ii) to provide another person with benefits of any kind, or (iii) to enable another person to acquire benefits of any kind, or (d) a person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose that— (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and (ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.” The final provision (d) of Section 4 was amended in 2009, after concern was expressed that the original wording implied that children could give consent to being subjected to one of the forms of exploitation associated with human trafficking. The explanatory note attached to section 54 says that the revised wording “expands the definition of exploitation in the offence of trafficking...to cover use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship”. The amendment followed a prosecution in 2008 for someone accused of trafficking a child in order to acquire benefits in the form of fraudulent social security payments (known as benefit fraud in the UK).

In October 2009 the Home Office and Scottish Government reported that, since the adoption in 2003 of the first new laws against human trafficking, there had been 113 convictions for trafficking for sexual exploitation, seven for trafficking for forced labour and three for conspiracy to engage in trafficking. None of these convictions were secured in Scotland and the one trafficking conviction in Northern Ireland was subsequently overturned. Up to April 2010, there were reported to have been nine convictions under the *Gangmasters (Licensing) Act 2004* (six in England and three in Scotland).¹⁵⁹ The government reported it convicted 31 trafficking offenders for sexual exploitation under its Sexual Offences Act and convicted two offenders for forced labour under its Asylum and Immigration Act in 2009, an increase over the 23 convictions achieved in 2008. The average length of imposed sentences on the 31 convicted offenders was 4.4 years. The UK reported convicted traffickers serve longer terms as a result of additional convictions for other related offenses.¹⁶⁰ UK case law is particularly appealing because of the highly personal touches given by the judges in their reasonings and summing ups.

In *R v O (2008) EWCA Crim 2835* (which was an unopposed appeal from the 17th of March 2008 at the Canterbury Crown Court before Her Honour Judge Adele Williams, this appellant pleaded guilty to an offence of possessing a false identity card with the intention of using it as her own and was sentenced to 8 months' imprisonment less 16 days spent on remand) the appellant was a young person sentenced to imprisonment. She was arrested trying to leave the UK. She was using false identity documents that inflated her age. The second ground for appeal¹⁶¹ invoked the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series 197/1975). As mentioned above in the section regarding this Convention, a prime purpose of it is to protect the human rights of the victims of trafficking. Article 10 requires the States Parties to identify and protect victims of trafficking. It is clear that the particular focus of the Convention is the protection of trafficked children: Article 10(3) provides that where the age of a victim is uncertain, and

(Contd.) _____

the unlawful detention of the person concerned. Once again, it is too early for charges to have been brought under this law, which is not scheduled to come into force until October 2010.

¹⁵⁹ Gangmasters Licensing Authority, *Wisbech Gangmaster Convicted* (press release), 28 April 2010.

¹⁶⁰ US Department of State: *Trafficking in Persons Report 2010*

¹⁶¹ The first ground of appeal was the want of an interpreter

there are reasons to believe that he or she is a child (that is a person defined as someone under 18 (Article 4D)) then he or she is to be presumed to be a child. The United Kingdom at the point in time of the case was a signatory to this Convention but had not ratified it. As such the United Kingdom was accordingly obliged by Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of the Trafficking Convention. In fact it was submitted that the United Kingdom had taken some measures expressly to support that purpose. There is not only the creation of criminal offences of trafficking (pursuant to sections 57 and 58 of the Sexual Offences Act 2003), but also the terms of two protocols: (i) on prosecution of defendants charged with immigration offences who might be trafficked to victims; and (ii) on prosecution of young offenders charged with offences who might be trafficked victims. These two protocols form part of the UK Code for Prosecution.

Under the first protocol, where a “credible” trafficked victim is prosecuted for an immigration offence, which includes possession of a false identity document, prosecutors are required to consider whether the public interest is best served in continuing the prosecution. The prosecution should set in hand appropriate enquiries into the question whether the person has in fact been trafficked and review the case. In the case of young defendants the Code says this: “Where there is clear evidence that the youth has a credible defence of duress, the case should be discontinued on evidential grounds. Where the information concerning coercion is less certain, further details should be sought from the police and youth offender teams, so that the public interest in continuing a prosecution can be considered carefully. 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 child care 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.”

The third ground of appeal was that the appellant may well have been entitled to rely on the defence of duress, on the footing that victims of trafficking are known to be at risk of physical violence if they seek to escape or obtain official help. This possibility should have been investigated, since it is a real and not a fanciful possibility the conviction must be regarded as unsafe. Grounds 5 and 6¹⁶² for appeal were to the effect that the appellant’s lawyers took no proper steps to appreciate her possible position as a victim of trafficking and a child or young person. Indeed they did not. On 17th March 2008 they determined to proceed without regard to any input from The Poppy Project.¹⁶³ They failed entirely to consider whether she might have been a victim of trafficking, or what might have been the consequences of her age, if it was 16 or even 17 as stated. A note from trial counsel showed that he was unaware of the protocols referred to above; so it seems was his instructing solicitor and, if the prosecutor or his instructing solicitor from the Crown Prosecution Service was aware of them, they took no steps to act on them once reference had been made to the possibility that this appellant had been put to prostitution.

¹⁶² The fourth ground of appeal concerned the appellant’s age. It was submitted to the Crown Court that she was 17. Given the date of birth she had supplied (10th December 1991), she might have been no more than 16. Aged 17 or under, she should have been proceeded against, if at all, in the Youth Court. The case should not have been sent to the Crown Court. The court was obliged to enquire into the appellant’s age (see section 99(1) of the Magistrates’ Courts Act 1980). Where such enquiry has been made and the court makes a finding: “The order of judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the true age of the person so brought before it, shall, for the purposes of this Act, be deemed to be the true age of that person.”

¹⁶³ This is part of an organisation known as Eves Housing for Women. It was set up in 2003 and is funded by the Ministry of Justice. It supports vulnerable women who have been trafficked into England and forced into prostitution. The social worker suggested seeking an adjournment of the proceedings so that a member of The Poppy Project’s outreach team could visit the prison and make an assessment of the appellant.

As indicated above the Crown did not oppose the appeal. There was in this case material before the defence which should plainly have raised at least the apprehension that this appellant had been trafficked to the United Kingdom for the purposes of prostitution. The defence had information from her suggesting that she was at most 17, as counsel indeed submitted to the court, and perhaps only 16. From the custody record the Crown should have appreciated that she might have been a very young person. No steps were taken by the defence to investigate the history. No consideration was given by the defence as to whether she might have a defence of duress. The possibility that she might have been trafficked was ignored. There is nothing in the transcript to suggest that any thought had been given to the State's possible duty to protect her as a young victim. Nobody considered that if she was 17 or less, she should not have been in the Crown Court at all. Counsel for the defence thought it right to refer to "an inevitable prison sentence". The judge passed what she described as an "inevitable prison sentence" of 8 months. If the appellant was 17 or less, a sentence of imprisonment as such was unlawful. "For good measure" the judge sentenced her without a report.

The Court of Appeal stated that the appeal against conviction must "obviously be allowed".

"We would put it most simply on the footing that the common law and Article 6 of the European Convention on Human Rights alike require far higher standards of procedural protection than were given here. There was no fair trial. We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client."

More over where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required. This was the first appeal by a trafficked person who had been prosecuted and convicted of an offence under the Identity Card Act. It unfortunately highlighted general ignorance in the criminal justice system about how such victims should be treated.

In *UK. R. v. Shaban Maka [2005] EWCA Crim 3365 Court of Appeals CA (Crim Div)* the appellant was convicted of trafficking into the United Kingdom for sexual exploitation, contrary to the Sexual Offences Act 2003, s.57(1), trafficking within the United Kingdom for sexual exploitation, contrary to the Sexual Offences Act 2003, s.58(1) and pleaded guilty to two counts of trafficking within the United Kingdom. A 15-year-old girl who was a Lithuanian national was tricked into coming to the United Kingdom by the promise of a well-paid job. She was met by the appellant when she arrived and her passport was taken away from her; she was then taken to a house where she spent the night. The following day, the girl was sold to another man for £4,000. This man raped the girl and then forced her to work as a prostitute in a brothel for several days. She escaped and contacted the appellant. The appellant picked her up and together with the other man sold her to a third man who put her to work in a brothel. She escaped from the second brothel and contacted the appellant again. The appellant met her and sold her to a third man. She was subsequently sold to a fourth man. She ran away from him and was subsequently sold to a fifth man who raped her and forced her to work in a brothel for about a week. The victim again returned to the appellant and was sold again to a sixth man who raped her several times and told her she would have to work in a brothel. The girl then managed to escape and went to the police. The appellant was sentenced to a total of 18 years' imprisonment and recommended for deportation. The sentencing judge stated that human trafficking was an international problem which produced untold misery throughout the world. The conduct had echoes of "slavery" with the victim being sold from one procurer to another. The sentencing judge had regard to the principle of totality. He took account of the appellant's previous good character and observed that the girl, having set off full of hope because she was "naive and vulnerable," finished up "disorientated, assaulted, threatened, friendless, controlled, and frequently having to engage in sexual intercourse when she did not want to in an alien environment". The appellant was totally indifferent to her suffering. He knew how old she was and he had arranged to sell her into prostitution. He was responsible for trafficking her up and down the country against her will for profit. A small discount would be given for the pleas of guilty on the counts to which the appellant

pleaded guilty. It was submitted for the appellant that the judge's starting point was too high and failed to reflect the fact that there was a single victim and the offences took place over a period of two months. The Court had been referred to case of *R. v Plakici* [2005] 1 Cr.App.R.(S.)19,83 (below) in which a sentence of 10 years imposed in the Crown Court was increased to 23 years in relation to a variety of offences, some of them similar to the present trafficking offences. It was to be noted that the maximum penalty prescribed for trafficking was 14 years' imprisonment while the maximum sentences available for the offences in that case, apart from rape and kidnapping, was 10 years. In that case there were a considerable number of women involved, the sums of money were greater than those in the present case and the offender's activity in that case was over a longer period. The intention of the legislature in introducing the offence of trafficking for sexual exploitation by the Sexual Offences Act 2003 was plainly to embrace a wide variety of different forms of conduct identifiable as trafficking for sexual exploitation. The Court derived some assistance from the level of sentence imposed in case of *R. v Plakici* subject to the differences to which attention had been drawn. It would have been open to the judge in the present case to structure the sentences in a variety of different ways. Accepting, as the Court did, that a sentence of nine years in relation to count one of trafficking into the United Kingdom was if viewed in isolation, excessive, the crucial question which the Court had to address was whether the total sentence passed, following a trial in relation to three of the counts and pleas of guilty in relation to two of them, was an appropriate reflection of the gravity of this appalling repeated conduct in relation to an unwilling girl of 15. In the Court's judgment the total sentence which the judge passed was "severe but appropriately so" because deterrence of those who were minded to take part in activities of this kind was a highly material consideration. The Court was unpersuaded that the sentences of 18 years could be categorised as manifestly excessive or wrong in principle. The appeal was dismissed. The fact that the return of the victim to the appellant on various occasions did not outweigh her vulnerability and actually rather seems to have confirmed her dependence is very interesting.

In a third appeal case; *UK R. v Agron Demarku* [2006] EWCA Crim 2049 [2007] 1 Cr. App. R. (S.) 83 the appellant was convicted of six counts of trafficking in women for sexual exploitation. A 16-year-old Lithuanian girl was tricked into travelling to London where she was met by two men and driven to Sheffield where she was told she was going to work as a prostitute. She was later driven back to London where she was told she would be sold and would have to work as a prostitute. She was employed at a brothel run by the appellant and others working for seven days a week. When her family contacted the police, the police visited the premises where she was and found a number of women. Observation was kept on six other brothels operated by the appellant and his co-accused. Sentenced to a total of 18 years' imprisonment. The Court considered that the offences were

exceptionally serious and involved a degrading, despicable activity producing untold misery and in so far as the girls who were unwilling and forced into prostitution were concerned, had echoes of slavery.

The Court could not see anything wrong with the total sentence of 18 years' imprisonment. Those who committed these offences must expect very lengthy sentences. The appeal was dismissed.

In *UK. R. v. Lorenc Roci & Vullnet Ismailaj* [2005] EWCA Crim 3404 *Court of Appeal Nov 16th 2005* a sentence of 11 years' imprisonment for trafficking into the United Kingdom for the purposes of sexual exploitation, where a man arranged for the immigration of a number of adult women who were willing to act as prostitutes, was reduced to nine years upon appeal. A number of adult women arrived in the United Kingdom from Lithuania. They were met on their arrival by the second appellant who had apparently paid their fares. They were taken to brothels in Birmingham and in London where they were required to work and to pay the bulk of their earnings to the second appellant. During their investigation the police obtained statements from the Lithuanian women who had come expressly for the purpose of working as prostitutes. None of them, however, expected to work in the manner they were subsequently required to. There were four adult women who described having arrived between November 2003 and September 2004, either at Heathrow Airport or at the Victoria Coach Station, from Lithuania. They described being met on arrival at whichever of those destinations by Ismailaj

who, in several cases, had apparently paid their travel fares and to whom they paid the bulk of their earnings from working, many hours a day, five or six days a week. They were required, which they did not wish to, to service drunken clients and in some cases they were required, which they did not wish to, to work when they were menstruating. Both these appellants drove them to brothels in Birmingham and in London. One of the women described how she had responded to Qata in the presence of Ismailaj when he had handed his telephone to her to speak to a woman in Lithuania. She threw the telephone down and then dialled the emergency services on her own telephone, and explained in broken English her predicament. A man who was passing by at the time was sufficiently concerned to take the telephone from her and speak to the police operator. Thereupon officers were dispatched and came to the scene. She made a statement to the Vice Squad which led to a much larger investigation. She told the police that her two cousins, who were sisters, had been due to come to this country as prostitutes and, in consequence, a surveillance operation was mounted. They were seen to arrive at Victoria coach station, where Ismailaj met them on September 29. During the course of their journey they had received a telephone call telling them that their cousin, the one who had gone to the police, had run away. But it was too late by then for them to stop their journey. When they met Ismailaj, they asked him what had happened to their cousin. He said she was working elsewhere. He took them to a flat where two other prostitutes and an Albanian man were waiting for them. Roci arrived a short while later. The following day, at about 17.00, Ismailaj came, and Roci brought food. A bald man turned up who said he was going to be their boss and that she had been sold to him or was about to be sold to him by Ismailaj. She said she was not prepared to work apart from her sister. An argument ensued. The sisters packed their bags. The surveillance operation continued. On October 6, 7 and 10, Ismailaj, and on October 6, Roci, were seen driving different women to brothels in various places. Ismailaj was arrested on October 11 and had in his wallet three £20 notes which police officers were able to identify as having been handed over by them in connection with prostitution the previous day. In his home was found £4,315 in cash, banking documents revealing large deposits of cash and transfers to Lithuania and Albania and a number of documents supporting false identities for him. There was also correspondence indicating that the two appellants had shared a flat together and with Qata. There were bogus employment references and numerous work records for various prostitutes, which showed that the earnings had been split 25 per cent for the girl and 75 per cent for the pimp. The sentencing judge took account of the appellants' pleas of guilty, although they were entered on a re-arraignment as the jury were about to be sworn. The judge accepted that the women had come to the United Kingdom for the purposes of prostitution and had not been corrupted in any way. But they had, by reason of the conditions in which they were required to work, been coerced. The judge referred to the high degree of planning and organisation involved in trafficking in people and he referred to some evidence of threats and inhuman treatment and restriction of the women's liberties and confiscation of their passports. It was noted, in contrast to the case of *Maka* [2006] 2 Cr.App.R.(S.) 14 (p.101) above, that the victims of the offences were adult prostitutes and came to the country for the purpose of carrying on trade as prostitutes. The coercion to which they were subjected was extremely minor compared with the coercion and corruption to which the victim in *Maka* was subjected. Looking at the circumstances of the case, although the Court considered that the sentencing judge was entirely right to impose a deterrent sentence, the sentences were excessive. The sentence on the first appellant would be reduced to three years and the sentence on the second appellant would be reduced from 11 years to nine years' imprisonment.

