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Re-thinking Anti-Trafficking Law and Practice: European and Commonwealth Caribbean Perspectives

Jason Haynes

A thesis submitted for the degree of Doctor of Philosophy

Durham Law School

Durham University

2015

Re-thinking Anti-Trafficking Law and Practice: European and Commonwealth Caribbean Perspectives

Jason Haynes

ABSTRACT

Human trafficking has increasingly been referred to in academic circles as ‘modern slavery’. It thrives in conditions of poverty, prejudice, inequality and discrimination, and has a deleterious impact on its victims. Its perpetrators come from all walks of life, and are actively involved in myriad forms of exploitation, which generate billions in profits on an annual basis.

Since the passage of the Trafficking Protocol in 2001, there has been a marked increase in anti-trafficking policy and legislation at the international, regional and domestic levels. Notwithstanding this, however, the effectiveness of these measures remains a hotly contentious issue. It is against this backdrop that this thesis has been conceptualised; the overarching aim being to critically assess the existing law and practice on human trafficking at the European and Commonwealth Caribbean levels, and to explore and evaluate possibilities for an enhanced regulatory framework. To achieve this aim, several objectives are actively pursued over the course of nine chapters. The first objective involves a deconstruction and critical evaluation of the various ‘hegemonic assumptions’ that underlie the conventional criminal justice and human rights approaches to human trafficking. The second involves a critical examination of the existing law and practice on human trafficking at the European and Commonwealth Caribbean levels from a comparative socio-legal perspective. The main argument advanced is that, at present, there is a ‘disconnect’ between anti-trafficking law and practice, which has an adverse impact on the prevention of human trafficking, the prosecution of traffickers and the protection of trafficked victims. The final objective involves an exploration of a non-exhaustive list of possibilities for reform that are aimed at ameliorating this ‘disconnect’.

The methodological approaches of the thesis to its research question involve *doctrinal* analyses, *comparative* analyses, as well as *socio-legal* analyses.

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DECLARATION

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award of any other degree or diploma of the university or other institute of higher learning, except where due acknowledgement has been made in the text.

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Last, but certainly not least, I wish to thank God for having afforded me the strength and endurance necessary to complete what is perhaps my most challenging endeavour yet.

LIST OF ABBREVIATIONS

| | |
|----------|--|
| ACP | African, Caribbean and Pacific Group of States |
| CARICOM | Caribbean Community |
| CAT | Convention Against Torture |
| CEDAW | Convention on the Elimination of all forms of Discrimination against Women |
| CEPOL | European Police College |
| CERD | Convention on the Elimination of Racial Discrimination |
| CoE | Council of Europe |
| COP | Conference of the Parties to the Trafficking Protocol |
| CoP | Committee of the Parties to the Council of Europe Anti-trafficking Convention |
| CRC | Convention on the Rights of the Child |
| CTU | Counter-Trafficking Unit |
| EMN | European Migration Network |
| EU | European Union |
| EUGET | EU Group of Experts on Trafficking in Human Beings |
| EUROJUST | European Judicial Cooperation Unit |
| EUROPOL | European Police Office |
| EUROSTAT | Statistical Office of the European Union |
| FIU | Financial Intelligence Unit |
| FRONTEX | European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union |
| GRETA | Group of Experts on Action against Trafficking in Human Beings |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ILO | International Labour Organisation |
| INTERPOL | International Criminal Police Organization |
| IOM | International Organisation for Migration |
| OAS | Organisation of American States |
| OSCE | Organisation for Security and Cooperation in Europe |
| TIP | Trafficking in Persons |
| UN | United Nations |
| UNDP | United Nations Development Program |
| UNHRC | United Nations Human Rights Committee |
| UNICEF | United Nations Children's Fund |
| UNODC | United Nations Office on Drugs and Crime |

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CHAPTER 1

INTRODUCTION

Every day across the globe, thousands of persons become victims of human trafficking.¹ These persons are typically recruited, coerced, and, ultimately, exploited in the sex industry, agricultural and construction sectors, and even in domestic spaces.² The traffickers, who come from all walks of life, facilitate this multi-billion dollar criminal industry, using their well-resourced networks to escape detection.³ In some countries, traffickers may even operate with impunity.⁴

Human trafficking not only has a deleterious impact on the health and well-being of its victims,⁵ but also on the rule of law in the context of individual states,⁶ and on the security of the international community as a whole.⁷ For this reason, since the mid-1990s, the international community has sought to progressively raise the global profile of the phenomenon in order to counter its adverse impact.⁸ Notwithstanding the considerable progress which has arguably been made since the passage of the Trafficking Protocol in 2001,⁹ the quickly evolving dynamics of human trafficking continue to challenge policy makers, particularly in Europe and the

¹ See UNODC, 'Human Trafficking: People for Sale' (United Nations Office for Drugs and Crime, 2011) <<http://www.unodc.org/toc/en/crimes/human-trafficking.html>> accessed 10 March 2015

² Kathleen Dunn, *Human Trafficking: Children Or Commodity? International and Domestic Child Sex Trafficking* (ProQuest 2007) 16

³ Louise Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press 2010) 138 (citing figures of between 10 - 32 billion dollars in profits on an annual basis, making trafficking the fastest growing form of organised crime).

⁴ Veerendra Mishra, 'Combating Human Trafficking: Gaps in Law Enforcement' in Veerendra Mishra (ed), *Human Trafficking: The Stakeholders' Perspective* (SAGE Publications 2013) 282

⁵ Padmini Murthy, Roshni Persaud and Mitsani Toda, 'Human Trafficking: A Modern Plague' in Padmini Murthy and Clyde Smith (eds), *Women's Global Health and Human Rights* (Jones & Bartlett Learning 2010) 63

⁶ UNODC, *The Globalization of Crime A Transnational Organized Crime Threat Assessment* (UNODC 2010) 1

⁷ Jennifer Lobasz, 'Beyond border security: Feminist approaches to human trafficking' (2009) 19(2) *Security Studies* 319, 326

⁸ Joel Quirk, 'New Approaches to Combating Modern Slavery' (2009) 31(1) *Human Rights Quarterly* 257, 258 (arguing that 'while forms of human bondage had attracted a relatively modest amount of interest in earlier decades, their global profile underwent a major transformation from the mid-1990s onwards, with growing concerns over post-Cold War human trafficking serving as a decisive catalyst').

⁹ Tomoya Obokata, 'Human Trafficking' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 185 (arguing that 'while there were early treaties on the subject [such as the International Agreement for the Suppression of White Slave Traffic 1904, the International Covenant for the Suppression of White Slave Traffic 1910, the International Convention for the Suppression of the Traffic of Women and Children 1921, the International Convention for the Suppression of Traffic in Women of Full Age 1933, the Convention for the Suppression of Traffic in Person and of the Exploitation of the Prostitution of Others 1949], the modern understanding of this crime as stipulated in Article 3 of the Trafficking Protocol should be the starting point because previously there was no agreement as to what constituted human trafficking.')

Commonwealth Caribbean, to consistently formulate and adopt targeted policy innovations.¹⁰ The central difficulty that arises in this regard, however, lies in the fact that these innovations are often untested, which raises interesting questions about their relative effectiveness in practice.¹¹ It is against this backdrop that this thesis has been conceptualised; the overarching aim, in this context, being to evaluate the extent to which, and specific ways in which, anti-trafficking law and practice in Europe and the Commonwealth Caribbean might require reform.

1.1. RESEARCH GAPS

In recent years, there has been a proliferation of books, journal articles and policy papers, amongst others, on various aspects of human trafficking. The increasingly dense literature not only addresses the dynamics of human trafficking and corresponding policy innovations from a legal perspective,¹² but also from economic,¹³ sociological,¹⁴ and, more recently, interdisciplinary,¹⁵ perspectives. These perspectives have shed light on, among other things, the profile of trafficked victims and the modus operandi of their perpetrators, the underlying factors that fuel the phenomenon, policy innovations to counter its adverse impact, and, in a few cases, the effectiveness of anti-trafficking law.¹⁶ Notwithstanding this, however, a critical review of said literature also reveals the existence of a number of shortcomings.

In the first instance, the existing literature, in almost exclusively examining the trafficking of women and girls for sex, does ‘a disservice to the overall movement and to the victims of

¹⁰ Alexis Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Greenwood Publishing Group 2009) 159

¹¹ Peter van der Laan and Others, 'Cross-Border Trafficking in Human Beings: Prevention and Intervention Strategies for Reducing Sexual Exploitation' (2011) 9 Campbell Systematic Reviews 1, 10 (arguing that ‘there has been relatively little independent research that evaluates and assesses the effectiveness of counter trafficking policies, programmes, and various interventions.’)

¹² See e.g. Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010); Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006); Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008); Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Bloomsbury Publishing 2007).

¹³ See e.g. Maria Joao Guia, *The Illegal Business of Human Trafficking* (Springer 2015); Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2013)

¹⁴ See e.g. Aver Theophilus and Yecho Jacob, *Modern Slave Trade: Sociological Approach to Human Trafficking* (Lambert Academic Publishing 2012); Sally Cameron and Edward Newman (eds), *Trafficking in Humans: Social, Cultural and Political Dimensions* (United Nations University Press 2008).

¹⁵ Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (Routledge 2013); Michael Palmiotto (ed), *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press 2015).