The case is noticeable for the fact that the conditions of work constituted coercion/deceit – it was never disputed that the women had agreed to perform the sort of work they were subsequently asked to carry out, but they had never agreed to those conditions. These cases are extremely important because they show that agreement from the outset to carry out work which may have been considered to have a somewhat undesirable for most people may subsequently be nullified and not constitute a defence because the standard of work or working conditions later turns out to be exploitative and not what was agreed upon from the outset. This is the case not only when the victim agrees to perform sexual services and afterwards is required to work in different and exploitative conditions as a sexworker but

also in other labour agreements where conditions later turn out to be “more exploitative” than what was agreed upon – then former consent can no longer be used as a defence by the defendant.

In *R. v Elisabeth Delgado-Fernandez Godwin Zammit* (2007) EWCA Crim 762 2007 WL 2041801 Miss Delgado-Fernandez who was a Spanish citizens had worked as a prostitute in Spain before arriving in the United Kingdom. It was in that capacity that she met Godwin Zammit and she began a relationship with him. He was a Maltese national who came to the United Kingdom in 1999 and set up the First Omega Escort Agency. The two appellants were then involved in an enterprise with Adrian Zammit (GZ’s nephew) which enabled women from Spain, South America and Eastern Europe to enter the United Kingdom in order to work as prostitutes. Once the women had arrived in the UK, the three defendants controlled the work they undertook and received 60% out of their earnings, out of which they paid substantial expenses. Miss Delgado-Fernandez’s role was primarily to recruit women from Spain and South America and to help them enter the UK irregularly. Godwin Zammit took on a similar role in relation to recruiting women from Eastern Europe. They both ran the agency with the day-to-day help of Adrian Zammit, who took telephone calls and allocated the work among the women. Fees were offered to those introducing women to the defendants and they selected those women whom they thought the most suitable. It was alleged that the three defendants had conspired to *control* the women for the purposes of prostitution. Godwin Zammit had provided a number of flats for use by the women. Miss Delgado-Fernandez encouraged the women to offer a wider range of sexual services than originally appealed to them, took them to photographers’ studios to obtain photographs for display on the agency website and on occasions accompanied Godwin Zammit on visits to the flats to collect his share of the earnings. Evidence was given by a number of women involved at the trial that none of them had been coerced into coming to the UK or into working as a prostitute. All were over 18 and were already working as prostitutes before arrival in the UK. Two alleged that they had been persuaded to indulge in sexual activities that they would not originally have been prepared to do.

In the first instance sentencing the judge made general comments in relation to both applicants stating that “... there is no offence committed when a woman sells her body for sex or a man pays her for those services; the problem is what accompanies it and that is the degree of exploitation. It is a repugnant situation. It exploited a weakness in the immigration system which no doubt was looked into by Godwin Zammit and discovered to be what one might describe as a loophole — efficient because the girls were put to work very quickly. But the real reason behind all this is not to provide some social service for anybody, it is but commercial gain, to make money, and to make it in large or very large quantities, not of course subject to any tax. It is making money, a lot of money, in a way which, is “repugnant to right-thinking people,” and that is why the Act is there to deal with it. This was well organised importation of essentially vulnerable people because they come from countries which suffer from considerable poverty.” In relation to Miss Delgado-Fernandez the judge added that “... it is quite clear that this organisation needed fresh girls. A supply was very necessary and you, for money you conducted well-organised researches for this end.” The judge commented that Miss Delgado-Fernandez had admitted all the offences in the course of her evidence, but stated that she did not consider herself guilty. The judge said that it was a pity that she had not pleaded guilty but that he would treat her, perhaps over-generously, as having not done so “out of stupidity”. She had been responsible for recruitment, but was less financially involved than Godwin Zammit. Whereas Mr Zammit received a sentence of seven years, hers would be five years. The judge added that this was less than she really deserved because she was a major part of the recruitment. Upon appeal the Court of Appeal modified the sentencing and stated that: “the remaining elements of the trafficking offence (apart from immigration offences) lacked most of the aggravating factors identified by the Sentencing Guidelines Council. There was no deception or coercion. There was assistance for prostitutes who wanted to come to the country — assistance with their entering the country illegally and organisation of their business while they were there on a substantial scale and for a substantial profit. In these circumstances we have reached the conclusion that the sentences imposed on Godwin Zammit were manifestly excessive. We shall grant his application for leave to appeal and we shall reduce the

sentences from seven years to five years' imprisonment, to be served concurrently, so that the overall sentence is reduced to five years' imprisonment. We consider that the judge was entitled to treat Miss Delgado-Fernandez more leniently, despite the fact that she did not plead guilty. She was very much under the control of Zammit and only received a modest share of the profits of the enterprise. Far from being unduly lenient, we consider that her sentence also was manifestly excessive. We will allow her application and reduce the sentence to four years, to be served concurrently, so that the overall sentence is reduced to four years' imprisonment.

The Appeal decision seems to have taken into account the fact that the alleged victims did not allege coercion or deception but at the most testified that they had been persuaded to perform services they would not originally have done – this may be morally repugnant but from the statements it did not seem that they had been in any way forced to commit these acts and also there seems to have been a lack of dependence upon the defendants/appellants in order to sentence them more severely.

In February 2004 in the Crown Court at Southwark in the appellant in *R. v. Vethasalem Muruganathan*, Court of Appeal Criminal Division, [2004] EWCA Crim 2634 was convicted by the jury, after a trial, of six counts of living on the earnings of prostitution. He was sentenced on each count concurrently to 3 years' imprisonment and recommended for deportation. There were two co-accused. The principal defendant was the appellant's wife, Guinara Gadzijeve. She was convicted and sentenced on the same date to concurrent sentences totalling 6 years' imprisonment, and she too was recommended for deportation. A third co-accused, Olga Chukanova, was convicted and sentenced to concurrent terms of 42 months' imprisonment. The appellant, Mr Murganathan, applied against sentence by leave of the Single Judge (as opposed to by leave of the full Court). The appellant's wife was a prostitute in the UK. She had been previously deported but returned in 1999 or 2000 and began to manage and control a number of brothels in Mayfair and Soho. Girls would be recruited from Moldova who arrived at Victoria Station and were told that they were to be accommodated in a flat in Acton and work as prostitutes whether they wanted to or not. They were in a foreign country with no passports and were fearful of possible reprisals on their family at home should they flee. The appellant's involvement was as a driver. He would accompany his wife when collecting the girls from Victoria Station. He would chauffeur her between the brothels and the flats where the girls lived. Two prostitutes and various maids called as Crown witnesses confirmed that they did not have conversations with the appellant and that he did not enter the brothels. The vast majority of the prostitutes' earnings went on rent and to the appellant's wife to whom they were indebted. The case against the appellant was that he was living off this operation but was not directly involved save as a driver. In her sentencing remarks the judge said, in sentencing the appellant's wife: "I also accept that there was no element of corruption or bullying girls under the legal age and introducing them to prostitution. There is no evidence of any violence being used against any of these girls.¹⁶⁴ Nor was there compulsion to indulge in deviant sex. Indeed, you made it clear on one occasion to one of the officers that there were limits beyond which you would not allow your girls to go. It is said on your behalf that none of them needed medical treatment or counselling. However, it is quite clear that you were operating a substantial enterprise in controlling prostitution. You were involved in the recruitment of the girls from Eastern Europe. You clearly brought the full force of your personality to bear so that they were mentally coerced and were in total fear of you, and you exploited that fear so that they were left feeling that there was no way that they could avoid your clutches, and remained to be exploited working long hours for a minimal gain."

In sentencing the appellant the judge said that until he got involved with his wife he was living a decent and industrious life but, once he did meet her, he got involved in the enterprise, that is the controlling of prostitutes, and enjoyed the spoils. Both instances accepted that the appellant was

¹⁶⁴ *R v Farrugia* 69 Cr App R 108 said, at page 113, that "in the absence of any evidence of coercion, whether physical or mental, or of corruption, the old maximum of 2 years' imprisonment is probably adequate. Anything exceeding 2 years should be reserved for a case where there is an element of coercion or there is some strong evidence of corruption."

nothing like as deeply involved in the enterprise as his wife had been. It was retained by the Court of Appeal that the case did not fall within the certain cases in which there is no evidence of coercion whether physical or mental. In this case, the judge in the first instance, who had a detailed knowledge of the facts after presiding at the trial, found that there was at least mental coercion of the girls in the way she described in her remarks in sentencing the appellant's wife. Although the appellant's role was limited, the Court of Appeal considered that he could not be disassociated from that characteristic of the enterprise which his wife controlled. And thus came to the conclusion that there was nothing wrong in the sentence of imprisonment passed by the judge and that aspect of the appeal therefore fails. However, regarding the recommendation for deportation, it was considered that the appellant has been in the country for 14 years. He married the principal defendant in 2001 and had a young daughter. It does not appear, at least from the sentencing remarks, that the judge in the first instance conducted the balancing exercise required by the case of *Nazari* [1980] 1 WLR 1366.¹⁶⁵ The Court of Appeal Judges took the view that this group of offences, though serious were not so serious that it was clear that the appellant, at the conclusion of his prison sentence, ought to be deported.

The focus on how mental coercion may be just as serious and real to the coerced as physical coercion is one of the most important points of this case. It is however also noteworthy how the Court of Appeal took into consideration the Appellants right to family life in sentencing – weighing the rights of the accused into the equation to find a just sentencing.

R v Plakici [2005] 1 Cr.App.R.(S.) 19, *Attorney General's Reference (No 6 of 2004)* dealt with a series of individual offences that amounted to an extremely serious case of trafficking. The offender had arranged for the illegal entry of women and young girls into the UK in circumstances that involved both deception and coercion and forced them to work as prostitutes. Counts of irregular entry attracted sentences of five years; of living on immoral earnings five years; of kidnapping ten years; and of incitement to rape eight years. A total sentence of 23 years was imposed. The offences committed by the offender pre-dated the trafficking offences introduced in the Immigration and Asylum Act 2002. The offender was charged with a range of offences including facilitating illegal entry, kidnapping, procuring a girl to have unlawful sex, living on prostitution, incitement to rape and false imprisonment. In the absence of any guidelines relating to sentencing for what amounted to an offence of trafficking for prostitution, the Court stated that human trafficking was a degrading activity that produced untold misery to girls around the world and such offences warranted lengthy custodial sentences. It is thus interesting to note how the Court dealt with what effectively was deemed to be a trafficking case before the relevant legislation on a specific trafficking offence was in place, by using trafficking related offences on which to base the sentences.

The investigation focused on a 26 year-old British citizen of Albanian descent, who organized the illegal trafficking of seven young women from Central and Eastern Europe into the United Kingdom for the purpose of sexual exploitation. The trafficker ran an international trafficking business, relying also on an international network of recruiters and transporters abroad as well as traffickers-exploiters inside the United Kingdom. Typically the women were deceived by false promises of employment, and then forced into prostitution to repay their debts for having been brought to the United Kingdom. To varying degrees, violence and threats were used, including the holding of women against their will. Pocket money was paid to the women whereas the bulk of earnings were kept by the trafficker. One of the victims was married to the trafficker, and assisted the trafficker in the control of other women.

¹⁶⁵ In *Nazari* in 1980 Lawton L.J. stated that “This court and all other courts would have no wish to break up families or impose hardship on innocent people” and that it was proper for a court to consider the impact of deportation on persons not before the court. However, in the more recent case of *Carmona (Nelson)* [2006] EWCA Crim 508. The court had transferred responsibility for assessing such impact to the Asylum and Immigration Tribunal when the sentence has expired. The court stated that, in the light of the Human Rights Act 1998 and the full range of relevant Art.8 issues to be addressed, it is now unnecessary and undesirable for a judge to assess the effect on innocent family members. Further, the court decided that a recommendation for deportation could be made by the sentencing judge notwithstanding the relatively lenient sentence of 15 months' imprisonment that was imposed.

Also, one victim was coerced to recruit other victims. Concretely, two women (sisters, aged 17 and 24) were lured from Romania with the false promise of (legal) employment in the United Kingdom and transported there with the help of a Romanian recruiter. They were brought to Prague, where they met the trafficker, who took them to Italy, from where two Italian men transported the women to the UK. The sisters were separated. In order to make the women comply and agree to work in prostitution, they were held against their will, subjected to repeated rape, beaten and threatened with physical violence and death. One woman was sold to another exploiter, whereas the other managed to escape and to contact the police. This led to the raid on the traffickers' premises and the freeing of her sister, as well as other women found there. These included two Romanian women (cousins) holding false Italian passports, who stated that they had originally left Romania for Italy in order to work as waitresses. There they were bought by an Italian who brought them to this trafficker in the UK. It emerged that one woman, having previously been forced into prostitution in the UK, subsequently agreed to recruit her cousin and bring her from Italy to the UK for the same purpose. Moreover, a Moldovan as well as a Romanian girl were found on the premises, both having been transported to the United Kingdom by the trafficker and other facilitators and forced to prostitute themselves in order to repay their debts to the trafficker for bringing them to the United Kingdom. A number of the victims were minors when they were first recruited, brought to the United Kingdom and forced into prostitution. The Moldovan woman who was married to the trafficker, and assisted him in controlling other victims, claimed that she was coerced to do so. The Romanian woman was at a certain point sold to another pimp and eventually returned to the trafficker; he kept all proceeds from her work with the exception of some pocket money. Lastly, another Moldovan woman and friend of the aforementioned Moldovan girl/trafficker's wife came to the United Kingdom with the assistance of the trafficker, utilizing false passports. She was also forced to work as prostitute in order to repay her debts. Where this information is known, the victims were purchased/sold for EUR 3,000. From 1999 to 2002, a total sum of GBP 204,396 in criminal proceeds was traced to the bank deposits of the accused. The funds were used to support a lavish lifestyle which included extensive travel, designer clothes and luxury cars. Some substantial amounts were transferred to relatives of some of the women. The tracing of the proceeds is noticeable since this is very often an overlooked aspect of the crime – if proceeds could be traced more often the very costly affair of investigating and prosecuting international crimes may to a certain point be “covered” economically.

The Court of Appeal held that since the defendant had commercially exploited illegal immigrants, five years was an appropriate sentence following a guilty plea, (see *R. v Le (Van Binh)* [1999] 1 Cr. App. R. (S.) 422). As to living on the earnings of prostitution, there was evidence of coercion and corruption in the case of three of the victims, so that five years was appropriate in the circumstances, (following *R. v Powell (Ashna George)* [2001] 1 Cr. App. R. (S.) 76). Two other victims could be treated differently as they had lived with the defendant, but there was still evidence of coercion and corruption that justified three years' imprisonment. For kidnapping, a sentence of 10 years was appropriate where the women had been held against their will (following *R. v Spence (Clinton Everton)* (1983) 5 Cr. App. R. (S.) 413). Finally, eight years was appropriate in respect of the single count of incitement to rape (following *R. v Millberry (William Christopher)* [2002] EWCA Crim 2891).

Starting on 3 February and ending on 4 March 2005, a trial took place in the Crown Court at Wood Green. This was subsequently appealed in *R. v. Ramaj and Atesogullari* 2005/01870/D1, 2005/01871/D1 [2006] EWCA Crim 448. There were four defendants who faced a number of counts concerning a brothel run in a flat in Ponders End in the suburbs of London and the girl who worked there called “S”. S arrived in England from Lithuania on Sunday 30 May 2004. She was 18. On Thursday 3 June 2004 she escaped from the flat. The following day the flat was raided by the police. The defendants were Besmir Ramaj, aged 20, Hasan Atesogullari, aged 22, Flamur Nuza, aged 26, and Adil Jealezi (whose age was not stated, but who was older than the others). The last three pleaded guilty on the first day of trial to keeping a brothel used for prostitution contrary to section 33(A) of the Sexual Offences Act 1956. Ramaj was found guilty on that count by the jury. The defendants had taken over the brothel from its previous management on Monday 31 May. Ramaj was also found

guilty of “trafficking into the United Kingdom for Sexual Exploitation, contrary to section 57 of the Sexual Offences Act 2003.” It was claimed that Besmir Ramaj, “on or before the 3rd day of June 2004, intentionally arranged or facilitated the arrival in the United Kingdom of S, intending to do something to or in respect of her after her arrival which if done would involve the commission of an offence of controlling prostitution for gain or keeping a brothel used for prostitution.” All defendants had been charged and were acquitted of false imprisonment of S. The applicant Ramaj had been charged and was acquitted of the rape of S. All defendants had been charged and were acquitted of controlling prostitution for gain. That, too, related to S. The judge had directed the jury that if S had consented to her prostitution, they should acquit on that count.

The Judge in the first instance noted at sentencing that: “The acquittals are important because taken together I accept that the jury were not sure that S was at all times an unwilling girl who had been made captive and guarded, and was forced into prostitution. The evidence of the three maids at the brothel attested that during that time there were no incidents or marks of violence, duress, or physical compulsion to remain. Also, in my view, it is important that you were acquitted of the alleged rape. The brothel at 68A High Road, Ponders End, was a start-up operation, crudely furnished and unsophisticated, taken over from Bobby, who had herself found it unprofitable over the preceding three months or so. Your part in the operation was to supply S to the brothel.” It is worth continuing with the judge’s remarks because it gives the gist of what occurred: “The evidence that I heard about Wednesday and Thursday, 2 and 3 June 2004 showed that S on Wednesday had sex with four customers. The takings were relatively modest; £160 or thereabouts. MaryAnne Ellen Surrey gave evidence that S was given £60-70 cash that evening for her services. S did not agree with that evidence, but on any basis S did not get to keep any money. However, the evidence of the maids was that there was no overt evidence of distress or misery from S until Thursday. On Thursday, S was the only girl at the brothel. She only had sex with one client, although about four men visited but did not indulge. This small-scale brothel suffered an acute shortage of girls (and probably also funds). There is, however, no evidence that a second girl “N” was trafficked. She had previously worked at the premises under “Bobby’s” management. An aggravating feature in this case is that S was an 18 year old, just out of school: naive, gullible and inexperienced in the ways of the world. Human trafficking is a problem which confronts not only this country, but many other countries in the world. It exploits the impoverished, and particularly, in this case, the young, who are promised big money if they abandon their homeland and their morals. Particularly in the case of the young, it strikes at the root of human rights. Those exploited in this way by false promises are entitled, and deserve, the protection of the law.”

The previous cases (above) *R v Maka* and *R v Roci and Ismailaj* were used as precedence and it was noted by the Court of Appeal that the facts of each case were very much more serious than the present case. It was underlined that in *Roci* and *Ismailaj* the Vice-President stated: “It is to be noted in this case, as in contrast to the case of *Maka* in which this constitution gave judgment, that the victims of these offences were not only adult prostitutes, but they came to this country for the purpose of carrying on trade as prostitutes. The coercion to which they were subjected was extremely minor compared with the coercion and corruption to which the victim in *Maka* was subjected. That said, these activities were carried out by these two appellants for commercial gain, over a substantial period of time.”

The judge in the first instance found that Ramaj was one of the principals involved in bringing S into the United Kingdom and had supplied her to the brothel. In accordance with the jury’s verdicts he proceeded on the basis that she had come willingly. She had worked in the brothel on two days or nights, 2 and 3 June. There was no evidence that on 3 June at least she was distressed or miserable. Ramaj was born on 29 April 1985, and so at this time was just over 19 years old. He was apparently of good character. In respect of that mitigation the judge stated: “You are of previous good character, and only 19 years of age. But that is balanced by the youth and naïveté of your victim and the seriousness of the offence. I have earlier mentioned the lack of physical injury, the acquittals of rape and false imprisonment and the short duration of the enterprise. However, having seen S giving evidence over

four court days, no one could doubt the adverse impact upon her of these events, and I thought her mother's confirming evidence was wholly credible on that point." It might appear from that passage that the judge was suggesting that the mitigation of Ramaj's youth and good character was removed by the effect on S. The Appeal Judges suggested the right way of reading that passage is that the judge was stating that the mitigating factors of good character and young age were to an extent offset by the aggravating feature to which he referred. The Court of Appeal considered that the sentence passed on Ramaj for his part in the trafficking of S was substantially too long, but added that it was more difficult to determine precisely what the correct sentence should be. The Judges continued: "we have anxiously considered that. Taking account of all the various factors in the case to which we have referred, including Ramaj's age and good character, we have concluded that a sentence of five years' detention would be appropriate on the trafficking count."

Again, as in *R. v. Vethasalem Muruganathan* above this case not only goes to show what has constituted trafficking in the UK national system – but also to show how sentences have been measured out and how the defendants circumstances have to be taken into account too in order to respect both the rights of the victims and of the defendants.

French case law

In 2003, France enacted Article 225-4, which defines 'human trafficking' as: "[The] recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour." It is punishable by seven years' imprisonment and by a fine of €150,000. However, Article 225-4 has not been used as much as two other provisions. Article 225-13 penalizes "obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender". Article 225-14 penalizes "subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity". In *Siliadin* (above) the European Court of Human Rights criticized earlier versions of these laws for being too vague for application by the courts.¹⁶⁶

In Articles 225-13 and 225-14, French lawmakers apparently preferred to rely on more tangible circumstantial factors. Unpaid work obtained by taking advantage of the vulnerability of the person in question or the subjecting of a person to degrading working or living conditions constitutes an offence. Whether or not the victim performs the work voluntarily is irrelevant, since consent given by a person in vulnerable circumstances is not considered admissible. This is similar to the Trafficking Protocol, which provides that abuse of vulnerability is one of the means that renders consent irrelevant. Under the Forced Labour Convention, menace of a penalty and voluntariness are treated as two separate elements, but the Committee of Experts has recognized that these two factors overlap.

(see also summary of French case of *Siliadin* above in the Section on the European Court of Human Rights)

In *Procureur de la République v. Monsieur B.*, Decision No. 97/8641, Court of Appeal of Poitiers (26 February 2001) Monsieur B. had established a company in the textile sector in Vendée and had here employed several dozen workers. In the workshop, workers were not allowed to raise their heads, talk or smile. Monsieur B. watched over the workers for any signs of infraction and would punish them if they smiled or talked. In addition, Monsieur B. refused to open the doors in summer, despite the extreme heat. During the winter, he turned off the heating system in very cold weather, but he

¹⁶⁶ ILO: Forced Labour and Human Trafficking Casebook of Court Decisions, p 61

insisted that workers remove their coats. Monsieur B. constantly threatened the workers with closure of the company and which would make them to lose their jobs. The Court first examined the situation of dependence. It noted that Monsieur B. had hired unqualified workers and that the textile sector was seriously affected by the economic crisis. Moreover, the company was set up in the farmland of Vendée, a region severely affected by unemployment. “Therefore the workers of Monsieur B. were in a situation such that the loss of their jobs would have had catastrophic consequences for them.” This is a very interesting point to notice when discussing “dependence” and “vulnerability” – effectively the Court found that the general economic situation could create a situation of dependence on the part of workers. Next, the Court found that Monsieur B.’s workers were under extremely strict discipline and that they worked in difficult physical conditions, subject to various humiliations, not talking, smiling or raising their heads is perhaps not direct physical exploitation but it is clearly conditions which impose a sense of humiliation and also of an excessive discipline which in today’s interpretation of fair working conditions may well be considered out of line. Alone the working conditions may not have been enough to sustain a conviction, but considering the dependence and the fact that the workers were constantly reminded that continuing their work depended on their employer, the Court concluded that, together, these elements characterized conditions of work incompatible with human dignity. Monsieur B. was sentenced to two years’ imprisonment and a fine of 100,000 francs. In the companion civil case, victims of the violation of Art. 225-14 were awarded 3,000 francs each.

French case law is not very rich in terms of number of cases but the definition of dependence created out of general situations external to the working relationship is highly significant and may well have ramifications.

Finnish case law

A National Plan of Action against Trafficking in Human Beings was adopted in Finland on 25 August 2005. It was revised and specified in 2007 by a Steering Group lead by the Ministry of Employment and the Economy. The revised Plan of Action was adopted by the Government on 25 June 2008. The Plan of Action is based on three main dimensions in combating trafficking in human beings: Human rights and victim based approach, including the protection of children’s rights; Gender sensitive approach; Comprehensive and multidimensional approach and that crimes related to trafficking in human beings were penalised in chapter 25, sections 3 and 3a of the Penal Code (39/1889) through amendment 650/2004. In the Finnish Penal Code, statutes concerning human trafficking entered into force on 1 August 2004. Prior to this, offences of a similar nature were punished on the basis of sections concerning, among other things, prostitution and work discrimination. Under chapter 25(3 and 3a) of the Finnish Penal Code (9.7.2004/650), trafficking in human beings, aggravated trafficking in human beings and the attempted commission of either are punishable offences. The penalty for trafficking in human beings is imprisonment for a period of no less than 4 months and no more than 6 years in duration. The penal scale for aggravated trafficking in human beings is imprisonment for a period of 2-10 years.

A multidisciplinary assistance system for helping and supporting victims of trafficking was established in accordance with Finland's first Plan of Action against trafficking in human beings. The regulations concerning the assistance of victims of trafficking are enforced in the Act on the Integration of Immigrants and Reception of Asylum Seekers (493/1999).

The Steering Group of the Plan of Action against Trafficking in Human Beings noted in its report published in 2008 that in 2006, 17 victims of human trafficking offences and 207 victims of offences related to human trafficking had been identified. Offences related to human trafficking include aggravated procuring, discrimination at work tantamount to extortion, and aggravated facilitation of illegal entry.

In July 2006, the Helsinki District Court passed the first sentence for human trafficking in Finnish history (*Helsinki District Court R 06/5204, 20.7.2006.*) In this case, the members of an Estonian-

Finnish criminal organisation were accused of compelling an Estonian woman to engage in prostitution in a manner that was considered to meet the statutory definition for an aggravated human trafficking offence by deceiving her (promising her a job as a babysitter). By threatening her with fines and a debt that she had already gotten into, the woman had been forced to travel to Finland, where she had been locked up in a flat in Helsinki and directed to engage in prostitution. The woman received three to fifteen customers a day and was not allowed to keep any of the money paid by the customers. The members of the criminal organisation threatened the woman with violence if she refused to work as a prostitute. The woman's vulnerability was increased by her inability to speak Finnish. One of the defendants promised to marry the woman if she "worked" well. At a certain point, fearing detection, the defendants sent the woman back to Estonia via Sweden, and she was warned by threats not to tell anyone about what had happened. The woman subsequently suffered from mental health problems. According to the District Court, the statutory definition of trafficking in human beings was fulfilled when the defendants deceitfully persuaded the woman to become a prostitute by promising her a job (not as a prostitute). The criterion of a vulnerable state was considered to have been met, as the woman was mentally disabled. The criterion of dependent status was met in the form of threats concerning the debt. It may be criticised that the vulnerability was considered met "because of" the mental disability and that this latter was not seen as an aggravating factor – vulnerability existing also due to the dependent status.

The act was considered aggravated, as its subject was a person whose capacity to defend herself was substantially diminished, and because threats of violence and deceitfulness had been used in the act. Again this seems slightly contorted since threats of violence and deceitfulness are the "ordinary" means used and criminalised and not what a priori constitutes an aggravating factor – the aggravating factor seems more to be the mental disability of the victim as just mentioned.