¹⁶ See e.g. Tomoya Obokata, ‘Implementing International Law on Human Trafficking: Case Studies of the United Kingdom and Ireland’ (2015) 2(2) State Practice and International Law Journal 85; Sandhya Drew, *Human Trafficking - Human Rights* (Legal Action Group 2009); Parosha Chandran, *Human Trafficking Handbook: Recognising Trafficking and Modern Day Slavery in the United Kingdom* (LexisNexis 2011)

human trafficking who [are] not forced into the sex trade.¹⁷ In other words, the near-ubiquitous focus on sex trafficking has arguably marginalised and, in some instances, even excluded from its ambit critical discourses about other forms of trafficking, such as servitude, slavery, forced labour and the removal of organs, amongst others.¹⁸ Related to this issue is the fact that discussions about human trafficking in the existing literature often conflate the phenomenon with other related illegal activities, such as prostitution¹⁹ or migrant smuggling,²⁰ notwithstanding the existence of an internationally agreed definition of human trafficking as contained in the Trafficking Protocol.²¹ Additionally, given the absence at present of 'a theoretical framework [that] comprehensively analyze[s] the phenomenon,'²² there are several instances in the existing literature whereby the 'cannons of scientific inquiry are suspended and research is deliberately skewed to serve a particular political or moral agenda.'²³ Furthermore, given the fact that issues related to human trafficking are often 'sensationalized, misrepresented, and politicized',²⁴ it is arguable that a large proportion of the existing literature is empirically weak,²⁵ which adversely affects the validity of conclusions reached about anti-trafficking law and practice. Moreover, there are also a number of instances in which discussions about anti-trafficking policies are

¹⁷ Robert Uy, 'Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the Perfect Victim Paradigm' (2011) 26 Berkeley Journal of Gender Law & Justice 204, 205.

¹⁸ Rebecca Wharton, 'A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act' (2010) 16 William and Mary Journal of Women and the Law 753, 756 (arguing that, in the context of the existing literature, the 'idea of men and women who are forced into domestic servitude, agricultural slavery, or other forms of forced labour, [is] not nearly as titillating' as sex trafficking).

¹⁹ Some feminist scholars (referred to as 'abolitionists') have conflated trafficking with prostitution. See e.g. Catherine MacKinnon, 'Trafficking, prostitution, and inequality' (2011) 46 Harvard Law Review 271; Kathleen Barry, *Female Sexual Slavery* (New York University Press 1979); Michelle Dempsey, 'Sex Trafficking and Criminalization: In defense of Feminist Abolitionism' (2010) University of Pennsylvania Law Review 1729. For critique see, Ronald Weitzer, 'Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation' (2011) 10 (4) Journal of Criminal Law and Criminology 1337, 1342

²⁰ On the dangers of this conflation, see Jennifer Solotaroff and Rohini Prabha Pande, *Violence against Women and Girls: Lessons from South Asia* (World Bank Publications 2014) 183; See also Min Liu, *Migration, Prostitution, and Human Trafficking: The Voice of Chinese Women* (Transaction Publishers 2013) 35 (noting that, in contrast to trafficking, smuggling involves the giving of consent by those smuggled, and that there is generally no coercion or exploitation).

²¹ See Article 3 (a) Trafficking Protocol

²² Elżbieta Goździak and Micah Bump, 'Data and Research on Human Trafficking: Bibliography of Research-Based Literature' (Institute for the Study of International Migration, Walsh School of Foreign Service, Georgetown University 2008) 9

²³ Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35(3) Politics and Society 447.

²⁴ Denise Brennan, 'Methodological Challenges in Research with Trafficked Persons: Tales from the Field' (2005) 43(1) International Migration 35, 36.

²⁵ Elżbieta Goździak, 'Issues and Challenges for Research on Trafficking' in Molly Dragiewicz (ed), *Global Human Trafficking: Critical Issues and Contexts* (Routledge 2014) 25

divorced from their proper context.²⁶ More specifically, it is important to note that the effectiveness of anti-trafficking law, when viewed in light of state practice, has not been a theme that is systemically assessed in the existing literature.²⁷ This effectively limits the extent to which we can definitively conclude that anti-trafficking policies are meeting their intended objectives. This challenge is best illustrated in the context of discussions about human trafficking in Europe, whereby a general failure to comprehensively assess the practices of member states of the European Union and Council of Europe, both individually and collectively, has meant that only a partial picture of the efficacy of anti-trafficking law has been painted in the existing literature to date.²⁸ Additionally, given the near-ubiquitous focus on human trafficking in the USA²⁹ and Asia,³⁰ the existing literature has marginalised, trivialised and, in some instances, even out-rightly ignored the dynamics of human trafficking in ‘invisible cases’³¹ – such as the Commonwealth Caribbean – a region wherein the phenomenon has reportedly become ‘very visible on the ground.’³²

²⁶ Guri Tyldum and Anette Brunovskis, ‘Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking’ (2005) 43(1) *International Migration* 17 (arguing that descriptions that have ‘little to do with reality’ run the risk of resulting in the adoption of policies and interventions which are ineffective).

²⁷ Anne Gallagher and Rebecca Surtees, ‘Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?’ (2012) 1(1) *Anti-Trafficking Review* 10, 11 – 12; US Government Accountability Office, *Human Trafficking: Better Data, Strategy, & Reporting Needed to Enhance U.S. Anti-trafficking Efforts Abroad* (DIANE Publishing 2006) 37 (noting that ‘little evaluation research has been conducted to determine which international anti-trafficking activities are working or how best to tailor them to meet specific needs.’)

²⁸ Most academic commentary have either addressed the law on human trafficking within the context of the EU or, alternatively, at the level of the CoE. For commentary on EU anti-trafficking law, see Saadiya Chaudary, ‘Trafficking in Europe: An Analysis of the Effectiveness of European Law’ (2011) 33 *Michigan Journal of International Law* 77; Tomoya Obokata and Brian Payne, ‘Implementing the EU Action against Trafficking of Human Beings under the TFEU: A Preliminary Analysis’ (2012) *New Journal of European Criminal Law* 298; Maria O’Neill, ‘The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective’ (2011) 7 (4) *Journal of Contemporary European Research* 452. Few commentaries have addressed the approaches of the EU and CoE together, see e.g. Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (n 12) chapters 4 and 5. Even fewer commentaries have addressed the state practices of European countries in the anti-trafficking field; see e.g. Leslie Holmes (ed), *Trafficking and Human Rights: European and Asia-Pacific Perspectives* (Edward Elgar Publishing 2013); Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (n 12) chapter 2.

²⁹ See e.g. Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today, With a New Preface* (University of California Press 2010); Anthony DeStefano, *The War on Human Trafficking: U.S. Policy Assessed* (Rutgers University Press 2007)

³⁰ See e.g. Willem van Schendel, Lenore Lyons and Michele Ford, *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (Routledge 2012); Sallie Yea and Pattana Kitiarsa, *Human Trafficking in Asia: Forcing Issues* (Routledge 2013).

³¹ African, Caribbean and Pacific Group of States, *Global Phenomenon, Invisible Cases: Human Trafficking in sub-Saharan Africa, the Caribbean and the Pacific* (ACP, 2011) 1

³² David Guinn and Elissa Steglich, *Modern Bondage: Sex Trafficking in the Americas* (Transnational Publishers 2003) 10.

1.2. EXPECTED CONTRIBUTION OF THIS THESIS

In view of the foregoing, this thesis attempts to address at least some of the gaps in the existing literature, by providing a critical, robust and comprehensive assessment of the law and practice on human trafficking in Europe and the Commonwealth Caribbean, from a comparative socio-legal perspective. More specifically, in addressing its research question, the thesis takes a holistic approach by moving beyond the focus on sex trafficking, to include discussions on how anti-trafficking law regulates all forms of trafficking, including those which have been traditionally marginalised in the existing literature, such as domestic servitude, forced begging and the production of cannabis, amongst others. Additionally, to ensure that conceptual clarity is achieved throughout the thesis, the subsequent chapters countenance the definition of human trafficking as contained in the Trafficking Protocol and other related instruments, thereby avoiding the criticism of conflation. This definition reads as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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.³³

In the context of this thesis, the foregoing definition presupposes that, in relation to adults, human trafficking arises where at least one element is found to exist under each of the tripartite ‘action’, ‘means’ and ‘purpose’ paradigms. That is, there will be trafficking if, for example, there is *recruitment* by means of *force*, which results in the commission of *servitude*. In addition, the thesis also presupposes, in line with the Trafficking Protocol, that the ‘means’ element does not have to be satisfied in respect of children,³⁴ and, further, that neither children nor adults can consent to being exploited.³⁵

More generally, rather than advancing unsubstantiated assertions, this thesis adopts a robust theoretical framework – the Socio-Legal Theory as posited by Denis Galligan³⁶ – to critically assess the efficacy of the law and practice on human trafficking. As further detailed in chapter 2, this theory has the advantage of not only being comprehensive in nature, but also empirically

³³ Article 3 (a) Trafficking Protocol

³⁴ Ibid Article 3 (c)

³⁵ Ibid Article 3 (b)

³⁶ Denis Galligan, *Law in Modern Society* (Oxford University Press 2006)

grounded, thereby facilitating a fair and accurate account of anti-trafficking law in its proper contexts.

Another major added value of the thesis lies in the fact that it addresses two regions - Europe and the Commonwealth Caribbean - whose anti-trafficking law and practice has not been systematically addressed from a comparative socio-legal perspective hitherto. The advantage of such an approach is that it sheds light on how different legal systems address the perennial challenge of human trafficking, thereby informing critical discourse on the challenges associated with operationalising anti-trafficking law in different contexts. More specifically, by examining 'anti-trafficking law in action', it is hoped that the findings presented herein would serve as the ground work for the reform of anti-trafficking law and practice.

1.3. RESEARCH QUESTION

To what extent, and in what ways, does the existing law and practice on human trafficking require reform?

1.4. RESEARCH AIM

The aim of this thesis is to critically assess the existing law and practice on trafficking in human beings at the European and Commonwealth Caribbean levels, and to explore and evaluate the possibility of an enhanced regulatory framework.

1.5. RESEARCH OBJECTIVES

The main objectives of this thesis are:

1. To deconstruct and critically evaluate the various 'hegemonic assumptions' that underlie the conventional criminal justice and human rights approaches to human trafficking;
2. To critically evaluate the existing 'disconnect' between the law and practice on human trafficking at the European level (European Union [EU] and Council of Europe [CoE]), using 'INI' typology (*Institutional*, *Normative* and *Individual* Paradigms) as a nuanced evaluation framework;
3. To critically evaluate, from a comparative socio-legal perspective, the relative effectiveness of anti-trafficking law and practice in four Commonwealth Caribbean countries; and
4. To explore the possibility of an enhanced regulatory framework.