The total number of injured parties in the case was 14 women, but the District Court considered that regarding the other injured parties, the defendants had been guilty of aggravated procuring. The court acknowledged that these women, too, were in a vulnerable state, but it did not consider their relationship with the defendants dependent to the extent that the violations of their right of self-determination would have constituted an offence of human trafficking. In its statement of reasons, the court referred to Report LaVM 4/2004 of the parliamentary Legal Affairs Committee, which urges the courts to interpret the open concepts of dependent status and vulnerable state in the statutory definition in a restricted sense and considers that in human trafficking, the subject's status of dependence on the perpetrator is more intensive and extensive than in procuring. In its statement of reasons, the District Court said: "[a]ll injured parties reported that working hours were imposed on the women, their movements outside were restricted, and goals were set for their work. Compliance with the rules was supervised, and fines were imposed for violations of the rules. At least some of the women were threatened with violence. As all injured parties who reported that fines had been imposed on them also said they had paid these fines at least in part, it was not proven that a financial dependence had in this way been created between the injured parties and the defendants. Excluding X (the disabled woman), it was not proven that threats of violence by the defendants rendered the injured parties to a vulnerable state referred to in the above-mentioned preliminary work."

The court considered relevant the fact that the other women had engaged in prostitution voluntarily, or at least had understood that they would have to offer "intimate services". The court also attributed significance to the fact that the women had earned money by prostitution. Threats of violence against the women or their family members, binding them by debt and considerable restrictions of their freedom of movement did not alter the District Court's interpretation of the relationship between procuring and human trafficking. The District Court strived to distinguish between procuring and human trafficking by stating that the majority of the women had followed the perpetrators voluntarily and had given their consent to working as prostitutes. The District Court considered the original voluntariness significant, despite the fact that some of the women had openly reported threats of violence against them and their family members, which could even fulfil the definition of aggravated

human trafficking. The District Court stated: “[o]f the injured parties, A, B, C, D, and E reported that they had come to Finland on a voluntary basis to work as prostitutes and to earn money in these activities. F said she had come to engage in an escort service, which she understood also involved offering intimate services, and G consented to working as a prostitute while she was in Finland. “[w]hen F had no customers, Y was angry and threatened to slash F’s face with a razor blade, beat her up, and burn her hair.” For one injured party, the District Court also stated: “In Finland, A had been told that they were not allowed to leave the flats without permission ... If they did leave the flat without permission, fines were imposed on them, and A had been ordered to pay a fine. They could not visit the corner shop without permission. In addition to a fine, A was also threatened by Y’s friends who were coming to beat her up. She had also received threats of having her face slashed, and her family had been threatened ... In addition, A was told that the weekly fee she had to pay was EUR 200, but the payment was unilaterally increased to EUR 500. Originally, A came to Finland for two months. After this period, however, she was not allowed to stop working as a prostitute.” In a recent report the Finnish National Rapporteur on Trafficking in Human Beings noted that she did not consider that the District Court had adequately examined the conditions in which the women were selling sexual services. The focus on voluntariness at the recruitment stage could also be seen in the pre-trial investigation, in which the committing of a human trafficking offence was only investigated in case of one injured party, a disabled woman who had been deceitfully compelled to engage in prostitution by promising her a job as a child-minder. The other women who were injured parties in the court were heard as witnesses in the pre-trial investigation. As a result of this procedure, it appeared that attention was only paid to violations of the rights of the disabled woman, who was an injured party. The restrictions of freedom of movement, fines, and threats of violence reported by the other women were treated as evidence of a procuring offence rather than violations of an individual’s rights or indications of their dependent status as to the defendants. The prosecutor, on the other hand, had decided to bring charges of human trafficking against the defendants for all of the women.¹⁶⁷ The same tendency to “lump together” the injured parties’ stories continued in the Court of Appeal (Helsinki Court of Appeal R 06/2317, 1.3.2007), where the restrictions of freedom of movement, fines, and threats of violence were understood as rules associated with procuring. The Court of Appeal, too, paid attention to the restrictions of movement, fines, and threats of violence, but did not find it necessary to review the District Court’s interpretation in this respect. In its statement of reasons, the Court of Appeal stated: “When determining the length of the sentence for aggravated procuring activities, on the other hand, the fact that this did not involve international organised crime must be taken into consideration. Stringent rules on the working hours had been imposed on the prostitutes who took part in the procuring activities, and they were prohibited from leaving the flat without permission. The prostitutes were controlled by telephone calls and visits to the flat. The prostitutes had been threatened with violence and fines imposed for violations of the rules.[B]ecause F had gone out to party, which was against the rules, she had been moved to the Tampereentie flat in Hämeenlinna, and W had imposed a fine of EUR 500 on her. During the car journey, W had also threatened to ‘throw her into the electrical wires’ if she reoffended.”

The line drawn between penal provisions on procuring and human trafficking also seems to be significant in compensation orders. One of the injured applicants for aggravated procuring, claimed compensation from her procurers in court. The District Court rejected the claim, as the charge of aggravated human trafficking had been rejected. The District Court stated that a witness of a procuring offence was not entitled to compensation based on the offence. According to Government proposal 167/2003, procuring may in individual cases constitute such substantial violations of a person’s right of sexual self-determination that this would entitle the injured party to compensation for her suffering

¹⁶⁷ The Finnish National Rapporteur on Trafficking in Human Beings Report 2010: Trafficking in human beings, phenomena related to it, and implementation of the rights of human trafficking victims in Finland, p 115

under the provision. In this case, however, the circumstances must make the violation of sexual self-determination evident.¹⁶⁸

In a second case related to sexual exploitation in summer 2008, three Finnish men and two women, who had subjected a young Finnish woman to sexual abuse or other demeaning circumstances as referred to in the provision on trafficking in human beings, were sentenced for aggravated trafficking in human beings.¹⁶⁹ The entire chain of events was based on a fabricated snitching debt, which the defendants forced the injured party to pay them by selling sexual services. In addition, the defendants forced the injured party to give them her savings, take fast loans, order goods from on-line stores and take internet and telephone subscriptions. The defendants took possession of the injured party's personal property, including the keys to her flat. The injured party's movements were watched, she was locked up in a basement, she received death threats, she was repeatedly subjected to serious violence, and finally, she was forced to sell sexual services to get money. The District Court considered that by means of restricting her freedom of movement, the debt, threat of violence, and violence, the defendants had put the injured party in a position where she no longer had other options than to submit to all types of abuse. In its assessment of the means used in the case, the District Court stated: "When threatened by violence, she [the injured party] attempted to minimise her injuries by making choices that were not based on voluntariness and free will. She dared not run away or refuse to sell sexual services. Only fear of death gave her the incentive to seek help, accompanied by a person who had intended to buy sex [...]. The [defendants] were aware of her lack of options, dependent status, and vulnerable state, and they used it for their own and other persons' financial benefit."

Regarding the manner of committing the offence, the District Court considered that the criterion of taking control had been met, because in addition to deprivation of personal liberty, the injured party was also considered to have been subjected to the control of the persons who had deprived her of her liberty. This condition was seen as having been met, because the injured party had been deprived of her personal liberty, her property had been stolen, and she could not influence the terms and circumstances of selling sexual services or the duration of these activities. According to the District Court, the purpose of the act met the criteria of both sexual abuse and demeaning circumstances. According to the District Court, the injured party had been, by means of deprivation of her personal liberty, the threat of violence, and violence, compelled to have sexual intercourse or to perform a sexual act, where she had to hand over all the money gained from these activities to the defendants. The District Court also found that the injured party had been put in demeaning circumstances in order to pay off a snitching debt, or in a position where the only possibility of paying the debt was through criminal means and finally selling sexual services. The District Court also considered that the snitching debt, which it compared to a drug debt, had no legal basis whatsoever. Even if no legal protection is afforded to a drug debt, according to the District Court it is different in that the debtor has received something in return for the debt, the drugs. The District Court commented on the drug use of the defendants and the injured parties by stating that drug users cannot be regarded as having "rules of their own", and they, too, have the right to live their lives with human dignity.

The third court case associated with sexual exploitation concerned an Estonian woman who had been brought to Finland to work as a prostitute (Helsinki Court of Appeal R 08/10613, 28.11.2008). The defendants, two Estonian men, had persuaded the woman to come to Helsinki, where she had worked as a prostitute. The defendants and the injured party disagreed about whether prostitution had been referred to in the recruitment stage: the injured party denied having known about the prostitution, whereas the defendants claimed the injured party knew that the purpose of the journey was to earn money through prostitution. When the injured party, after arriving in Finland, found out that the

¹⁶⁸ Ibid.

¹⁶⁹ Kotka District Court R 08/1069, 9.12.2008. The District Court assessed the offence as aggravated, as violence and threats had been used in it. Considering the deprivation of personal liberty, threats and seriousness of the violence, the act was aggravated also when considered as a whole.

purpose of her journey was to engage in prostitution, she no longer dared to refuse, as she was afraid that the defendants would leave her in Helsinki alone, without money, and unable to speak Finnish.

In many trafficking cases, there is initial consent or cooperation between victims and traffickers followed later by coercive, abusive or exploitive circumstances. Any initial consent is effectively later nullified by initial deception, later coercion, or an abuse of authority at some point in the process in accordance with article 3, subparagraph (b), of the Trafficking in Persons Protocol. This raises practical problems in cases where accused traffickers raise evidence of victim consent as a criminal defence. Subparagraph (b) of the definition clarifies that consent becomes irrelevant whenever any of the “means” of trafficking has been used. Consent of the victim can still be a defence in domestic law, but as soon as means such as threats, coercion or the use of force or abuse of authority are established, consent becomes irrelevant and consent-based defences cannot be raised. In most criminal justice systems, the effect would be that prosecutors would raise evidence of improper means and defence counsel would tender evidence of victim consent, leaving the court to assess first the validity of the prosecution evidence and then the validity of the defence. Under the Trafficking in Persons Protocol, it is possible that a valid consent, completely free of any improper means, might be obtained. The definition of trafficking and the modus operandi of most traffickers make this a relatively unlikely scenario however, and investigators and prosecutors should carefully consider all of the evidence and elements of any case before reaching this conclusion. Where a person is fully informed of, and consents to, a course of conduct that might otherwise constitute exploitation and trafficking under the Protocol, no offence of trafficking would occur. However, trafficking does occur if consent at any stage of the process is nullified or vitiated by the application of improper means by traffickers. Effectively, the consent of the victim at one stage of the process cannot be taken as the consent at all stages of the process, and without consent at every stage a trafficking offence has taken place. The nature of the activity consented to, is less important than the question of whether valid consent is established at the outset and has been maintained at all subsequent stages of the process. If such consent does not exist or is nullified at any stage, it is trafficking. If the consent is maintained, it is not trafficking, even if the subject has consented to engage in actions that are illegal in the destination State, such as prostitution or drug trafficking. A further issue in many cases will be the legal question of whether a particular victim had the capacity to consent to recruitment or subsequent treatment in national law. Under article 3, subparagraph (c), of the Trafficking in Persons Protocol, consent and the presence or absence of improper means of trafficking become completely irrelevant if the victim is a child under 18 years of age, and under the national laws of many States parties, the capacity to consent, especially to sexual activity, may be even further restricted.¹⁷⁰ Real consent is only possible and legally recognisable, when all the relevant facts are known and a person is free to consent or not. Moreover, one cannot legally consent to forced labour, slavery or practices similar to slavery or servitude.¹⁷¹

What began as a voluntary activity on the part of the migrant will still qualify as a case of trafficking in persons if the initial consent of the victim was gained through the use of deception, coercion or any other means, and exploitation subsequently takes place.¹⁷² In other words, it is the means of consent, rather than consent *per se*, that is important. The problem is how the means of consent can be determined other than by the sole testimony of an alleged victim of trafficking. It may be argued that migrants who are not “well informed” in making their decision to migrate cannot later claim they had false expectations and were thus a victim of trafficking. This makes some sense, but there is also a fine line between being given enough information and correct information. As economists often argue, if one assumes a rational decision making process, then one assumes perfect

¹⁷⁰ UNODC: Toolkit to Combat Trafficking in Person. 2006. p xvii

¹⁷¹ UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p 5

¹⁷² UNODC: Toolkit to Combat Trafficking in Person. 2006. p xvii

market information. Whose responsibility is it, to provide all the information? Is it the recruitments agency's responsibility, or is the onus on the individual migrant who may be self-delusional or in denial of warnings of the risks involved? Or are the specifications as detailed in the contract sufficient? Even then, we know that many migrant workers do not understand and cannot recall the conditions in the contracts they have signed.¹⁷³

Defendants have a right to a defence but, once the elements of the crime of trafficking are proven, any allegation that the trafficked persons 'consented' is irrelevant. Real consent is only possible and legally recognizable, when all the relevant facts are known and a person is free to consent or not. Defendants do not lose their right to raise all defences. Thus, despite evidence that the victim consented to migrate, to carry false documents and to work illegally abroad, defendants cannot argue that the victim 'consented' to work in conditions of forced labour, slavery or servitude. 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.¹⁷⁴ 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/her in debt bondage, involuntary or forced conditions.¹⁷⁵ In most criminal justice systems the effect would be that prosecutors would raise evidence of improper means and the defence counsel would tender evidence of the victim's consent, leaving the court to assess the validity of the evidence of both the prosecution evidence and the defence.¹⁷⁶

The defendants in the current case had also persuaded the injured party to continue in prostitution by telling her about the possibility of going to Sweden to work in a different sector, once she had first made enough money in prostitution. The money earned by the injured party alone in prostitution had been shared between the defendants and the injured party. After staying in Helsinki for two weeks, the defendants had left Finland without informing the injured party. In order to make a living and to pay for the hotel room, the injured party had continued working as a prostitute for approximately one week before she was caught by the police. In its judgment, the District Court considered that the defendants were only guilty of procuring. When assessing the case, however, the District Court confused the means and the manner of committing a human trafficking offence. Consequently, it required in its decision the fulfilment of two different means, or exploitation of a dependent status and vulnerable state as well as deception, and failed to look at the manner of committing the offence defined in the Criminal Code, or taking control of another person, recruiting, transferring, transporting, receiving,

¹⁷³ See also Jureidini, R.: "Trafficking and Contract Migrant Workers in the Middle East", *International Migration*, 2010. The standard contract introduced by the Sri Lankan government in 2000 [*Contract of Employment for Domestic Helpers from Sri Lanka in the Middle East Countries*] was only written in English and Arabic. In addition, it makes explicit what is normally left implicit in contracts, namely that: The employee may terminate this contract without any notice to employer for any of the following just causes: maltreatment by the employer or any member of his household; violation of the terms and conditions of this contract; non-payment of salary; physical molestation and assault. (Clause 10b) Under "Special Provisions" (Clause 12), the contract also stipulates: The employer shall treat the employee in a just and humane manner. In no case shall physical violence be used upon the employee. (Clause 12b) Such provisions are instructive because they are indicative not only that such practices actually occur, but their inclusion should also be a warning to the migrants themselves.

¹⁷⁴ A specific case is from Murmansk where Russian women took a bus to a small Norwegian town, where they spent the week-end selling alcohol and souvenirs. Soon they were selling their bodies as well, and bringing home large sums of money. The news of this enterprise spread among friends and as many as 70 women began boarding the bus each week. This was voluntary prostitution and the women were able to return home at will. Although, given the opportunism of organised crime it is likely that the prostitution later became more organized, more exploitative and more coercive, but this was not the case at the outset. See Williams, P.: *Trafficking in Women: The Role of Transnational Organised Crime*, in Cameron, S. and Newman, E. (Eds.): *Trafficking in Human – social, cultural and political dimensions*, p 129

¹⁷⁵ Jordan, A.D.: op.cit p 11

¹⁷⁶ UNODC: *Toolkit to Combat Trafficking in Persons*, 2008, p 7

and harbouring. The District Court found that the injured party had known about prostitution when she arrived in Finland, and the criteria of deception concerning the nature of the work in Finland was not fulfilled. The District Court pointed out, however, that the deception does not need to concern the quality of work. This is why it examined the promises of moving on to Sweden made by the defendants and considered that they had deceived the injured party to the extent that the injured party had been persuaded to continue in prostitution by making deceitful promises to her. The District Court considered this exploitation of deception as tempting, by means of which the defendants persuaded the injured party to continue in prostitution, and took this into account as a matter that increased the sentence for the procuring offence. In this connection, the National Rapporteur on Trafficking in Human Beings rightly pointed out in her report from 2010 that under the penal provision on human trafficking, abusing a mistake made by another person also meets the criteria for the means required in this provision.¹⁷⁷

The District Court further assessed the injured party's dependent status on the defendants by focusing attention on the fact that her freedom of mobility had not been restricted, nor did she have to comply with all the requests of the customers. As to the injured party's vulnerable state, the District Court examined it based on her intellectual capacity. As the injured party had taken the matriculation examination, knew at least some English, and had been able to set up web pages, according to the District Court the injured party was not helpless in a sense that left her no option to act differently. The injured party's story and witness accounts would, however, have also made it possible to look at the dependent status or vulnerable state from another perspective. According to Government proposal 34/2004, the dependent status may be caused by family relationships. The injured party had previously had a relationship with one of the defendants. Based on international experience, the so-called "lover boy" also referred to above especially in Dutch case-law recruitment method is frequently used in human trafficking. An intimate relationship entices the victim to trust the exploiter. The victim is not prepared for the idea of the person he or she loves trying to exploit him or her. When the victim understands he or she has been deceived, the trauma caused by the betrayal may be deep. Leaving this type of exploitation may also be more difficult because of the relationship between the victim and the perpetrator. According to Government proposal 34/2004, the vulnerable state may refer to the victim's age, characteristics, financial, social, or psychological situation or previous experiences, which may expose him or her to exploitation by the perpetrator. When assessing the injured party's vulnerable state, however, the District Court failed to pay attention to the assessments of psychiatrists heard as experts in court, according to which the injured party was exposed to exploitation because of her development and previous experiences. Exploitation of the injured party's vulnerable state was also indicated by the fact that even before her arrival in Finland, the defendants had rendered the injured party to a poor financial situation. On request of one of the defendants, the injured party had taken fast loans, which the defendant had failed to pay back to the injured party. Because of her psychological characteristics and experiences of exploitation, the injured party was also unable to leave prostitution after the defendants had left Finland. The police officer heard as a witness in court reported that the injured party could not have left prostitution on her own initiative, as she was trapped in her situation. The hearings of those accused of the offence of abuse of a victim of prostitution also supported the idea that the injured party was not happy to work in prostitution. They described the injured party as passive, absent, and reserved, thus differing from women who usually sell sexual services. In some of those heard, the injured party's behaviour had raised suspicions of whether the injured party was involved in prostitution on a voluntary basis. In its decision, the District Court attributed significant importance to whether the injured party had understood that the purpose of the journey was to come and sell sexual services in Finland.

The prosecutor appealed the District Court decision to the Court of Appeal, which finally sentenced the defendants for trafficking in human beings (Helsinki District Court R 06/385, 29.12.2009). In its

¹⁷⁷ The Finnish National Rapporteur on Trafficking in Human Beings Report 2010: op.cit, p 119

decision, the Court of Appeal dissociates itself from the original voluntariness (awareness of the nature of the work) and its significance when applying and interpreting the penal provisions on trafficking in human beings. The Court of Appeal looked at all the contributing factors to the human trafficking offence separately: acts, manners, and means. In its decision, the Court of Appeal considered that the defendants had recruited or tempted the injured party to engage in an activity, the purpose of which was to compel her to have sexual intercourse for money. The Court of Appeal considered that another manner of committing an offence of human trafficking, or harbouring, was also fulfilled, as the defendant had reserved hotel rooms and flats for the purpose of accommodation, in which the injured party had also received customers and sold sexual services to them.

Regarding the means, the Court of Appeal found that the defendants had subjected the injured party to sexual abuse by using her *vulnerable state and dependent status*. The criteria for vulnerable state and dependent status were met in the means, because the injured party was, due to her lack of language skills and safety network (no support persons), her indebtedness and the resulting poor financial standing, and psychological properties so helpless that she had no other real and actual option than to submit to continuing the selling of sexual services. In its decision, the Court of Appeal also notes that the defendants must have observed a particular vulnerability to exploitation in the injured party, and their act was thus intentional. The Court of Appeal considers relevant the fact that the injured party was easily led and guided (indebtedness), the injured party did not have adequate linguistic skills to make her way around the city, she did not feel she could return to Estonia after her family members had heard about her engagement in prostitution, and after the defendants left Finland, she had been forced by the circumstances to continue in prostitution to be able to make a living. Finally, the injured party was in a mental state that made it impossible for her to leave prostitution on her own initiative. The Court of Appeal accepted the injured party's claim for compensation, as it considered that the injured party's post-traumatic stress reaction was caused by the prostitution in which the defendants had compelled the injured party to engage. The decision of the Court of Appeal illuminates the meaning of the difficult-to-apply concepts of vulnerable state and dependent status in a manner that broadens the relatively restricted idea of trafficking in human beings and a victim of human trafficking prevalent in Finland. In its decision and statement of reasons, the Court of Appeal distances itself from the relevance of original voluntariness and pays attention to the experiences and individual characteristics of the person subjected to sexual abuse, which may make him or her vulnerable to exploitation and make it difficult or impossible for the victim to leave the exploitative situation. The court cites certain factors that indicate helplessness, which also makes this decision a significant standard for the future application and interpretations of the provisions on trafficking in human beings. The Court of Appeal reinforces the perpetrators' responsibility for their actions, and refocuses attention away from the victim's possible motives, original voluntariness, sufficient resistance, or unawareness of the nature of the work promised to him or her in the country of destination. Based on this decision by the Court of Appeal, the case may also constitute trafficking in human beings when the perpetrators have not resorted to the most extreme means of committing human trafficking, such as coercion by violence or deceitfulness.¹⁷⁸

In a case of human trafficking related to labour exploitation (*Vantaa Court of Appeal R 07/1363, 13.7.2007*) two men who were Finnish citizens but of an Indian background were accused of aggravated trafficking in human beings. They had arranged for the arrival of an Indian man in Finland with the intention of making him work in market trade and in a restaurant without pay. The injured party had arrived in Finland on a tourist visa and paid the defendants a considerable sum of money for his travel arrangements. After his arrival in Finland, the injured party had been accommodated in a flat arranged for him by the defendants and started working in the jobs they assigned to him. At times he had also lived at his place of work. The defendants had taken possession of the injured party's passport, directed him to seek asylum in Finland under a false name, assisted him in leaving the

¹⁷⁸ The Finnish National Rapporteur on Trafficking in Human Beings Report 2010: op.cit p 121

reception centre and collected a fee for this assistance, tried to arrange for the injured party's marriage with a Finnish woman, and threatened him with violence in the event that he sought help from the authorities. The threats had been reiterated when the injured party had demanded the return of his passport. The injured party had worked in the defendants' various business enterprises from summer 2005 until autumn 2006, but claimed he had received no wages for his work. After the authorities started investigating a suspected human trafficking offence in early 2007, however, a sum of money had been paid to the injured party's parents in India. The pre-trial investigation sought to establish whether the injured party had known what he would do and what his wages would be for the work in Finland, and how active a role he had himself played in the activities. The pre-trial investigation authorities were interested in knowing if he had wanted to come to Finland and if he had contacted the defendants while he was in the reception centre. The pre-trial investigation concluded that the statutory definition of human trafficking had been fulfilled, as the defendants were considered to have deceived the injured party as to the wages, and this deception was considered to put the injured party in a dependent status in terms of the defendants. The injured party's freedom of movement had been restricted by taking possession of his passport, and he had been threatened with violence.¹⁷⁹ It was

¹⁷⁹ Examples of exploitation of immigrants in Portugal (Example from Pereira, S. and Vasconcelos, J.: Human Trafficking and Forced Labour - Case studies and responses from Portugal, International Labour Office, Geneva, 2008) show that they were victims of organised crime as well as targets for exploitation by employers. The former involved practices such as extortion and induced indebtedness, retention of documents, physical violence, and control of movement. But exploitation was also less "drastic". In the construction sector: Exploitation by employers consisted of situations involving: Irregularities in payment of wages: non-payment (there are several cases in which sub-contractors filed for bankruptcy and failed to pay their workers); delayed payment (contractors often only pay their workers when the job has been finished which means that workers in remote locations have no means of leaving the place); unequal pay (e.g. in 2000/2001, an Eastern European immigrant, working 13-14 hours per day including weekends was paid €400 to €450 per month while a Portuguese worker earned around €1,000); Non-payment or only partial payment of social security contributions: in many cases employers trick their workers by saying that they are paying their contributions while paying only a few days per month (this also applies to Portuguese workers, but is worse for immigrants as it has implications for renewal of their visas); Provision of an employment contract only against payment or false promises about the terms and conditions of employment. An employment contract is essential for an immigrant worker to obtain or renew her/his visa or stay permit; Prolonged working hours without payment of overtime; Arbitrary dismissal without payment of compensation and outstanding wages – workers, including Portuguese workers, are sometimes fired when the job is almost finished and are not paid their wages or given any reason for their dismissal. In such cases, the recovery of wages and compensation owed is hampered by the absence of a contract. Non-compliance with health and safety regulations, including no industrial accident insurance. The occupational hazards to which immigrant workers, particularly Eastern Europeans, are exposed are greater because they are unfamiliar with construction work and the safety precautions that should be taken. Besides, they are often made to carry out the most dangerous tasks; There are reports of workers being physically assaulted or fearing physical assault. For instance, in the case of immigrants from Eastern Europe who were not familiar with the work, language difficulties gave rise to situations in which they were ill treated by their supervisor; Threats of being reported to the authorities (irregular status); Some employers confiscate employees' identity documents on the pretext of legalising their situation. As a result, employees are at the mercy of their employer

Domestic sector: Non-payment of wages: In cases where the employer stops paying the wages of the household employee and refuses to allow her to enter the home, it is often hard to recover outstanding wages. There is no employment contract and wages are often paid in cash, making it very hard to prove the existence of an employment relationship; Absence of a contract: When domestic workers are employed by an agency they generally have a contract, but those employed in private homes often do not have one. There are cases in which women immigrants have signed employment contracts that they do not understand. These often stipulate wage rates that are below what has been agreed verbally, or even provide for non-payment of wages. In other cases, where there is a valid contract it is not adhered to. In some urban cleaning firms, for example, there are collective contracts that provide for the transfer of workers from one firm to another, according to the needs of the firms. Despite this, employees are often dismissed when a contract with the client ends. Immigrant workers are usually given the worst working hours, those that no one else wants, but which they agree to because they have no other alternative. They work, for example, three hours in the morning, and possibly a further three hours in the afternoon, with a different contract for each period. These irregular working hours make life particularly complicated for single because arranging childcare is not easy. The short hours also mean that they often earn less than €180 a month. In the case of live-in domestic employees, there are no fixed working hours and they can be on call almost 24-hours a day. Indeed the employer's family assumes that they should be available day and night, depriving them of freedom, privacy, or social life. Cases in which women, especially live-in domestic employees and those repressed by their husbands or partners, were working in situations that could be considered forced labour. These situations included

considered that of the ways of committing a human trafficking offence, recruitment, transport, and harbouring had been fulfilled. As to the purpose, it was considered obvious that the defendants had arranged for the arrival of the injured party in Finland to obtain labour that was practically free. In the pre-trial investigation, it was considered that the injured party was rendered into demeaning circumstances and forced labour, or at least into circumstances where he had to make his living by criminal means or illegal work. The aggravated manner of committing a human trafficking offence was considered having been fulfilled, because the injured party had been threatened with violence and because the act was committed as part of the activities of an organised crime group.

Unlike cases of human trafficking associated with prostitution, no attention was paid in the pre-trial investigation to whether the injured party had been working against his will or why he had not left the exploitative situation. Neither was the injured party asked how the defendants had compelled him to act in a situation that went against his wishes. As sufficient evidence was considered the fact that no wages had been paid to him, his freedom of movement had been restricted by taking his passport, and he had been threatened with violence. This is quite remarkable considering the cases above where threats of violence and working conditions seemed not to suffice to create a situation of vulnerability in cases of sexual exploitation. It is especially remarkable since he tendency not to consider exploitation or rather to look at work as exploitation per se without too many questions asked is usually in cases of sexual exploitation not vice versa.

When the court assessed the fulfilment of the penal provisions on trafficking in human beings, on the other hand, based on its decision, it seemed to also consider relevant the fact that he had originally left his home country on a voluntary basis.

In the District Court, the accounts given by both the injured party and the witnesses changed and were partly toned down compared to what had been said during the pre-trial investigation. Charges of aggravated trafficking in human beings were accordingly rejected, and one of the defendants was sentenced for facilitation of irregular entry. It also transpired that shortly before the court hearing, the parents of the defendant had visited the parents of the injured party in India and “settled the matter”. According to the court, it was obvious that the injured party had left his home country on his free will, but the court considered it had not been proven that the injured party had been deceived by promising him paid employment in Finland. The court stated that it had also not been proven that the injured party had been coerced to work. The threats that were mentioned were not, according to the District Court, in any way relevant to working, and consequently the activities cannot be said to meet the criteria of forced labour. On the other hand, the court found it evident that the defendants had assisted the injured party in obtaining a tourist visa, while they knew his intention was to stay in Finland. As the reported information thus was partly untrue, one of the defendants was found guilty of facilitation of illegal entry. The prosecutor did not appeal the District Court decision. The decision is not legally invalid but can be subject to criticism (immediately below).