1.6. STRUCTURE OF THESIS

The next chapter will address a number of issues that are of foundational importance to this thesis. It will begin by exploring and critiquing the various 'hegemonic assumptions' that underlie the existing regulatory approaches to human trafficking - the criminal justice and human rights approaches. This assessment will then be followed by a discussion of the appropriateness of the Socio-legal Theory as advanced by Denis Galligan to address the thesis' research question. A typology of action ('*INI*' typology), which is strongly influenced by the main obligations contained under the Trafficking Protocol and other related instruments, will then be examined, and subsequently utilised as a nuanced analytical framework for critically assessing the law and practice on human trafficking at the European and Commonwealth Caribbean levels. The thesis' methodology will then be fully explored, with particular emphasis being placed on the processes of research design, data collection and analysis, as well as the ethical issues that arose in the context of the empirical investigation conducted by the researcher in the Commonwealth Caribbean.

The third chapter is the first of three chapters that attempt to comprehensively address the law and practice on human trafficking in Europe. Against the backdrop of the various benchmarks outlined under the '*Normative*' paradigm of the '*INI*' typology described in chapter 2, this chapter will critically assess the law and practice on human trafficking in Europe in a number of substantive fields, including the criminalisation of trafficking-related incidents, the imposition of penalties, forfeiture, compensation and investigations. The central argument advanced, in this context, is that while European anti-trafficking law provides a robust *normative* framework in so far as the regulation of human trafficking is concerned, existing state practice on the part of a number of European countries suggests that either a minimalist, and, in some instances, a wholly inconsistent, approach to the operationalisation of the normative aspects of European anti-trafficking law is countenanced in practice. It is argued that the 'disconnect' that currently exists between the law and practice on human trafficking in Europe has a number of adverse implications, some of which are explored in detail.

Building on the conclusion advanced in chapter 3, chapter 4 will explore the related argument that, at the *institutional* level, there is also a 'disconnect' between European anti-trafficking law and practice. To substantiate this contention, this chapter will critically assess existing state practice across Europe, and contend that gaps at the institutional level in respect of compliance with several institutional obligations, including the requirements to effectively place human trafficking on national agendas, victim identification and referral, the conduct of court

proceedings, as well as stakeholder collaboration, have a number of adverse implications, not only in so far as the prosecution of the crime is concerned, but also in terms of its prevention and the protection of the most vulnerable - trafficked victims.

Given the primacy which the international community has attached to the obligation to effectively protect and assist trafficked victims,³⁷ chapter 5 will critically assess the law and practice on human trafficking in Europe through the prism of the third paradigm of the *INP* typology - the *Individual* paradigm. Several rights-related issues will be critically evaluated in this chapter, including the primacy of trafficked victims' rights, viewed through the lens of states' compliance with the 'non-punishment' and witness protection obligations, as well as the obligations to provide basic supplies, medical and psychological assistance and appropriate accommodation to trafficked victims. The existing law and practice relative to the protection of trafficked children; victims' privacy and confidentiality; as well as questions regarding the provision of information, documentation and translation will also be addressed. The extent to which European countries have successfully operationalized the obligation to regularise victims' immigration status, as well as secure their safe repatriation and reintegration will also be critically evaluated in this chapter. Chapter 5, like chapters 3 and 4, will conclude that there is, at present, a 'disconnect' between the requirements of European anti-trafficking law and the practice on the part of a number of European countries regarding the protection of trafficked victims. This 'disconnect' suggests that, in many respects, reform is required, at the very least in so far as state practice is concerned.

Drawing primarily on empirical data, chapter 6, which is the first of three chapters on the Commonwealth Caribbean, will compare the law and practice on human trafficking at the *normative* level in four Commonwealth Caribbean countries - Guyana, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago, and, to a lesser extent, the approach countenanced in these countries with that which obtains at the European level. The central argument of this chapter is that although there has been considerable progress in recent years in so far as the regulation of human trafficking at the *normative* level in the Commonwealth Caribbean countries examined is concerned, gaps in implementation, largely similar to those which exist in Europe, still exist in practice, in relation to which reform is required.

³⁷ Conny Rijken and Others, 'Trafficking for Sexual Purposes as a Globalized Shadow Economy: Human Security as the Tool to Facilitate a Human Rights Based Approach' in Rianne Letschert and Jan Van Dijk (eds), *The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights* (Springer 2011) 90

Chapter 7, like chapter 4, will critically assess the main *institutional* challenges surrounding the law and practice on human trafficking in selected Commonwealth Caribbean countries. The main argument advanced in this chapter is that while there are, at least in theory, institutional mechanisms in place whose aims are to, among other things, facilitate victim identification and referral and efficaciously conduct court proceedings, institutional lethargy, coupled with inadequate capacity and coordination, are the main areas in relation to which reform is required.

The third and final chapter on the Commonwealth Caribbean, chapter 8, will advance the argument that, in a number of respects, the rights of trafficked victims are not always effectively protected in practice in the selected countries under investigation. While the chapter concedes that a number of similarities exist between both the European and Commonwealth Caribbean approaches regarding the provision of support and assistance to trafficked victims, it, however, contends that several socio-legal factors, including a lack of political priority and financial difficulties, are distinct challenges which continue to adversely affect the extent to which Caribbean countries are able to effectively protect, respect and fulfil the myriad rights of trafficked victims in practice. In short, this chapter takes the view that there is, in many respects, a ‘disconnect’ between anti-trafficking law and practice in the Commonwealth Caribbean in relation to the *individual* rights paradigm.

The thesis will conclude in chapter 9. In general, this chapter will briefly reiterate the main findings identified by the thesis, as well as explore several possibilities for reform wherever implementation deficits are found to exist. While not attempting to propose a specific model for reform, this chapter will nevertheless advance a principles-based approach that focuses on clarity and consistency; capacity building; redress; rehabilitation; coordination; and the links between human trafficking and a development-oriented agenda.

CHAPTER 2

BACKGROUND AND METHODOLOGY

INTRODUCTION

This chapter will address a number of foundational issues. First, in keeping with the first objective of the thesis as outlined in chapter one, it will deconstruct the various 'hegemonic assumptions' that underlie the existing regulatory approaches to human trafficking - the criminal justice and human rights approaches. This assessment will then be followed by an evaluation of the appropriateness of Galligan's approach to the socio-legal theory for the purposes of answering the thesis' research question. A nuanced typology of action ('INI' typology) will then be advanced as the most suitable analytical framework for critically assessing the law and practice on human trafficking at the European and Commonwealth Caribbean levels. Finally, the methodology employed by the thesis will be fully explored.

A. REGULATORY APPROACHES TO HUMAN TRAFFICKING

Over the last two decades, two broad frameworks have emerged as regulatory approaches for the purposes of conceptualising anti-trafficking efforts at the international, regional and domestic levels. These approaches, which are typically framed in contemporary anti-trafficking discourse as the criminal justice and the human rights models,¹ are comprised of binding as well as non-binding normative commitments derived from international human rights law, international criminal law and transnational criminal law.² In the context of the existing literature, the criminal justice and human rights approaches have, however, been portrayed as being in 'tension' with each other.³ This tension arguably stems from the fact that whereas the former approach is primarily concerned with investigating and prosecuting trafficking-related offenses, with victim protection only being a secondary consideration, the latter is invariably concerned with protecting the rights of trafficked victims through the provision of appropriate

¹ Cheah Wuiling, 'Assessing Criminal Justice and Human Rights Models in the Fight against Sex Trafficking: A Case Study of the ASEAN Region' (2006) 3 (1) Essex Human Rights Review 46, 48

² Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 167

³ Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses to Human Trafficking in the Greater Mekong Sub-region* (Routledge 2012) 226.

support and assistance.⁴ From the perspective of leading scholars in this field, this is an unsatisfactory state of affairs, given that trafficked victims are vulnerable individuals, whose rights and interests could be easily circumvented by a disproportionate focus on criminal justice considerations.⁵ Notwithstanding the existence of this ‘tension’, however, very little is presently known about the underlying ‘hegemonic assumptions’⁶ or ‘discourses’⁷ which underlie the criminal justice and human rights approaches to human trafficking. ‘Hegemonic assumptions’, a term of art coined by Stephen Brookfield, is used in the context of this thesis to describe ‘the stock of opinions, conventional wisdoms, or common-sense beliefs’⁸ about the efficacy of the criminal justice and human rights approaches, which we uncritically accept as truth, without realising that these same beliefs are counter-productive in practice as they are grounded in harmful exercises of state power. Given the significance and potential implications of these assumptions, the next section will critically explore these issues in light of the existing law and practice on human trafficking, as well as the views of some of the leading scholars in the field.

⁴Alison Brysk and Austin Choi-Fitzpatrick, ‘Rethinking Trafficking’ in Alison Brysk and Austin Choi-Fitzpatrick (eds), *From Human Trafficking to Human Rights: Reframing Contemporary Slavery* (University of Pennsylvania Press 2012) 6

⁵ Pardis Mahdavi, *From Trafficking to Terror: Constructing a Global Social Problem* (Routledge 2013) 53.

⁶ ‘Hegemonic assumptions’ can be described as discourses that we uncritically accept, and which may appear to be ideal responses to human trafficking, but which may nevertheless prove to be counterproductive in practice. The concept was coined by Stephen Brookfield. See Stephen Brookfield, ‘Using the Lenses of Critically Reflective Teaching in the Community College Classroom - New Directions for Community Colleges’ (2002) 18 *Wiley Periodicals* 118, 32 (‘An assumption becomes hegemonic when it begins to exercise a dangerous control over our practice and we still accept it uncritically.’); See also, Stephen Brookfield, ‘The Concept of Critically Reflective Practice’ in Arthur Wilson and Elisabeth Hayes (eds), *Handbook of Adult and Continuing Education* (John Wiley & Sons 2000) 40 - 41 (‘Hegemonic assumptions [are] assumptions about practice that we believe represent common wisdom and that we accept as being in our own best interests, without realizing that these same assumptions actually work against us in the long term by serving the interests of those oppose to us’).