The National Rapporteur on Trafficking in Human Beings commented on the procedure and decision noticing that the procedure followed by the authorities were both justified and appropriate: the injured party was granted a reflection period and he was referred to the system for victim assistance in an early phase, and the pre-trial investigation authorities and the prosecutor genuinely reflected on the possibility of human trafficking in the case from various angles. The authorities could not anticipate that the injured party’s report would change so crucially in court. As this was the first case of human trafficking for labour, it might have been appropriate to also examine the exploitation

(Contd.) _____

such practices as retention of passports, often on the pretext that it was necessary for the legalisation process, confinement at the workplace, and control over contacts with the outside world. Long working hours of up to 60 to 70 hours per week, sometimes more: Workers often only have one day off a week, and have to work on national holidays without being paid overtime for doing so. This was one of the most common complaints of the immigrant workers interviewed; Payment of wages at a rate that is less than the rate stipulated in the collective bargaining agreement. There is, however, a difference of opinion regarding this practice. The absence of a written contract of employment for foreign workers is common, even if employers are making the required Social Security contributions.

as discrimination at work tantamount to extortion, which could have induced the court to consider the potential exploitative situation in a more versatile manner. As the subject of facilitation of illegal entry does not have the position of an injured party, and he or she is in other words not regarded as a victim of an offence, the decisions of the pre-trial investigation authorities may have a significant impact on whether the person is allowed to stay in the system for victim assistance and/or whether he or she is issued a residence permit or removed from the country.¹⁸⁰

In accordance with definitions under international law or criminal provisions on trafficking in human beings in the Finnish Criminal Code, the victim's consent is irrelevant to the fulfilment of the definitions if one of the means mentioned in the definitions is used to obtain it. Deception, for example, is not required in order for the act to fulfil the definition of human trafficking, and human trafficking may also be involved when the dependent status or vulnerable state of the victim has been abused. These means actually had been resorted to in this case. Furthermore labour exploitation should be assessed in light of the national labour law and collective agreements: the victim's happiness about or consent to working on certain conditions or in certain circumstances should be irrelevant, even if the victim disagreed. Ensuring the employees' equality also protects more general interests in the national labour market.

The Palermo Protocol does not define any of the mentioned forms of exploitation related to forced labour. But a definition for each of them can be found in the relevant international convention. Article 2, paragraph 1 of ILO Forced Labour Convention, 1930 (No. 29) defines forced 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*". States Parties ratifying this Convention are also committed to ensuring that the illegal exaction of forced labour is a punishable penal offence under national legislation. The concept of forced labour as defined by ILO Convention 29¹⁸¹ comprises three basic elements:

- a. the activity exacted must be in the form of work or service;¹⁸²
- b. the menace of a penalty used to exact the work or service can take different forms, including the loss of rights and privileges. The ILO identified a number of practices that constitute such penalties and might be indicators of forced labour situations. These include: *Physical or sexual violence against the worker, his/her family or close associates; Restriction of the worker's movement; Debt bondage or bonded labour; Withholding wages, non-payment of wages or illegal wage deductions; Retention of identity documents; Threat of denunciation to the authorities and of deportation*. Most of these practices are, in themselves, crimes provided for under States' legal systems. However, the imposition of forced labour, which can include one or more of the above practices, is of a different order, with a scope of application that is not exactly the same.
- c. it is undertaken involuntarily by the victim. This aspect includes situations in which there was initial willingness on the part of the victim, but where external constraints and coercion come into play at a later stage and the victim is no longer free to withdraw his/her consent¹⁸³

¹⁸⁰ The Finnish National Rapporteur on Trafficking in Human Beings Report 2010: op.cit. , p 139

¹⁸¹ Supplemented by the ILO Abolition of Forced Labour Convention, 1957 (No. 105), which does not change the concept of forced labour provided by Convention 29. ILO Convention 182, 1999, seeks to secure the prohibition and elimination of the worst forms of child labour, including trafficking of children.

¹⁸² ILO Convention 29 excludes from its sphere of application a number of activities, including work exacted in virtue of compulsory military service, and any work or service exacted as a result of a conviction in a court of law, provided it is supervised by a public authority.

¹⁸³ Pereira, S. and Vasconcelos, J.: Human Trafficking and Forced Labour - Case studies and responses from Portugal, International Labour Office, Geneva, 2008, p 10

According to the ILO Guidelines on Human Trafficking and Forced Labour Exploitation legislatures and law enforcement have to take into account that the seemingly “voluntary offer” of a worker / victim may have been manipulated or was not based on an informed decision. The ILO notes that a forced labour situation is determined according to the nature of the relationship between a person and an “employer” and not by the type of activity performed. The legality or illegality of the activity under national law is irrelevant to its determination as forced labour.

Penal law often do not place the emphasis on coercion, and often have rather subjective criteria as to what constitutes forced labour. In most cases common sense will show when one human being is exploiting another human being to make unfair profits. It is however important to underline that simply poor working conditions do not alone constitute forced labour, there must be an element of intention to exploit. In the fight against forced and bonded labour, the Protocol enormously useful for the work of ILO since before its adoption the agency looked only on the State and whether the State conducted forced labour – with the Protocol the focus was broadened and so was the understanding of what forced labour is – now it is shown that 80% of forced labour is in the private sector.¹⁸⁴

The Forced Labour Convention No 29, adopted by the International Labour Organization in 1930, defines forced 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 (Article 2). Essential factors as to the definition of forced labour are exacting under the menace of a penalty and lack of consent. The convention excludes five different types of work from forced labour: work exacted in virtue of compulsory military service laws for work of a purely military character; work which forms part of normal civic obligations; work exacted as a consequence of a conviction; work exacted in cases of emergency; and minor communal services in the direct interest of the community. Neither is work related to education and training forced labour. Since the convention was adopted, forced labour has changed in that in its current form, it is not as closely linked to the state, and today it is mostly private persons and companies who are guilty of using forced labour. The menace of a penalty referred to in the definition of forced labour does not only mean consequences under criminal justice. Penalties employed in forced labour may involve all types of physical or sexual violence, restrictions of movement, debt bondage, or bonded labour, for example, by exacting an inflated price for the costs of recruitment and transportation, or by undervaluing the work to the extent that the debt is not reduced in practice, withholding wages or refusing to pay the worker at all until after the work is finished, retention of passports and identity documents, and threat of denunciation to the authorities of an employee illegally resident in the country, which is compared to blackmail. Debt bondage, on the other hand, may be involved when the employee is partly or exclusively working to pay off the debt incurred because the employer undervalues the work or provides accommodation for the employee at an inflated price. The debt may also be incurred during the process of recruitment or transport, in which case it may affect the degree of freedom of the employment relationship in the final stage. In addition to the actual act of consent, looking at forced labour from the perspective of lack of consent highlights the influence of external circumstances on the validity of the consent and the possibility of revoking the consent at any time. In that case, circumstances with a physical or psychological influence that prevent the victim from leaving a situation involving exploitation will also be taken into consideration. Deception and deceitful promises as well as taking possession of identity documents may be indications of forced labour. Work may also turn into forced labour if the employee is not allowed to leave the employment relationship. When assessing the validity of the victim’s consent, attention should be paid to the circumstances in which the person works, as well as to each act or measure to which the employee is subjected. The victim’s vulnerability must be taken into account when applying the definition of forced labour. In its judgment in the case of *Van der Müsselle v. Belgium*, the European Court of Human Rights stated that when determining whether the case falls

¹⁸⁴ Plant, R.: the Labour Dimension of Human Trafficking. Alliance against trafficking in persons, Vienna, ILO, 2004

within the definition of forced labour, only a relative weight should be attributed to the victim's prior consent. The validity of the consent should be looked at in the light of all circumstances of the case.

In many cases concerning discrimination at work tantamount to extortion, national courts have also considered that the satisfaction of the employees with their conditions of employment and working conditions does not eliminate the punishable nature of the offence. Even if the injured parties had not felt that their rights had been violated, courts have considered that the cases also involved a general interest of the society and general law abidance: the employees must be treated equally, and the employees' ignorance of their rights due to being foreigners must not be exploited. In their decisions, courts may also have highlighted the need to protect working life at a general level and to prevent certain employers from obtaining an unfair competitive advantage over others. The International Labour Organization outlines the elements of the definition of forced labour as follows: **Lack of consent to (involuntary nature of) work (the "route into" forced labour); Menace of a penalty (the means of keeping someone in forced labour); Actual presence or credible threat of:** Birth/descent into "slave" or bonded status Physical violence against worker or family or close associates; Physical abduction or kidnapping Sexual violence; Sale of person into the ownership of another (Threat of) supernatural retaliation; Physical confinement in the work location – in prison or in private detention; Imprisonment or other physical confinement; Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance; Financial penalties; Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.); Denunciation to authorities (police, immigration, etc.) and deportation; Deception or false promises about types and terms of work; Dismissal from current employment; Withholding and non-payment of wages; Exclusion from future employment; Retention of identity documents or other valuable personal possessions; Exclusion from community and social life; Removal of rights or privileges; Deprivation of food, shelter or other necessities; Shift to even worse working conditions; Loss of social status.

It is especially important to note that traffickers cannot circumvent the definition of trafficking by paying the victim a small sum or by giving certain benefits or by engaging the person in legal activities if otherwise some of the conditions of forced labour are present – e.g. if the person does not have his/hers identity documents or is being threatened with denunciation to immigration authorities etc. The fact that the victim is not in a slavery-like condition but does have a slightly better standard of living does not mean that forced labour/exploitation/trafficking is not taking place and cannot be prosecuted and proved.¹⁸⁵

Trafficking violates the most basic rights of any person in relation to a work situation – the freedom from coercion at work, the freedom to set up associations and bargain collectively, and the freedom from discrimination at work. Further trafficking of children has been defined by the ILO as one of the worst forms of child labour, which seriously harms the development of the child. These four core principles are enshrined in the ILO Declaration on Fundamental Principles and Rights at Work that was adopted by ILO members in 1998. The Declaration is based on eight core Conventions, two of which are most closely related to the Palermo Protocol (No. 29 on Forced Labour and No. 182 on the Worst Forms of Child Labour). They are also among the most widely ratified Conventions of the ILO. The principles have to be respected and promoted by all member States even if they have not ratified the respective conventions. The States which ratify Convention No. 29 undertake "to suppress the use of forced labour or compulsory labour in all its forms within the shortest possible period" (Art.1, para. 1, of the Convention). The States Parties to the Convention must ensure that "the illegal exaction of forced or compulsory labour shall be punishable as a penal offence" and "that the penalties imposed by law are really adequate and are strictly enforced" (Art. 25 of the Convention). Convention

¹⁸⁵ See Touzenis, K.: Op.cit

No. 182 requires that each ratifying State take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.¹⁸⁶

It has been argued that trafficking is fundamentally a labour market problem.¹⁸⁷ This is most certainly a big part of the problem and underestimating the positive effect it could have to focus on labour market regulations and respect for labour rights is very grave. But it is obviously only part of the problem and the solution.

Respecting labour rights is an often, if not overlooked at least diminished, part of fighting trafficking. But it is a highly important tool and labour rights, and a promotion of solidarity through unions including with non-nationals, regular or not, will help promote better working conditions for all, less exploitation (and thus less trafficking cases too). What must be underlined is that nobody in the working forces gains from having a certain group left outside the protection of labour laws since it will only create unhealthy competition and lower wages also for nationals in regular employment.

What may prove a challenge is the fact that the victims do not report their experiences of exploitation to the authorities. This is also linked to a tendency to focus on trafficking of women and children, and less on men trafficked for forced labour in certain sectors of the labour market.¹⁸⁸ Apart from conventional conceptions and gender divisions on who are “victims” and who are irregular migrants - women seen as vulnerable, men as active – there are a great number of linked factors which can influence a trafficked male’s perception of his situation and the likelihood of seeking help. Exploitation is a normative aspect of migrant labour and migrant workers may see their trafficking as ill fortune rather than a violation of their human rights. Others may feel that their own participation in the recruitment process disqualifies them as trafficked victims.¹⁸⁹ Being labelled a “victim” may have an impact on how men see themselves, as the term stands in contrast to social norms of men as caretakers of their families. As such, it is not only about what services and interventions are developed but also how these interventions are framed and offered to the target group. This also makes clear the need to better understand and appreciate the gender dimensions of trafficking, both to assess trafficking vulnerabilities and to provide appropriate interventions and assistance.¹⁹⁰

Foreigners residing or working in an unlawful way in the country should not be removed until it has been established individually and with sufficient accuracy that the case does not involve human trafficking or related exploitation. If there are grounds to suspect that a person has been a victim of human trafficking, consequences under criminal and immigration law should be waived. This would also implement the intention of the Council of Europe Convention on Action against Trafficking in Human Beings and in particular its Article 26 (non-punishment provision). Under the non-punishment provision, no penalties should be imposed on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. In addition to any evasion of immigration provisions, attention should be paid to any violations of rights to which an individual may have been subjected.

Exploitation of foreign labour in the construction sector was found in a case of Chinese stone workers, which was heard by the Hämeenlinna District Court in 2004, and later by the Turku Court of

¹⁸⁶ ILO Action Against Trafficking in Human Beings. ILO 2008. p 7

¹⁸⁷ For a good analysis see Plant, R.: Op.cit

¹⁸⁸ See also Touzenis, K. op.cit. It is true that many aspects of trafficking (migration, empowerment, human rights) are to some extent gendered. Economic inequality is often gendered, the majority of the world’s poor are women; industries are gendered, generally women are trafficked into sweatshops, domestic work¹⁸⁸ and prostitution where men are trafficked into agricultural labour and mining; traditional gender roles often impede women’s participation in public and economic life which creates a disadvantage. Trafficking has also supplied domestic workers to destination countries exactly because women in these have moved out into the labour market and now need domestic help.

¹⁸⁹ IOM: Trafficking of men – a trend less considered. . In “A Global Eye on Trafficking”, Issue 1, December 2007, IOM, Geneva, 2007

¹⁹⁰ Ibid.

Appeal (Turku Court of Appeal, R 04/1963, 13.6.2005 and R 06/364, 14.9.2007). The managing director of a stone dressing company was accused of industrial discrimination, giving a false statement, and working hours offence. A total of 12 Chinese stone workers were employed in a stone dressing business, some of them for nearly three years. The Chinese employees were compelled to cut stone in poor conditions for an hourly wage of three Euros. In the court hearing, attention was paid to whether the managing director acted in the role of an employer, even if the employees had been arranged through a Chinese company. Indications of human trafficking in the case included the fact that the Chinese men reported having paid a sum corresponding to about four years' wages to a Chinese employment company to be able to go and work in Finland. As their family members had often helped pay this sum, the persons were in their debt. The Finnish employer was aware of the agreements made with family members as guarantors and the employment company, and the consequences to be expected in China in the event that the employees violated their employment contract. The Chinese workers had had "guarantors", who in a letter of guarantee had committed to financial responsibility on behalf of the employees going to Finland. The employees claimed that the employer had directly or indirectly threatened them with consequences to the injured parties. Because of their brokerage agreements, the workers were defenceless, and they had no real possibility of leaving their work. The employment contract prohibited the employees from changing jobs or telling anybody about their working conditions. The injured parties reported that their passports had been taken as soon as they arrived in the country. They were subjected to miserable working conditions. Seven of them lived together in a small, 30-square metre flat. One of the injured parties had broken a bone in his arm as a result of an accident, but after a visit to the hospital, he had been brought back to work. What put the workers in an even more vulnerable position was that the Chinese authorities were in some way involved in the case. The case would thus evidently have met at least the definition of discrimination at work tantamount to extortion, if the penal provision had been in force at the time the offence was committed. The offence would probably also have met the definition of a human trafficking offence if the provisions on human trafficking had been in force at the time the offence was committed. In 2008, a case was heard by the Helsinki Court of Appeal where a company, specialising in work practice and exchange programmes, as well as its employers individually, were found guilty of discrimination at work tantamount to extortion (Helsinki Court of Appeal R 07/92, 29.5.2008. See also the District Court decision on the case 06/2381, 22.11.2006). In this case, a company specialising in work practice opportunities had lured Bulgarian, Latvian, and Polish students to summer jobs supposedly relevant to their field of study in Finland in 2004. The students ended up doing underpaid work with inadequate equipment on construction sites, in the food industry, and other sectors that were not associated with their fields of study. The employees were compelled to work long hours, and the employment company failed to organise the language studies or cultural programme that it had promised. The students reported having paid more than EUR 1000 for the brokerage service and their travel costs, and they had been promised earnings of EUR 1000-2000, while in fact their wages were only about EUR 500 per month. The students said they had borrowed money from family members to pay for their trip. Some of them said they could not stop working in Finland because they had paid so much for the travel arrangements and owed money to their families. The pre-trial investigation also uncovered threats against the students' families and promises of work permits in case the employers were satisfied with their work performance.

In the restaurant sector, the problems have primarily concerned the payment of wages, excessively long working hours, and organisation of occupational health care. One case (Savonlinna District Court R 08/206, 20.2.2009 and R 08/206, 29.1.2009) showed clear indications of human trafficking. The pre-trial investigation revealed that a couple who were originally from China but were Finnish nationals had for ten years employed Chinese persons in a restaurant they owned. The employers underpaid their employees, compelled them to work for up to 24 hours at a time, and controlled the employees during their time off. The pre-trial investigation also revealed that the employers had not approved of their employees interacting with Finnish people or studying Finnish. Some of the employees were forced to live in a small room in the employers' tofu factory, which contained hot steam and windows that could not be opened. The employees had their meals in the restaurant, but their diet was limited. The pre-trial

investigation established that the employees had no access to the account into which their wages should have been paid without the employers' permission. The employees' work and residence permits were tied to the restaurant. The employees had no acquaintances in Finland, they could not speak Finnish, and they did not have enough money to return to China. The employees were dependent on the employers, and they had no real possibility of leaving work. In the pre-trial investigation, the case was investigated as human trafficking, but the prosecutor brought charges of discrimination at work tantamount to extortion against the employers, for which they were also sentenced. The court confirmed an agreement under which the employers committed to paying the employees considerable compensations as outstanding wages. A similar case of discrimination at work tantamount to extortion was heard by the Helsinki District Court in 2008 (Helsinki Court of Appeal R 08/3476, 13.10.2008). According to the charges, three injured parties had worked in a pizzeria owned by an employer of the same nationality for six Euros per hour. The District Court found, however, that the offence for which charges had been brought was not proven, as the injured parties told the court that they had assisted the defendant in starting a business and had mutually agreed on the arrangements. Neither did they claim compensation. The court regarded this as an indication that the injured parties had not been put in an unfavourable position because of their nationality, and consequently the definition of discrimination at work tantamount to extortion was not fulfilled.

In the Hyvinkää District Court, a case was heard in 2008 where the managing director and board chairperson of a horticultural company were sentenced for industrial discrimination and a working hours' offence (Hyvinkää District Court R 08/417, 21.11.2008). The District Court considered that the defendants had abused their Estonian employees' willingness to work and ignorance of their rights by failing to pay them the statutory compensation for overtime, Sunday work, and breach of the weekly rest period. All the injured parties said that they had themselves been willing to work more to increase their earnings and that they had been ignorant of their right to overtime pay and other compensation. According to the District Court, however, the employer cannot let an employee work overtime without paying a special compensation, not even at the request of the employee. This is akin to the fact that, as mentioned above, the legal question of whether a particular victim had the capacity to consent to recruitment or subsequent treatment in national law. Under article 3, subparagraph (c), of the Trafficking in Persons Protocol, consent and the presence or absence of improper means of trafficking become completely irrelevant if the victim is a child under 18 years of age, and under the national laws of many States parties, the capacity to consent, especially to sexual activity, may be even further restricted.¹⁹¹ Real consent is only possible and legally recognisable, when all the relevant facts are known and a person is free to consent or not. Moreover, one *cannot legally consent to forced labour, slavery or practices similar to slavery or servitude*.¹⁹² That national law takes such a protection significantly further and disallows consent to work without payment for overtime is obviously within national jurisdiction and sovereignty and as long as applied with common sense and for the protection of the worker can only be seen as a victory for labour rights. Consequently, the District Court considered that the defendants had put the Estonian workers in an unequal position compared to the Finnish employees of the company, who had been working on a monthly salary and who worked 5-day weeks and no more than 8-hour days. In addition, a case was heard in the Vaasa District Court in which the managing director of a vegetable company was sentenced for industrial discrimination against his Thai employees (Vaasa District Court R 08/791, 29.10.2009). The defendant had recruited the employees through family members and acquaintances of his wife and her mother, and he had not concluded employment contracts in writing with the injured parties. The employees reported that he had compelled them to work excessively long days and weeks without specific compensation, taken possession of their bank cards and PIN numbers, and collected payments for their accommodation and food from the employees' accounts without their knowledge. Even if their monthly working time

¹⁹¹ UNODC: Toolkit to Combat Trafficking in Person. 2006. p xvii

¹⁹² UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 023 Workshop: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation. p 5

could amount to 260 hours, the employees always received the same net salary of Euro 250. Some of the injured parties also reported that the defendant had not allowed them to return to their home country before signing an agreement where they declared that they had no claims exceeding Euro 200-250, as the defendant paid for their accommodation, food, and other costs. The injured parties included persons who came to work in Finland for the second time, as they or their family members owed money to the defendant after working in Finland for the first time, and they now had to pay back the debt by working. The District Court sentenced the defendant for industrial discrimination.

Final Remarks

In certain national systems problems seem to arise from determining what kind of exploitation should be regarded as “serious enough” to fulfil the definition of human trafficking (see Finnish National Rapporteur’s Report from 2010 op.cit. which mentions that “the uncertainty on this point is specifically associated with the interpretation of forced labour, and Finland does not seem to be the only country facing this problem.”). The Finnish Report states that “drawing the line between human trafficking for labour and discrimination at work tantamount to extortion is unlikely to arise in the most aggravated cases involving violent recruitment and coercing the victim to work in conditions resembling slavery. Neither are problems caused by the milder cases, such as those in which overtime pay of a foreign worker is neglected. The most challenging questions of drawing the line are likely to be associated with situations where the exploitation is somewhere between these two extremes.”¹⁹³

It is however important to note that in order for a crime to “qualify” as trafficking is not a question – or not only a question – of the degree of exploitation. Once it has been established that a degree of exploitation is present other factors come into play (and it would be opportune here to recall that exploitation will in all cases be subject to labour law sanctions and in many to criminal law sanctions). As can be clearly seen from the above national examples, no matter how much national systems may vary on e.g. sentencing the influence of international standards is – fortunately – clear. All systems try in one way or another to determine how “vulnerable” or how “dependent” the alleged victim was and uses the means of recruitment and of maintaining control as criteria to determine these factors. Physical violence and threats of such – but also mental coercion, external factors of vulnerability and personal criteria such as age and mental capacity are considered.

Trafficking in modern times is commonly regarded as a “contemporary” form of slavery. The term denotes that it is different from the traditional forms of slavery with a set of characteristics that sets it apart from this latter. For instance legal ownership of people is not a defining attribute under contemporary form of slavery.¹⁹⁴ Contemporary forms of slavery are also less permanent, in addition racial bias is not the key justification for enslavement, where “ethnic and racial” differences were used in the past to explain and excuse slavery the profit to be made from slavery and the slave trade has become a more important consideration in modern times.¹⁹⁵

The relationship between trafficking and slavery/enslavement is critical. While it may be easy to treat these two acts synonymously, trafficking and slavery are not necessarily the same. The key element of slavery as stipulated in the Slavery Convention is the right of ownership. In the context of trafficking of human beings subsequent exploitation can effectively amount to slavery because the right of ownership is fully exercised and retained when people are exploited.¹⁹⁶ But not only slavery-like exploitation amounts to trafficking.

¹⁹³ The Finnish National Rapporteur on Trafficking in Human Beings Report 2010, op.cit. p 149

¹⁹⁴ Bales, K.: *New Slavery: A Reference Handbook*, p 9

¹⁹⁵ Obokata, T.: Op.cit. p 18

¹⁹⁶ Ibid. p 19

In *Prosecutor v. Kunarac*¹⁹⁷ the ICTY elaborated on the meaning of slavery and enslavement noting that a mere ability, among others, to buy, sell or trade people, although an important factor to be taken into consideration, is in itself insufficient in determining whether or not the enslavement is committed.¹⁹⁸ Trafficking may then be treated as slavery simultaneously mainly when people are exploited afterwards by the traffickers themselves – or the same organisation – as this ensures the continuous exercise of the right of ownership.¹⁹⁹ The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.²⁰⁰

As mentioned above, the absence of slavery does not create an absence of trafficking, since exploitation may well take place outside slavery like situations. It may seem evident but too often the mistake is made that exploitation below the threshold of slavery excludes that the crime of trafficking has been taking place or effectively equalling trafficking with slavery which is extremely incorrect and would exclude many cases which actually are clear trafficking cases.²⁰¹

Taking advantage of more than a decade of experience in identifying and prosecuting trafficking cases it can be noted that proper identification of trafficked victims can be broken down into four stages and can be applied to both adult and child victims of trafficking. The four stages include; i) initial identification to assess if one or more indicators of human trafficking is present, ii) enquiries to corroborate these indicators, iii) further action which may include offering victims access to recovery and support services, evidential interviews or arrest and iv) active review of the action to establish that the indicators are corroborated further or to assess if further indicators of trafficking are present.²⁰²

UNODC proposes a standard checklist (obviously cases are not all alike – quite the contrary – so the list can be seen as a guideline and tool not a foolproof instrument). 1. Demographics (sex, current age, age at departure, education, occupation, nationality). 2. Does the victim possess false documents? 3. Does the victim allege kidnapping or admit travelling voluntarily? 4. Did the victim approach the offender or vice versa? 5. Was payment made to the victim or the victim's family? 6. Was payment made prior to departure or has debt or debt bondage occurred? 7. Did the victim make any payment to the offender? 8. Does the victim allege deception or violence on recruitment? 9. Does the victim allege exploitation or violence at the place of reception? 10. Was the victim involved in illegal activities at the place of reception? 11. Were other victims involved in the same recruitment, transport and exploitation? *Offender* 1. Demographics (sex, age, nationality/ethnic background, profession, education). 2. Is the offender integrated in the community of recruitment? 3. Does the offender have a criminal background? 4. Is the offender suspected of or have convictions for trafficking? 5. Is there evidence of involvement in a criminal organization? 6. Is there evidence of contact or involvement with corrupt officials? 7. Were false documents provided to the victim? 8. Was a recognized trafficking transit route used? 9. Were non-standard transport modes used? 10. Were safe houses used? 11. Were documents withheld from the victim? *Other* 1. How was contact made? 2. Through whom was recruitment made? 3. If deception is alleged, what was the nature of the deception? 4. If violence is alleged, was the violence actual or threatened? 5. Was the violence against the victim or the victim's family? 6. If false documents were used, what documents were falsified? 7. How long was the victim abroad? 8. Were other suspects involved in recruitment, transport, transit or reception?

¹⁹⁷ *Prosecutor v. Kunarac*, IT-96-23, Trial Judgment, 22 Feb. 2001

¹⁹⁸ *Kunarac*, para 543

¹⁹⁹ Obokata, T.: *Op.cit* p 20

²⁰⁰ *Kunarac*, para 542

²⁰¹ See Touzenis, K. *Op.cit*

²⁰² See UNGIFT: The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper. 006 Workshop: Criminal Justice Responses to Human Trafficking

The Council of Europe Convention Against Trafficking in its Article 10²⁰³ is devoted to the identification process and call upon countries not to remove victims of trafficking from their territories until the identification process is complete. The United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, Guideline 2 on identification of trafficked persons and traffickers underlines that trafficking means much more than the organized movement of persons for profit. The critical *additional* factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process –such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place. States are also obliged to exercise due diligence in identifying traffickers, including those who are involved in controlling and exploiting trafficked persons.²⁰⁴

Schematically it may be possible to distinguish between:

- a. the pre-exploitation phase (recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person – or even trading with at the least intended criminal gain
- b. the exploitation phase (at a minimum, forced or compulsory labour or services, slavery or practices similar to slavery or servitude imposed by a non-State actor) with 1) actual criminal gain; 2) Working conditions violating labour laws and/or rights

²⁰³ 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 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.

²⁰⁴ Guideline 2: States and, where applicable, intergovernmental and non-governmental organizations, should consider: Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

Trading of persons as an action of human trafficking may take place during the pre-exploitation phase (selling and buying), but also during the exploitation phase (for instance, when a victim is resold as found in above UK case law). The trading in persons can involve the intention to subsequently exploit, and the actual exploitation of that person by appropriating that person's labour, possibly after trading someone. A person caught at the border, for instance, can only be found a trafficker when there is an indication of intention to exploit another person's labour (notwithstanding that it may constitute human smuggling). However, cross-border transport of the trafficked person is not required. Lastly, trading is an indicative of human trafficking, but a necessary requisite for the worst type of forced labour: slavery.