⁷ Moshoula Capous-Desyllas, ‘A Critique of the Global Trafficking Discourse and US Policy’ (2007) 34 *Journal of Sociology & Social Welfare* 57, 58 (explaining that ‘discourses describe the set of accepted and relevant concepts related to trafficking which have become socially legitimized as knowledge and truth within society.’)

⁸ See Stephen Brookfield, ‘Assessing Critical Thinking’ (1997) 75 *New Directions for Adult and Continuing Education* 17, 18, 20.

2.1. THE CRIMINAL JUSTICE APPROACH

2.2. General

The UN Convention against Transnational Organised Crime,⁹ its annexed Trafficking Protocol,¹⁰ as well as the Rome Statute of the International Criminal Court (ICC),¹¹ provide the normative underpinnings of what has in recent years been described as the ‘criminal justice approach’ to human trafficking.¹² The central premise underlying the criminal justice approach is that the criminal law, and its attendant enforcement institutions, must be employed to ‘subject [perpetrators] to punishment.’¹³ This, according to criminal justice scholars, is essential to curtailing the illicit activities of traffickers,¹⁴ whilst freeing trafficked victims from exploitative conditions.¹⁵ Against this backdrop, the criminal justice approach demands that sustained efforts be undertaken by states to fortify national security,¹⁶ under the ‘toughness rhetoric’¹⁷ of intelligence, surveillance, increased border controls and harsh punishments.¹⁸ These measures, which have increasingly been countenanced by a number of states, as well as international, regional and domestic organisations in the anti-trafficking field, have as their ultimate goal winning the proverbial ‘war on human trafficking’.¹⁹

The first element of the criminal justice approach is the enactment of anti-trafficking laws that are designed to criminalize the full spectrum of trafficking-related activities identified by

⁹ Convention Against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) 40 ILM 335

¹⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003)

¹¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90.

¹² Marie Segrave, ‘Surely Something is Better Than Nothing? The Australian Response to the Trafficking of Women Into Sexual Servitude in Australia’ (2004) 16(1) *Current Issues in Criminal Justice* 85, 89.

¹³ See, Douglas Husak, ‘The Criminal Law as a Last Resort’ (2004) 24(2) *Oxford Journal of Legal Studies* 207, 232

¹⁴ Marianna Leishman, ‘Human Trafficking and Sexual Slavery: Australia’s Response’ (2007) 27 *Australian Feminist Law Journal* 193, 198; Erica Kotnick, Melina Czymoniewicz-Klippel and Elizabeth Hoban, ‘Human Trafficking in Australia: The Challenge of Responding to Suspicious Activities’ (2007) 42(3) *Australian Journal of Social Issues* 369, 372.

¹⁵ This idea of freeing victims from trafficking situations is based on the harm-reduction model. See Catherine MacKinnon, ‘Pornography as Trafficking’ (2005) 26 *Michigan Journal of International Law* 993, 1009.

¹⁶ Claudia Aradau, *Rethinking Trafficking in Women: Politics out of Security* (Palgrave Macmillan 2008) 3

¹⁷ Paraskevi Boukli, ‘Imaginary Penalties: Reconsidering Anti-trafficking Discourses and Technologies’ (PhD Thesis, London School of Economics and Political Science 2012) 3

¹⁸ Claudia Aradau, ‘The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking’ (2004) 33(2) *Journal of International Studies* 251, 252

¹⁹ Anthony DeStefano, *The War on Human Trafficking* (Rutgers University Press 2007) 130.

international law.²⁰ More specifically, these laws must stipulate, in no uncertain terms, the prohibited conduct,²¹ thereby sending ‘a clear message to traffickers that their actions will not be tolerated.’²² Apart from serving as the statutory basis for the prosecution of trafficking-related offenses,²³ the enactment of anti-trafficking laws also facilitates the identification of trafficked victims,²⁴ as law enforcement personnel, armed with the specific indicators of what constitutes the crime, can better exercise their jurisdiction to remove victims from exploitative conditions.²⁵ The enactment and, indeed, rigorous enforcement,²⁶ of anti-trafficking laws, is also a precondition to securing successful convictions.²⁷

Apart from enacting anti-trafficking criminal laws, the criminal justice approach demands that states operationalize a robust, proactive and intelligence-led investigative machinery,²⁸ that includes targeted raids on suspected premises where trafficking might be occurring; identifying routes used by traffickers; surveillance; as well as planned border operations.²⁹ These techniques are intended to assist in uncovering the full gamut of available evidence that might be used to impugn traffickers,³⁰ and may, in some instances, even shed light on the number of state officials that might be complicit in the commission of trafficking related-offenses.³¹

²⁰ Article 5(1) Trafficking Protocol; Article 5(1) UN Organised Crime Convention

²¹ See generally, Stephanie Mariconda, ‘Breaking the Chains: Combating Human Trafficking at the State Level’ (2009) 29 Boston College Third World Law Journal 15.

²² Human Rights Law Network, *Trafficking and the Law* (2nd edn, Socio-Legal Information Centre 2011) 507

²³ See generally, Stephanie Richard, ‘State legislation and human trafficking: Helpful or harmful’ (2004) 38 University of Michigan Journal of Law Reform 447.

²⁴ Amy Farrell, Jack McDevitt and Stephanie Fahy, ‘Understanding and improving law enforcement responses to human trafficking: final report’ (US Department of Justice 2008) 18 - 19

²⁵ Franklyn Casale, ‘International Trafficking in Persons: Suggested Responses to a Scourge of Humankind’ (2008) 3 Intercultural Human Rights Law Review 343, 263.

²⁶ Susan Tiefenbrun, ‘Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad’ (2005) 11 William and Mary Journal of Women and the Law 317, 323.

²⁷ Michelle Rickert, ‘Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level’ (2009) 4 Liberty University Law Review 1, 31.

²⁸ Article 4 Trafficking Protocol; Articles 19 and 20 UN Organised Crime Convention; Anne Gallagher and Paul Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line’ (2008) 18(3) International Criminal Justice Review 318, 324.

²⁹ See generally, UNODC, ‘Anti-human Trafficking Manual for Criminal Justice Practitioners, Module 2: Indicators of Trafficking in Persons’ (United Nations Office for Drugs and Crime 2009)

³⁰ See generally, UNODC, ‘Anti-human Trafficking Manual for Criminal Justice Practitioners, Module 7: Crime scene and Physical Evidence Examinations in Trafficking in Persons Investigations’ (United Nations Office for Drugs and Crime 2009).

³¹ Gallagher and Holmes (n 28) 324 (arguing that frontline officials, through the use of intelligence gathering and management, human and technical surveillance, undercover operations, controlled deliveries, and parallel financial and money-laundering investigations, often discover public sector complicity in trafficking).

To ensure that the investigative techniques identified above are adequately operationalized, the criminal justice approach also envisages that states will cooperate with each other at the regional, and, where appropriate, international level. Cooperation, in this context, is envisaged to take many forms, but should include, at a minimum, extradition;³² mutual legal assistance;³³ the transfer of criminal proceedings;³⁴ the transfer of sentenced persons;³⁵ the confiscation of criminal assets;³⁶ the exchange of information;³⁷ as well as shared inquiries and joint investigations.³⁸ These methods, according to criminal justice practitioners, serve to ensure that, as far as possible, all safe havens for traffickers are eradicated, and that the underlying impetus for committing the crime in the first place – profits – is minimized, if not eliminated.³⁹

Moreover, it is important to note that, in those circumstances where available evidence reveals that a trafficking-related offense has been committed, the criminal justice approach demands that traffickers be penalised to the full extent of the law.⁴⁰ Individual liability is envisaged to arise at both the international and domestic levels. In relation to the former, the Rome Statute of the International Criminal Court lists human trafficking as one of the ‘crimes against humanity’⁴¹ that the international community as a whole has a vested interest in eradicating.⁴² The threshold, however, for a finding of individual liability in international criminal law is a high one,⁴³ and would therefore require the presentation of cogent evidence that establishes that:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or

³² Article 16 UN Organised Crime Convention

³³ Ibid Article 18 UN Organised Crime Convention

³⁴ Ibid Article 21 UN Organised Crime Convention

³⁵ Ibid Article 17 UN Organised Crime Convention

³⁶ Ibid Articles 12 - 14 UN Organised Crime Convention

³⁷ Ibid Article 28 UN Organised Crime Convention

³⁸ Articles 19 and 20 UN Organised Crime Convention; See also, UNODC, ‘Anti-human Trafficking Manual for Criminal Justice Practitioners, Module 6: International Cooperation in Trafficking in Persons Cases’ (United Nations Office for Drugs and Crime 2009)

³⁹ See Gallagher and Holmes (n 28) 336.

⁴⁰ Ibid

⁴¹ Article 7(2)(c) of the Rome Statute of the International Criminal Court (Rome Statute) provides that enslavement ‘means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’.

⁴² Ibid Article 1

⁴³ See *Prosecutor v Kunarac (Trial Judgment) IT-96-23 (22 Feb 2001) [542] - [543]* (although the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that ‘enslavement’ as a crime against humanity included trafficking of human beings, it nevertheless considered that the mere ability to buy, sell, or trade is in itself insufficient in determining whether or not the enslavement is committed. In other words, something more than transporting is necessary).

bartering such a person or persons, or by imposing on them a similar deprivation of liberty;

2. The conduct was committed as part of a widespread⁴⁴ or systematic⁴⁵ attack⁴⁶ directed against a civilian population;⁴⁷ and that
3. The perpetrator knew that the conduct was part of or intended⁴⁸ the conduct to be part of a widespread or systematic attack directed against a civilian population.