"Gain" is included in Dutch legislation, and Belgian and Dutch case law seem to require it. Human traffickers aim to obtain, directly or indirectly, a financial or other material benefit and do so through exploitation. This indicates the intended and actual gain in the separate phases of pre exploitation and exploitation. Hence, labour exploitation does not need to have taken place for there to be trafficking; the intention may suffice – this is a basic criminal law concept; attempted murder is a crime because there was intent to commit murder.

When in the exploitation phase, forced labour is defined as labour or services undertaken (i) under the menace of a penalty and (ii) involuntarily. Consent is irrelevant when the means are deployed, because no one consents to being exploited, whether at present or in the foreseeable future.

Because forced labour depends on the character of the work, courts must decide whether a worker's testimony or individual belief that the work was involuntary is sufficient, or whether there should be an objective component to the analysis. Are there objective, externally visible facts that make work into forced labour? What weight should be given to the worker's perspective? In this regard, the decision of the ICTY Trial Chamber in *Prosecutor v. Krnojelac (Prosecutor v. Milorad Krnojelac (Trial Judgement))*, IT-97-25-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 March 2002)²⁰⁵ and the US Supreme Court decision in *US v. Kozminski*²⁰⁶ may give useful pointers – for all domestic and regional systems. Keeping in mind that each individual is different and the pressure or constraint that makes labour 'forced' for one person may not be the same as for another.

It is obvious from cases that forced labour is increasingly viewed not only as a human rights concern which imposes obligations on states, but also as a norm of criminal law, both domestic and

²⁰⁵ The Trial Chamber examined the charges of slavery and enslavement based on the allegation that the detainees were subjected to forced labour. It required that the Prosecution demonstrate that the detainees had no freedom of choice as to whether they would work while detained at the KP Dom. Forced labour was not accepted where the Prosecution relied solely on a subjective belief of a detainee that he had no choice without some factual basis being adduced for that belief or for the belief that he would, by working, be entitled to additional food or to escape from his room for a time. The issue was to establish whether the particular detainee lost his choice to consent or to refuse the work. In considering whether an individual detainee was forced to work, the Trial Chamber regarded the following factors as "relevant: the substantially uncompensated aspect of the labour performed, the vulnerable position in which the detainees found themselves, the allegations that detainees who were unable or unwilling to work were either forced to or put in solitary confinement, claims of longer term consequences of the labour, the fact of detention and the inhumane conditions in the KP Dom.

²⁰⁶ *United States v. Kozminski*, 487 U. S. 931 (1988). After two mentally retarded men were found laboring on respondents' farm in poor health, in squalid conditions, and in relative isolation from the rest of society, respondents were charged with violating 18 U.S.C. § 241 by conspiring to prevent the men from exercising their Thirteenth Amendment right to be free from involuntary servitude, and with violating 18 U.S.C. § 1584 by knowingly holding the men in involuntary servitude. At respondents' trial in Federal District Court, the Government's evidence indicated, *inter alia*, that the two men worked on the farm seven days a week, often 17 hours a day, at first for \$15 per week and eventually for no pay, and that, in addition to actual or threatened physical abuse and a threat to reinstitutionalize one of the men if he did not do as he was told, respondents had used various forms of psychological coercion to keep the men on the farm. The court instructed the jury that, under both statutes, involuntary servitude may include situations involving any "means of compulsion . . . sufficient in kind and degree to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer."

international. Individuals are criminally liable for imposing forced labour, and states have positive obligations to prosecute such crimes.

It should also be underlined that exploitation which does not amount to trafficking because e.g. the criminal organisation is absent – e.g. when a family is exploiting a domestic worker, can still be prosecuted according to national laws, and many human rights obligations would apply also to non-nationals which the State also has an obligation to protect so a number of international obligations would offer protection to such victims. It is always important to remember that the Palermo Protocol does not exist in a void – it is part of an international legal framework which consists of many instruments and many legal “systems” – criminal law, transnational, national, international; labour law, national and international; human rights law.²⁰⁷

Conclusions

The adoption of criminal offences covering the full range of trafficking in persons, as well as organizing, directing and participating as an accomplice in any form of trafficking, is a central and mandatory obligation of all States parties to the Protocol. Similar action must be taken in respect of attempts if that can be done within the basic concepts of the legal system of the country concerned. Liability must extend to both natural and legal persons, although for legal persons it can be criminal, civil or administrative liability. It is particularly important that the meaning of the Protocol, rather than the actual language used, should be reflected in national law. Generally simple incorporation of the definition and criminalization elements into national law will not be sufficient; given the nature and complexity of trafficking and other forms of transnational organized crime.

Belgian case law has given a useful list of indicators (mentioned also above) which to consider when a possible trafficking case is suspected. These indicators clearly reflect what established case law has concluded on what circumstances are to be considered when deciding upon what constitutes exploitation. It was intended as a non-exhaustive list to allow investigators and prosecutors to conclude that a trafficking investigation should be opened:

- working in very poor conditions or for long periods of time
- lack of social protection and benefits
- confiscation of identity papers by the employer
- threats, intimidation, insults and violence towards workers
- lack of sanitation facilities, heating or electricity in workplace
- living and working in the same place
- living in overcrowded and unhygienic places
- lack of a place to eat meals
- no salary, or very low salary
- deductions for equipment, work clothing, food and housing
- unpaid overtime
- debts to employer

As can be seen these criteria are rather objective points on which to pin “conditions incompatible with human dignity” one or, more probable, more of which may be present in each case of probable/alleged trafficking/exploitation. The added “dependency” on the exploiter is important since it may well in certain cases clench the trafficking case as opposed to remaining within the framework “only” on exploitation. Dependency and working conditions are considered together and in most cases

²⁰⁷ See Touzenis, K.: Op.cit

working conditions in themselves will not be enough to convict for trafficking, even if they may constitute basis for a conviction based on national labour law.

Another useful list has been created in Dutch case law where, in examining the facts against the legislative framework, the Courts have taken the following facts and circumstances into account:

- the agreed remuneration (too low in comparison to general Dutch standards);
- very long working days;
- financial dependence;
- confiscation of papers
- confinement (more or less severe);
- lack of any private life;
- the physical violence;

Furthermore case law in the examined national systems with a rather extensive useful jurisprudence all agree on considering the objective criteria of working conditions together with the actual or perceived dependence of the victims and of the victims vulnerability – be that due to external (e.g. economical circumstances or immigration status) circumstances or personal circumstances (e.g. age, mental capability). It is important to note that this dependence and vulnerability is what in many cases have clenched the trafficking case as opposed to being able only to bring to court labour law violations.

The fact that there are very few prosecuted cases of trafficking for labour exploitation in e.g. European destination states²⁰⁸ is related to the difficulties in obtaining the right evidence to prove the

²⁰⁸ See e.g. In OSCE Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification – Prevention – Prosecution Report of the 3rd *Alliance against Trafficking in Persons* Conferences on Human Trafficking for Labour Exploitation/Forced and Bonded Labour. Vienna, 7 and 8 November 2005 for country examples. In Italy the relevant articles in the Italian Criminal Code provide for different degrees of severity, ranging from the use of illegal immigrants and the exploitation of their illegal status for the purpose of labour, to incitement to illegal migration for the purpose of exploitation, to holding a person in slavery. In addition, the law provides for special protections for exploited workers (Article 18 Legislative Decree No. 286, 25 July 1998). Since 2000, there have been a number of illustrative cases. The ‘Kevin Cosmetics’ case concerned the exploitation of illegal Romanian men and women by a company led by an Italian businessman and located in a remote area. The workers were housed in the same building as they worked, and arbitrarily paid sums equal to approximately half of the remuneration due in a regularized working situation. Before raiding the company, the police had arranged that the workers would immediately be taken care of by an NGO. The promise of care appeared to be a decisive factor. Through the prompt action of all involved, the workers could rapidly be granted a residence permit on social protection grounds (Article 18). Ultimately they were granted regular working permits and are now employed elsewhere in Italy. Interestingly enough, the case actually started as an investigation into business fraud and product safety. Article 18 was also applied to a case involving eight Romanian workers who had witnessed the murder of one of their colleagues by their employer, a building contractor, and had initially disappeared out of fear of threats made by the employer. A consistent feature of migrant workers employed illegally or held in slavery is their complete isolation: they do not speak the language; they live in accommodation provided for the employer; their identity papers are withheld, and they are afraid to turn to the authorities. Success factors in the Kevin case were the ‘soft’ initial contact with the authorities, the provision of language services, the rapid involvement of the various bodies, and the positive attitude of the police. This not only broke their isolation, but also showed the ability of the public authorities to offer an alternative to the exploiters. In general, effective prosecution calls for a proactive legal approach focusing on the protection of human labour and human dignity rather than on the undesirable social impact of migration, and concentrating on the prevention of these offences and the organized crime behind it, rather than the visible preservation of public order, along with the correct application of the social protection statute (Article 18). Based on the experiences of NGOs in the area of trafficking for sexual exploitation and the cases examined, a ‘hospitality network’ has been developed in the areas of Varese, Busto Arsizio and Malpensa, that between 2003 and 2004 offered protection to around 100 foreign workers during the course of investigations, leading to the arrest of 27 employers.

See UNODC: Toolkit to Prevent Trafficking in Persons pp 99-107

Section 262 a of the Danish Penal Code explicitly criminalizes human trafficking. It reads: “a person who by an act of recruiting, transporting, transferring, housing or subsequently receiving another person shall be guilty of trafficking in human beings and shall be liable to a term of imprisonment of no more than eight years”.

crime and to identify and secure the arrest of suspects. The problems of building a case are exacerbated by several elements in trans-national cases including the procedural and logistical obstacles posed by the fact that the evidence and witnesses may only be available in *another* State's jurisdiction (usually the country of origin of the victim and/or the country to which the victim has been returned). Trans-national legal co-operation between police, prosecutors and judiciary is crucial to enable, *inter alia*:

- Interviewing witness and obtaining other evidence (e.g. documentation) located in another State.
- Locating witnesses and suspects in another State.
- Executing searches and tracing financial assets in another State.
- Serving documents on witnesses and suspects in criminal and civil cases.
- Completing risk assessments in home countries for any nationals who wish to return or for whom a destination State is considering deportation.²⁰⁹

In order to effectively address trafficking, direct exchange and sharing of information on local, national, regional, international level is needed, without confusing trafficking with control of prostitution or illegal migration. Differences in legislation are among the greatest challenges in international co-operation.²¹⁰ Some countries have provisions that cover all elements of trafficking

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Federal Law No. 162-Φ3 "On introducing changes and additions to the Criminal Code of the Russian Federation" entered into effect in Russia on 16 December 2003. With the adoption of this law, the term "trafficking in persons" was given legal definition. According to the Criminal Code as amended by this Law, trafficking in persons is "the buying and selling of a person or other actions committed for the purpose of his exploitation in the form of recruitment, transportation, transfer, harbouring or receipt". The Law differentiates the criminal liability for trafficking in persons; depending on the gravity of the crime (committed with regard to two or more persons, with the use or threat of force, etc.), the punishment might be up to 15 years of imprisonment. The amended Criminal Code envisages criminal liability for trafficking in persons (art. 127-1), the use of slave labour (art. 127-2), the involvement of minors in engaging in prostitution (art. 240, para. 3), the organization of engaging in prostitution (art. 241) and the manufacture and distribution of materials or objects with pornographic depictions of minors (art. 242-1).

In 2006, Israel amended its trafficking legislation to cover all forms of trafficking. The Prohibition of Trafficking in Persons (Legislative Amendments) Law 5766-2006 of 29 October 2006 defines trafficking as "transaction in persons" and adds article 377A, Trafficking in persons, to the Penal Law: Anyone who carries on a transaction in a person for one of the following purposes or in so acting places the person in danger of one of the following, shall be liable to sixteen years' imprisonment: 1. Removing an organ from the person's body; 2. Giving birth to a child and taking the child away; 3. Subjecting the person to slavery; 4. Subjecting the person to forced labour; 5. Instigating the person to commit an act of prostitution; 6. Instigating the person to take part in an obscene publication or obscene display; 7. Committing a sexual offence against the person..

²⁰⁹ OSCE Occasional Paper Series n. 1. *A Summary of Challenges: Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region*. p 12

²¹⁰ United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002). Guideline **11: Cooperation and coordination between States and regions**. Trafficking is a regional and global phenomenon which cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle. States and, where applicable, intergovernmental and non-governmental organizations, should consider: 1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare. 2. Offering, either on a bilateral basis or through multilateral organizations, technical and financial assistance to States and relevant sectors of civil society for the purpose of promoting the development and implementation of human rights-based anti-trafficking strategies. 3. Elaborating regional and subregional treaties on trafficking, using the Palermo Protocol and relevant international human rights standards as a baseline and framework. 4. Adopting labour migration agreements which may include provision for minimum work standards, model contracts, modes of repatriation, etc. in accordance with existing international standards. States are encouraged effectively to enforce all such agreements in order to help eliminate trafficking and related exploitation. 5. Developing cooperation arrangements to facilitate the rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of

while others have separate provisions for the different elements that constitute trafficking. Again others have different provisions for the various forms of trafficking, for example trafficking for sexual exploitation and for labour exploitation. More unity is urgently needed in this respect. It is however clear from the above analysis that countries which by now are starting slowly to build a body of case law on trafficking are going in the same direction regarding what indicators and criteria they look at – and they do so very clearly due to the influence of international standards. It is also clear that countries, in order to create unity in fighting a crime which is clearly both by its practices and by its definition transnational, may look to each other case law in order to understand and better implement consistently the provisions which in international law may seem to a certain extent abstract to very concrete situations. There can thus be no doubt that in applying international standards nationally case law from neighbouring states – but not only! – will influence jurisprudence in states which are now creating anti-trafficking laws.

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residence. 6. Establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation. 7. Developing procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned States. In recognition of the value of direct contacts, provision should be made for direct transmission of requests for assistance between locally competent authorities in order to ensure that such requests are rapidly dealt with and to foster the development of cooperative relations at the working level. 8. Ensuring judicial cooperation between States in investigations and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. This cooperation should include assistance in identifying and interviewing witnesses with due regard for their safety; in identifying, obtaining and preserving evidence; in producing and serving the legal documents necessary to secure evidence and witnesses; and in the enforcement of judgements. 9. Ensuring that requests for extradition for offences related to trafficking are dealt with by the authorities of the requested State without undue delay. 10. Establishing cooperative mechanisms for the confiscation of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.

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