Given that the majority of trafficking-related activities will arguably fall outside the scope of international criminal law,⁴⁹ the criminal justice approach further envisages that individual criminal liability will also arise at the municipal level. In this context, the criminal justice approach demands that ‘effective, proportionate and dissuasive’⁵⁰ penalties be imposed on traffickers, thereby sending a firm message that there is, unequivocally, no tolerance for the types of exploitation which characterize their operations.⁵¹ Apart from securing deterrence at the individual level, these penalties are also intended to deter would-be traffickers at the wider societal level, thereby making a ‘significant dent into the multi-billion dollar business of human trafficking.’⁵²

44 See e.g. Prosecutor v. Gombo, Decision on the Confirmation of charges, ICC-01/05-01/08-424, [82] – [83] (noting that a widespread act indicates the large-scale nature of the attack, either over a large geographical area or directed against a large number of targeted persons)

45 See e.g. Prosecutor v. Katanga, Decision on the Confirmation of charges, ICC-01/04-01/07-717, [394], [397] (noting that a ‘systematic act’ refers to the organized nature, pattern, or policy of the acts of violence and consists of ‘non-accidental repetition of similar criminal conduct on a regular basis’. Random incidents might not suffice).

46 See e.g. Situation in the Republic of Kenya, Decision on the Authorisation of an Investigation, ICC-01/09-19, [80] (noting that an ‘attack’ indicates a course of conduct, campaign, mistreatment, or operation involving the multiple commission of the established act carried out against civilians).

47 See e.g. Gerhard Werle, *Principles of International Criminal Law* (Cambridge University Press 2005) 224 (noting that a civilian population must be the primary objective of the attack; this does not mean that an entire population of a state or territory must be affected, but rather, that the crime must have a collective nature, ruling out individual, incidental, and isolated acts of violence).

48 See e.g. Prosecutor v. Gombo (n 44) [87] – [88] (explaining that the perpetrator must have been aware of the consequences of his/her conduct, but it does not mean that the perpetrator must have knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization).

⁴⁹ Tomoya Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System’ (2005) 54(2) *International and Comparative Law Quarterly* 445, 453 – 454 (Obokata sees several impediments to a successful claim for human trafficking before the ICC. First, given that family members, relatives and friends are also known to engage in trafficking, their activities may not be as ‘systematic’ as organized criminal groups. As such, the requirements for invoking the ICC might not be satisfied in such cases. Secondly, jurisdictional requirements may also serve as impediments; that is, because the consent of the state of the accused is required, the principle of state sovereignty may hinder a successful action against traffickers at the level of the ICC).

⁵⁰ UNODC, ‘Anti-human Trafficking Manual for Criminal Justice Practitioners, Module 14: Considerations in Sentencing in Trafficking in Persons Cases’ (United Nations Office for Drugs and Crime 2009)

⁵¹ Matthew Cameron and Andreas Schloenhardt, ‘Punishing trafficking in persons: International standards and Australian experiences’ (2012) 24(1) *Bond Law Review* 1, 9.

⁵² See Michelle Rickert (n 27) 28.

In short, therefore, the criminal justice approach to human trafficking, with its strong emphasis on criminalisation, investigations and prosecutions, has the advantage of providing a robust framework for penalizing traffickers in a sufficiently dissuasive manner, as well as ensuring that victims are effectively protected from the recalcitrant practices of traffickers and their associates.

2.3. 'Hegemonic Assumptions'

Notwithstanding the undeniable importance of the various determinants identified above, it must, however, be noted that, in practice, a number of hegemonic assumptions arise which, in some respects, question the overall efficacy of this approach. These assumptions are addressed hereafter.

2.3.1. **Persons not rescued by law enforcement officials are unlikely to be trafficked victims.**

An often unsaid, yet pervasive, hegemonic assumption that underlies the criminal justice approach to human trafficking is the notion that only those who are rescued by law enforcement authorities are trafficked victims. This assumption stems from the belief that law enforcement officials are best placed to identify victims, and, that in the vast majority of cases, unless a victim is rescued, he/she is at best passively complicit in his/her supposed exploitation or, at worst, an illegal alien who deserves to be deported. A nuanced analysis of this assumption was recently provided by Dina Haynes,⁵³ who argues that the criminal justice approach to human trafficking continues to fail a number of trafficked victims who are 'not found chained to a bed in a brothel.'⁵⁴ More specifically, Haynes contends that these victims continue to be denied access to the 'beds, medical care, and legal advocacy'⁵⁵ that are reserved for 'rescued' victims. On a related point, Haynes, like other scholars in the field,⁵⁶ further argues that a growing number of these non-rescued victims are in fact being treated as criminals.⁵⁷ Citing practical examples to substantiate her contention, Haynes advances the argument that even where non-rescued victims are not treated as criminals, their stories are typically treated with

⁵³ Dina Haynes, '(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfil the Promise of the Trafficking Victims Protection Act' (2007) 21 Georgetown Immigration Law Journal 337

⁵⁴ Ibid 349

⁵⁵ Ibid 347

⁵⁶ Stephanie Hepburn and Rita Simon, *Human Trafficking Around the World: Hidden in Plain Sight* (Columbia University Press 2013) 193

⁵⁷ Dina Haynes (n 53) 349

extreme scepticism by criminal justice practitioners, the consequence of which is that trafficking-related investigations are not systematically initiated against many perpetrators.⁵⁸ In view of these scathing criticisms, it is arguable that this unfortunate state of affairs requires serious reassessment. In other words, the parochial approach typically countenanced by states in respect of operationalizing the criminal justice elements of anti-trafficking law needs to be expanded to ensure that all trafficked persons, whether rescued or escapees, are treated as ‘real’ victims, since the ‘the exercise of agency to escape at some point in the trafficking exploitation does not indicate that a victim is somehow less authentic.’⁵⁹ Indeed, as Srikantiah correctly asserts, ‘trafficking does not always involve chains and physical bondage.’⁶⁰

2.3.2. A ‘real’ victim is a passive foreign girl or woman who has been trafficked for the purpose of sexual exploitation.

When a ‘raid’ or ‘rescue’ operation is conducted, a particular type of victim is envisaged by criminal justice practitioners: a passive foreign woman or girl who is trafficked for the purpose of sexual exploitation.⁶¹ This notion of an ‘iconic victim’, as described by Jayashri Srikantiah, has arguably ‘seeped into prosecutors’ and investigators’ identification of traffick[ed] victims, with tragic consequences for victims of labour or sex trafficking who do not describe their stories consistently with it.’⁶² Nevertheless, it appears that painting the picture of an ‘iconic victim’ is tacitly an important aspect of the criminal justice approach, as it allows prosecutors to describe the victim as completely blameless and the trafficker as maximally culpable.⁶³ In this regard, a victim who is assumed to have exercised any degree of agency, such as the desire to migrate from his/her country of origin in order to better his/her economic prospects or to free him/herself from exploitative conditions in the destination country, is quickly disregarded as a victim and, in some instances, even treated as a criminal.⁶⁴ In the same vein, a local man who has been subject to internal, as opposed to transnational, trafficking, for example, into the

⁵⁸ Ibid 347

⁵⁹ Jayashri Srikantiah, ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 Boston University Law Review 157, 198.

⁶⁰ Ibid

⁶¹ See Nandinee Bandyopadhyay, ‘Streetwalkers Show the Way: Reframing the Debate on Trafficking from Sex Workers’ Perspective’ (2004) 35(4) IDS Bulletin 104 (rejecting the “raid and rescue” approach favoured by law enforcement officials).

⁶² See Jayashri Srikantiah (n 59) 160.

⁶³ Ibid 161.

⁶⁴ Nora Demleitner, ‘The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution’ in David Kyle and Ray Koslowski (eds), *Global Human Smuggling: Comparative Perspectives* (JHU Press 2001) 257.

mining or agricultural industry, may also be regarded as unworthy of protection.⁶⁵ The practical implications of this particular hegemonic assumption are manifold, but include, at the very least, an incomplete description of trafficked persons' victimhood and the complex socio-economic realities surrounding their diverse experiences;⁶⁶ the misclassification of victims who do not meet the pervading criteria as 'illegal aliens';⁶⁷ misleading the public into believing that only one form of trafficking – sex trafficking – is recognisable and, indeed, capable of being legally addressed; 'essentializing' and 'othering'⁶⁸ a large cadre of foreign victims who are already subject to pervasive forms of cultural stereotypes, racism and gender discrimination;⁶⁹ and, potentially, legitimizing the use of the services of men who are trafficked into forced labour.⁷⁰ These consequences are far-reaching, and would suggest that a re-assessment of the existing criminal justice approach to human trafficking is of utmost necessity.

2.3.3. Only a person who cooperates with law enforcement officials in the institution of criminal proceedings and who can act the part of a good witness is truly worthy of support and assistance.

Another pervasive, though often unstated, hegemonic assumption underlying the criminal justice approach to human trafficking is that to be a 'real' victim, a person who alleges that he/she has been trafficked must demonstrate that he/she is willing and able to cooperate with law enforcement officials, and that once criminal proceedings have been commenced against his/her trafficker(s), he/she will act the part of a good witness.⁷¹ According to Bo Cooper, the most practical illustration of such an assumption arises in the context of criminal proceedings

⁶⁵ See Kathy Richards, 'The Trafficking of Migrant Workers: What are the Links between Labour Trafficking and Corruption?' (2004) 42(5) *International Migration* 147 (citing instances where these victims' 'testimonies have been intentionally ignored or destroyed to protect certain powerful alliances).

⁶⁶ Jayashri Srikantiah (n 59) 209.

⁶⁷ Kevin Johnson, 'Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement' (1993) *Boston University Law Review* 1139, 1234 (arguing that victims who do not fit established criminal justice criteria fall into the category of 'illegal aliens').

⁶⁸ See Jonathan Todres, 'Law, Otherness, and Human Trafficking' (2009) 49 *Santa Clara Law Review* 605 ('essentialism' is defined as the attribution of certain [negative] characteristics to certain groups of people i.e. trafficked victims from the 'South'; whilst 'othering' involves the devaluation of these individuals, communities, and even nations, and a privileging of those who are members of the dominant group, class, or country).

⁶⁹ Dina Haynes (n 53) 356 – 57.

⁷⁰ Julie Lopiccolo, 'Where are the Victims - The New Trafficking Victims Protection Act's Triumphs and Failures in Identifying and Protecting Victims of Human Trafficking' (2008) 30 *Whittier Law Review* 851 (arguing that the 'uneven focus on sex trafficking reflects western ideals that condemn the sale of sex, but participate in creating the demand for inexpensive products that require the use of cheap or forced labour. Therefore, it is easier to turn a blind eye to labour exploitation than sexual exploitation').

⁷¹ For critique of this approach, see Committee against Torture, 'Concluding observations of the Committee against Torture on Czech Republic, adopted at Forty-eighth session (7 May-1 June 2012)', CAT/C/CZE/CO/4-5, 13 July 2012 [16]

wherein which victims are typically required to cooperate with competent authorities in order to qualify for the temporary regularisation of their immigration status⁷² or, indeed, benefit from the attendant physical and material assistance that anti-trafficking law typically envisages. More specifically, the argument has been advanced that this approach fails to account for contemporary humanitarian ideals,⁷³ such as those provided for in the UN Trafficking Guidelines,⁷⁴ which require that states afford trafficked victims at least 30 days to recover from the trafficking experience without being pressured into cooperating with criminal justice practitioners.⁷⁵ Moreover, by overemphasizing the need for victims to cooperate in the institution of criminal proceedings, the foregoing hegemonic assumption does not adequately take account of the fact that said victims might very well be ‘frightened, numb, confused, or still under the psychological control of the trafficker’⁷⁶ at the relevant time. In such circumstances, victims who might very well have been trafficked risk losing out on support and assistance measures,⁷⁷ and may even be deported should they refuse to cooperate.⁷⁸ On a related issue, the argument can also be made that trafficked victims run the risk of being re-victimised where the circumstances are such that they are lured into cooperating with criminal justice practitioners through the provision of ‘false or unrealistic promises regarding their safety and that of their families’.⁷⁹ Whenever promises of this nature are made, but are not kept in practice, victims, as well as potential victims who might otherwise have been inclined to institute criminal proceedings against their traffickers, might lose trust in the criminal justice system, thus widening the gap between the number of victims identified and the number of ensuing

⁷² Bo Cooper, ‘A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act (TVPA)’ (2002) 51 *Emory Law Journal* 1041 (arguing that section 107 of the TVPA serves a purely law enforcement purpose).

⁷³ Julie Lopiccolo (n 70) (arguing that the requirement to cooperate with law enforcement officials ‘does not help those victims who are too paralyzed by fear, or traumatized by their experience to testify against their morally bankrupt captors.’)

⁷⁴ UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add.1, United Nations 2002).

⁷⁵ See UN High Commissioner for Human Rights, ‘Commentary to the UN High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*’ (2010) 151

⁷⁶ See Jayashri Srikantiah (n 59) 180.

⁷⁷ Committee on the Elimination of All Forms of Racial Discrimination, ‘Concluding observations on the sixteenth to nineteenth periodic reports of Belgium’, Adopted by the Committee at its eighty-fourth session (3–21 February 2014), CERD/C/BEL/CO/16-19, 14 March 2014 [21]

⁷⁸ See Dina Haynes, ‘Used, abused, arrested and deported: The Case for Extending Immigration Benefits to Protect Victims of Trafficking and Secure Prosecution of Traffickers’ (2003) 6 *Bepress Legal Series* 1.

⁷⁹ Gallagher and Holmes (n 28) 333.

convictions.⁸⁰ Against this backdrop, it is submitted that the hegemonic assumption regarding victim cooperation requires serious re-assessment, and, indeed, corrective action.

2.3.4. A decrease in the prevalence of trafficking-related incidents or, alternatively, an increase in trafficking-related prosecutions/convictions, are strong and reliable indicators of ‘success’ in responding to human trafficking.

The rapid expansion in measures aimed at combating human trafficking since the entry into force of the Trafficking Protocol has led to increasing calls for two important criminal justice determinants to be measured: the prevalence of trafficking-related incidents and the rates of criminal prosecutions/convictions.⁸¹ Unfortunately, while the growing corpus of data on these determinants has arguably been useful in informing anti-trafficking policy, these have nevertheless been appropriated by criminal justice practitioners in a way that seeks to bolster the assumption that ‘success’, however defined, is achieved where there has been an increase in trafficking-related prosecutions/convictions or, alternatively, a decrease in the perceived prevalence of the phenomenon.⁸² As Anne Gallagher has rightly pointed out, this assumption is often misplaced, particularly when viewed in light of the fact that changes in respect of these determinants are ‘crude and potentially misleading success indicators.’⁸³ In other words, changes in prosecution rates, for example, may be attributable to the implementation of new anti-trafficking laws, improvements in the way in which data is collected or, in some cases, poor quality prosecutions which place a disproportionate amount of attention on prosecuting ‘easy cases’.⁸⁴ In the same vein, a decrease in the perceived prevalence of incidents of human trafficking may not in all cases be indicative of ‘success’ in responding to human trafficking, but rather, the adaptation of traffickers to new modes of operation that further drive victims underground, thus making it more difficult for them to be identified by competent national authorities. In short, therefore, it is submitted that it is dangerous to unequivocally assume, as some criminal justice practitioners have done, that changes in patterns on the criminal justice front reflect ‘success’ in responding to human trafficking. In this regard, it must be borne in mind that while there is a need for sustained evaluations of every aspect of a state’s anti-trafficking machinery, the findings derived from these evaluations must necessarily be treated

⁸⁰ Tsachi Keren-Paz, *Sex Trafficking: A Private Law Response* (Routledge 2013) 7

⁸¹ Claire Seelke, *Trafficking in Persons in Latin America and the Caribbean* (DIANE Publishing 2010) 14

⁸² Anne Gallagher and Rebecca Surtees, ‘Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?’ (2012) 1 *Anti-Trafficking Review* 10, 23

⁸³ *Ibid*

⁸⁴ *Ibid* 24

with a degree of caution given the difficulties inherent in establishing correlations in respect of key criminal justice determinants, as discussed hitherto.

2.4. THE HUMAN RIGHTS APPROACH

2.5. General

In contrast to the criminal justice's 'offender-centric' approach as described in the foregoing section, the human rights approach's primary focus lies in effectively securing the rights and interests of trafficked victims.⁸⁵ At the elementary level, this approach considers that in order to effectively protect victims of trafficking, the offense of trafficking must itself be prohibited.⁸⁶ In fact, this elementary commitment has been *explicitly* enshrined in a number of international human rights instruments, including the Convention on the Elimination of All forms of Discrimination against Women (CEDAW),⁸⁷ the Convention on the Rights of the Child,⁸⁸ the American Convention on Human Rights,⁸⁹ and the ILO Convention 182 on the Worst Forms of Child Labour,⁹⁰ which respectively place an obligation on states to prohibit, in particular, the trafficking of women and children.⁹¹ Apart from the obligation to prohibit human trafficking,

⁸⁵ Conny Rijken, 'A Human Rights Based Approach to Trafficking in Human Beings' (2009) 20 Security and Human Rights 212

⁸⁶ Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (n 2) 148

⁸⁷ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) Article 6 provides that requires that these countries 'take all appropriate measures, including legislation, to suppress all forms of traffic in women.' See also CEDAW, 'Concluding Comments - Croatia' (2005) UN Doc CEDAW/C/CRO/CC/2-3 [37]-[38]; CEDAW, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Mauritania' (2007) UN Doc CEDAW/C/MRT/CO/1 [31].

⁸⁸ Article 35, Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

⁸⁹ Article 6, American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

⁹⁰ C182 - Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted on 17 Jun 1999, entered into force on 19 Nov 2000). Article 1 obliges states to prohibit and eliminate the worst forms of child labour as a matter of urgency. 'Child labour' is defined in Article 3 of said instrument as including the 'trafficking of children.'

⁹¹ Note that other international instruments, such as the International Covenant on Civil and Political Rights (Article 8), the Forced Labour Convention (Article 2) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 11) prohibit slavery, forced labour and servitude. In their recommendations, the respective Committees charged with monitoring the implementation of these Conventions have cited the need for effective action against human trafficking. See e.g. UN Human Rights Committee, 'Concluding observations of the Human Rights Committee - Philippines' (2003) UN Doc CCPR/CO/79/PHL [13]; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families - Mali' (2006) UN Doc CMW/C/MLI/CO/1 [8]; ILO, Report of the

however, the human rights approach goes further by emphasizing the critical importance of the obligation enshrined in international human rights law to prevent human trafficking⁹² by, for example, addressing the root causes that fuel the continued existence of the phenomenon, including poverty, discrimination, and the absence of employment and educational opportunities.⁹³

Furthermore, in contrast to the criminal justice approach which places considerable emphasis on the criminalisation of both state and non-state actors, the human rights approach to human trafficking primarily concerns itself with the duties owed by *states* to respect, protect and fulfil⁹⁴ their international anti-trafficking obligations. In this context, the human rights approach countenances the notion that states must give primacy to the rights of trafficked victims on all fronts, and in particular, in so far as support and assistance is concerned.⁹⁵ Undoubtedly empowered by the most comprehensive transnational anti-trafficking tool in existence – the Trafficking Protocol – human rights practitioners have increasingly pressured states to view human trafficking as a continuum of violence⁹⁶ over the course of which the rights of trafficked victims are systematically violated.⁹⁷ To counter this perennial challenge, the human rights approach envisages that measures will be adopted by states that are aimed at ensuring the physical safety of victims, their active participation in court proceedings, and the provision of appropriate compensation so as to ameliorate any harm caused.⁹⁸ The human rights approach

Committee of Experts on the Application of Conventions and Recommendations - Bangladesh: Forced Labour Convention No. 29' (2012) [250]

⁹² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990). Article 35 requires that states 'take all appropriate national, bilateral and multilateral measures to prevent the [...] traffic in children for any purpose or in any form.' See also CRC, 'Concluding observations of the Committee on the Rights of the Child - Bangladesh' (2003) UN Doc CRC/C/15/Add.221 [74(c)]

⁹³ International Covenant on Economic, Social and Cultural Rights (ICESCR) See e.g. Articles 2(2), 6, 7, 11 and 13 - 14; See also CESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights - Slovenia' (2006) UN Doc E/C.12/SVN/CO/1 [33]; CESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights - Uzbekistan' (2006) UN Doc E/C.12/UZB/CO/1 [56]. See generally, Articles 1 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; see also CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination - Azerbaijan' (2005) UN Doc CERD/C/AZE/CO/4 [11]; CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination - Nigeria' (2005) UN Doc CERD/C/NGA/CO/18 [22].

⁹⁴ Tomoya Obokata, 'A Human Rights Framework to Address Trafficking of Human Beings' (2006) 24 Netherlands Human Rights Quarterly 377, 379

⁹⁵ Zbigniew Lasocik, 'Human trafficking: a challenge for the European Union and its member states (with particular reference to Poland)' in Leslie Holmes (ed), *Trafficking and Human Rights: European and Asia-Pacific Perspectives* (Edward Elgar 2010) 30

⁹⁶ Rosemary Barberet, *Women, Crime and Criminal Justice: A Global Enquiry* (Routledge 2014) 130

⁹⁷ See generally Yu Kojima, *Women in the Trafficking-Migration Continuum: from the Perspectives of Human Rights and Social Justice* (Shaker Publishing 2007).

⁹⁸ UNHRC, 'Report of the Special Rapporteur on trafficking in persons especially women and children - the right to an effective remedy for trafficked persons' (2011) A/HRC/17/35 [20]

not only borrows from the Trafficking Protocol, but also from the strong normative commitments that characterise international human rights law. These commitments emphasize respect for, and, where appropriate, the fulfilment of, a number of important obligations relating, in particular, to residency,⁹⁹ repatriation¹⁰⁰ and reintegration.¹⁰¹

The human rights approach serves as a robust ‘framework of action’ that ensures that pressure is consistently placed on states to not only prohibit incidents of human trafficking, but also to actively investigate such matters, and, where appropriate, address the structural conditions, such as poverty, discrimination, and violence against women, that contribute to the continued existence of the phenomenon.¹⁰² Moreover, the human rights approach serves as a framework of action that empowers victims of human trafficking by affording them improved access to justice as well as non-discriminatory access to essential services commensurate with their needs.¹⁰³ The human rights approach also serves to unpack the lived experiences of trafficked victims in ways that place pressure on states to consistently meet the specific needs of these victims.¹⁰⁴

2.6. 'Hegemonic Assumptions'

The human rights approach, like the criminal justice approach, is also characterised by hegemonic assumptions.

2.6.1. Preventative measures aimed at raising awareness about human trafficking always result in positive attitudinal changes.

Over the last decade, a number of prevention-based measures have been directed at raising global awareness about human trafficking.¹⁰⁵ As a central tenet of the human rights approach, it is assumed that these measures have succeeded in changing deep-seated attitudes about human

⁹⁹ See e.g. Article 8 of the Migrant Workers Convention

¹⁰⁰ See e.g. Articles 1A(2) and 33(1) of the Convention Relating to the Status of Refugees. See also UNHCR Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HRC/GIP/02/01 (2002).

¹⁰¹ See e.g. Article 39 of the Convention on the Rights of the Child

¹⁰² Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (n 2) 121

¹⁰³ Ann Jordan, ‘Human rights or wrongs? The Struggle for a Rights-based Response to Trafficking in Human Beings’ (2002) 10 (1) *Gender & Development* 28, 33

¹⁰⁴ Shelley Inglis, ‘Expanding International and National Protections Against Trafficking for Forced Labour Using a Human Rights Framework’ (2001) 7 *Buffalo Human Rights Law Review* 55, 100

¹⁰⁵ See generally Céline Nieuwenhuys and Antoine Pécoud, ‘Human trafficking, information campaigns, and strategies of migration control’ (2007) 50 (12) *American Behavioural Scientist* 1674

trafficking, thereby aiding in the reduction of demand for the services of victims, whilst simultaneously creating an avenue for the proper identification and referral of trafficked victims.¹⁰⁶ However, without providing empirical evidence relating to the efficacy of these measures, it appears that it is often assumed by human rights practitioners that these measures have achieved their intended objectives, and, that, accordingly, more of said measures is warranted. The reality, however, is far more complex, and, in some instances, even antithetical to the basic premise underlying this assumption. As Cynthia Wolken has ably demonstrated in this context, the current portrayals of human trafficking in awareness-raising programs, rather than inevitably resulting in positive attitudinal changes, may in fact be marginalising those victims who do not conform to the ‘Hollywood-created mould of a victim’s colour, gender and country of origin.’¹⁰⁷ In other words, the near-ubiquitous portrayal of victims as passive, sexually exploited women from the global South by many human rights practitioners, ‘perfectly satiates the public demand for sexual violence using *education* as the perfect cover.’¹⁰⁸ Unfortunately, such images only serve to buttress the public’s already skewed image of human trafficking. In this context, it is submitted that numerous awareness-raising measures undertaken to date, pursuant to the demands of the human rights approach, though essential in educating the public about the dynamics of the phenomenon, cannot be uncritically assumed to result in positive attitudinal changes.¹⁰⁹ As such, human rights activists must be ever cognizant that the stereotypical images used in their public education campaigns may result in what Wolken describes as the failure of ordinary citizens to ‘identify the [...] invisible male victims or victims of colour who might be working or living within blocks of them.’¹¹⁰ In short, as the UN Special Rapporteur on Human Trafficking has herself concluded, it is not that the human rights approach sets out to embrace this hegemonic assumption, but rather that existing practice suggests that awareness-raising measures undertaken to date under the guise of human rights education do not always produce positive attitudinal changes.¹¹¹

¹⁰⁶ Vidyamali Samarasinghe and Barbara Burton, ‘Strategising prevention: a critical review of local initiatives to prevent female sex trafficking’ (2007) 17(1) *Development in Practice* 51, 58 - 59

¹⁰⁷ Cynthia Wolken, ‘Feminist Legal Theory and Human Trafficking in the United States: Towards a New Framework’ (2006) 6 *University of Maryland Law Journal of Race, Religion, Gender and Class* 407, 414

¹⁰⁸ *Ibid*

¹⁰⁹ Neil Weiner and Nicole Hala, ‘Measuring Human Trafficking: Lessons from New York City’ (Vera Institute of Justice 2008) 1 (arguing that the proliferation of awareness-raising programs, in the absence of reliable data, ‘presents the distinct risk of misdirected interventions and missed opportunities.’)

¹¹⁰ Cynthia Wolken (n 107) 416

¹¹¹ See Report of the Special Rapporteur on trafficking in persons, especially women and children, ‘Prevention of Trafficking in Persons’, A/65/288, UN General Assembly, 9 August 2010 [44] - [45] (noting that awareness-raising

2.6.2. Measures taken to protect victims of trafficking always operate in their best interests

Over the last decade, human rights practitioners have made tremendous strides in terms of convincing the international community of the need to articulate a comprehensive catalogue of rights that are intended to secure the best interests of trafficked victims.¹¹² While this is a positive development, both in terms of victims' increased access to services essential to their successful recovery as well as improved accountability and transparency on the part of states that provide these services, it should not be uncritically assumed that these measures always operate in victims' best interests. Rather, one must be ever cognizant of the fact that, in some instances, trafficked women, in particular, might be 'infantilized in the name of protecting and saving them [...] which takes away their agency and power.'¹¹³ In other words, by uncritically assuming that protection-based measures undertaken pursuant to the human rights approach are always operating in the best interests of victims of trafficking, human rights practitioners run the risk of denying the agency of victims who migrate in search of better opportunities or who make choices regarding whether they are willing to accept the services afforded them, such as accommodation in state-run facilities. This point is strongly articulated by one of the leading scholars in the anti-trafficking field, Anne Gallagher, whose empirical findings suggest that 'measures taken in the name of addressing trafficking [...] have had a highly adverse impact on individual rights and freedoms.'¹¹⁴ In this context, Gallagher cites a number of 'negative human rights externalities',¹¹⁵ including the unwarranted detention of trafficked persons in immigration or shelter facilities under the guise of protection, which invariably results in their freedom of

campaigns undertaken pursuant to the human rights approach 'do not always reach groups that are at higher risk, that many of them use detrimental images of women and girls and convey distorted messages about the risks involved in trafficking and that their impact is barely monitored and evaluated [...] Many awareness-raising campaigns simply use scare tactics to prevent people from leaving home. Such campaigns are counterproductive and cause unintended negative effects. There are reports, for instance, that awareness-raising campaigns resulted in a decrease in children's school attendance because the parents were afraid that their children might be abducted and refusal by some to travel overseas because the traveller thought she would be trafficked if she left the village. Furthermore, some awareness-raising campaigns may result in the unintentional stigmatization of certain groups of trafficked persons, such as women [...] Many of the images and messages used in awareness-raising campaigns tend to focus on women trafficked for forced prostitution, thereby giving the public the wrong impression that trafficking is about prostitution and that all trafficked women are prostitutes. In some countries, such misdirected awareness raising efforts have reportedly produced overly suspicious law enforcement officers who hinder the exercise by women and girls of the freedom to travel abroad. In addition, such stereotyping and stigmatization may pose obstacles to the reintegration process upon their return to their communities.'

¹¹² Anne Gallagher, 'Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis' 23 (4) *Human Rights Quarterly* 975, 990

¹¹³ Moshoula Capous-Desyllas (n 7) 72

¹¹⁴ Anne Gallagher, 'Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway' (2009) 49(4) *Virginia Journal of International Law* 789, 831

¹¹⁵ *Ibid*

movement being curtailed; invasion of victims' privacy under the guise of protection; as well as unfair trials that do not comport with the basic principles of the legal system in question.¹¹⁶ While these externalities might not in all circumstances be the result of wilful acts or omissions, their very existence, according to the UN Special Rapporteur on Human Trafficking, does, however, suggest that in their thrust to secure the protection of victims of trafficking, there is a need for human rights practitioners to critically and consistently evaluate the efficacy of their work so as to ensure that intended objectives are achieved in a manner that does not (in)advertently re-victimise the already victimised.¹¹⁷

2.7. Summary

A large scale empirical study recently commissioned by Richard Frank and Beth Simmons of Harvard University suggests that, statistically, the criminal justice approach has made a significant contribution to reducing the likelihood of a 'trafficking corridor' developing between neighbouring countries.¹¹⁸ The study further indicates that stringent law enforcement efforts on the part of several states result in a significant reduction in observed trafficking that is 'well above and beyond the benefits of one-sided enforcement.'¹¹⁹ As such, it would appear that compatible policies on the part of both source and destination countries are what are needed in order to better combat human trafficking. Notwithstanding this positive outlook, however, it is perhaps axiomatic that the criminal justice approach alone is a wholly insufficient regulatory framework for comprehensively addressing the phenomenon and, indeed, the myriad needs of trafficked victims. Equally, however, although the human rights approach offers practical solutions that could address the 'broader social aspects of trafficking,'¹²⁰ as well as the immediate and long term needs of trafficked victims, such an approach - in the absence of a robust criminal justice framework - is also an insufficient regulatory framework. Against this backdrop, it is submitted that in order to avert what Gallagher and Holmes describe as possible

¹¹⁶ Ibid

¹¹⁷ Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, 'A Human Rights-based Approach to the Administration of Criminal Justice in Cases of Trafficking in Persons', United Nations A/HRC/20/18, UN General Assembly, 6 June 2012 [100] (noting that 'as States work to adopt a rights-based approach, they should be cognizant of the fact that certain laws and policies may have unintended negative consequences for victims of trafficking. Laws or policies that infringe the right to movement for victims or that impose mandatory detention or rehabilitation in the name of protection are in violation of human rights laws and may deny victims the right to a proper remedy.')

¹¹⁸ Richard Frank and Beth Simmons, 'National Law Enforcement in a Globalized World: The Case of Human Trafficking' (APSA 2013 Annual Meeting Paper 2013) 12

¹¹⁹ Ibid 14

¹²⁰ Paraskevi Boukli (n 17) 19

‘irrelevance and failure’,¹²¹ both the human rights and criminal justice approach must work in synergy, ‘mutually reinforcing, and not necessarily conflicting with each other’,¹²² as suggested by Tomoya Obokata. While the theme of synergy is briefly addressed in chapter 9, it suffices for the purposes of this chapter to note that the underlying tenets of the criminal justice and human rights approaches have informed the typology of action (‘INI’) utilised by this thesis. More specifically, while criminal justice considerations primarily inform the *normative* paradigm, human rights considerations inform the *individual* paradigm. And, finally, the institutional paradigm is informed by both criminal justice as well as human rights tenets. This theme is discussed further in the subsequent section.

B. THEORETICAL PERSPECTIVE

2.8. General

As indicated in chapter 1, one of the major gaps in the existing literature relates to the general absence of a comprehensive theoretical framework for the purposes of assessing the law and practice on human trafficking.¹²³ While, in recent years, Criminological,¹²⁴ Feminist¹²⁵ and Economic¹²⁶ Theories have emerged, their suitability for a thesis of this nature is questionable.

¹²¹ Gallagher and Holmes (n 28) 321.

¹²² Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (n 2) 169

¹²³ Mohammad Joarder, Abdul Munim and Paul Miller, ‘A Theoretical Perspective on Human Trafficking and Migration-debt Contracts’ (2013) 49 (10) *The Journal of Development Studies* 1332, 1333 (arguing that ‘despite the policy relevance, theoretical analysis in the area of human trafficking is relatively scarce’).

¹²⁴ Several criminological theories have been developed over the years to problematize the phenomenon of human trafficking. For commentary on the Social Disorganisation Theory, see Önder Karaku, and Oğuzhan Başibüyük, ‘Social Disorganization Theory and Human Trafficking: a Systemic Control Approach to the Phenomenon’ (2010) 12 (2) *Turkish Journal of Police Studies* 23. For commentary on the Rational Choice and Neutralisation Theories, see e.g. Beth Simmons and Paulette Lloyd, ‘Subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking’ (International Studies Association annual meeting, Montreal, 2011) 3; For commentary on the Integrated Theory, see e.g. Thozama Lutya and Mark Lanier, ‘An Integrated Theoretical Framework to Describe Human Trafficking of Young Women and Girls for Involuntary Prostitution’ in Jay Maddock (ed), *Public Health - Social and Behavioural Health* (INTECH Open Access Publishing 2012) 555

¹²⁵ For commentary on Feminist Abolitionism, see Kathleen Barry, *The Prostitution of Sexuality* (New York University Press 2005); Michelle Dempsey, ‘Sex Trafficking and Criminalization: In defense of Feminist Abolitionism’ (2010) *University of Pennsylvania Law Review* 1729. For commentary on the work of Feminist Prohibitionists, see e.g. Jo Doezema, ‘Who gets to choose? Coercion, consent, and the UN Trafficking Protocol’ (2002) 10(1) *Gender & Development* 20; Kamala Kempadoo, ‘From Moral Panic to Global Justice: Changing Perspectives on Trafficking’ in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (Paradigm Publishes 2005); Martha Nussbaum, ‘Whether from reason or prejudice: taking money for bodily services’ (1998) 27(2) *Journal of Legal Studies* 693

¹²⁶ See e.g. Alexis Aronowitz, Gerda Theuermann and Elena Tyurykanova, *Analysing the business model of trafficking in human beings to better prevent the crime* (OSCE Office of the Special Representative and Co-

The overarching challenge that these theoretical perspectives face in terms of appropriateness is their general lack of comprehensiveness.¹²⁷ In other words, while these theories may very well address specific aspects of the phenomenon of human trafficking, such as the determinants that influence traffickers' decision to engage in exploitation, the distinct ways in which exploitation adversely affects women who have been trafficked for sex, and the key market variables that contribute to the continued existence of the crime, they do not comprehensively nor satisfactorily address all of these issues in a manner that sheds light on the effectiveness of anti-trafficking law and practice. For this reason, and in an effort to move beyond the partial picture painted by these theories, this thesis adopts Galligan's Socio-Legal Theory to address its research question.

2.9. The Socio-Legal Theory

The theoretical framework through which this thesis will attempt to assess the effectiveness of anti-trafficking law and practice is the Socio-legal Theory as advanced by Denis Galligan in his pioneering monograph, *Law in Modern Society*.¹²⁸ The central premise of this theory is that law exerts authority over society and yet, in so doing, is also restrained and influenced by social, political and economic factors.¹²⁹ In other words, law, in the context of this thesis, 'anti-trafficking law', is itself a distinct social phenomenon with its own character and features, but nevertheless interacts with society in real ways. In this interaction, the law may be modified, compromised, overridden or even ignored.¹³⁰ This is because, while law influences and affects attitudes and actions of state officials and citizens, its effectiveness is also influenced by said attitudes and actions.

The Socio-legal Theory, rather than focusing on the conceptual basis of law alone, goes even further by examining how law works in practice. According to Galligan, this can only be achieved by studying the law itself, as well as its implementation in particular social contexts. Apart from allowing for a critique of law's gaps and inconsistencies in view of state practice, this

ordinator for Combating Trafficking in Human Beings, 2010); Elizabeth Wheaton, Edward Schauer and Thomas Galli, 'Economics of human trafficking' (2010) 48 (4) *International Migration* 114.

¹²⁷ Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany* (Springer 2009) 74

¹²⁸ Denis Galligan, *Law in Modern Society* (Oxford University Press 2006) 4 fn 1. Note that Galligan uses the terms 'law in society' and 'law and society' to describe his theoretical orientation.

¹²⁹ *Ibid*

¹³⁰ *Ibid* 6

theory also provides a robust framework for reform against the backdrop of what Galligan describes as ‘practical experience.’¹³¹ Given that the socio-legal theory is concerned with issues of implementation, several assumptions underlie this perspective. Perhaps, the most important is that, despite a state’s commitment toward implementing law, the operation of law may nevertheless encounter ‘obstacles’ in practice,¹³² which may be practical in nature, such as a lack of resources, or conceptual in nature, such as uncertainty, inconsistency and vagueness. According to Galligan, in view of these obstacles, states may take a minimalist approach by engaging in ‘creative compliance’,¹³³ particularly when there are competing interests at work.

2.9.1. Appropriateness of the Socio-Legal Theory

Galligan’s Socio Legal Theory is employed in this thesis primarily because of its comprehensive breadth and pragmatic approach to assessing law when operationalized in particular social contexts. Notwithstanding the criticisms levelled against its theoretical orientation,¹³⁴ it is submitted that the Socio-legal Theory is nevertheless best suited for the purposes of a thesis of this nature which is concerned with the law and practice on human trafficking. The fact that it provides a road map for answering the research question, as well as guidance for constructing a typology of action, are also key considerations which are indicative of this theory’s suitability in relation to this thesis. For example, chapters 3 - 8 generally follow the analytical format suggested by Galligan for effectively answering the research question. First, they ‘map’¹³⁵ the law on human trafficking as accurately and completely as possible by identifying, describing and analysing key features and concepts underlying said law. Second, they assess how states, through state agents and institutions, operationalize anti-trafficking law. In particular, they explore the meanings¹³⁶ ascribed to anti-trafficking law by states through their practice, and the patterns that can be identified in so far as implementation is concerned. Third, they examine conventions and understandings¹³⁷ which shape the effectiveness of law in practice. These ‘social spheres’, according to Galligan, include the social, political and economic factors

¹³¹ Ibid 18

¹³² Ibid 340

¹³³ Ibid 343

¹³⁴ Reza Banakar, ‘Having one’s cake and eating it: the paradox of contextualisation in socio-legal research’ (2011) 7 (4) *International Journal of Law in Context* 487

¹³⁵ Denis Galligan (n 128) 34

¹³⁶ Ibid 35

¹³⁷ Ibid 37

that shape how anti-trafficking law is implemented.¹³⁸ Finally, they explain the implications of the findings on implementation and, suggest, where appropriate, suitable possibilities for reform.¹³⁹

2.9.2. Typology of Action

Apart from the foregoing, Galligan's Socio-legal Theory also informs the typology of action chosen to assess the efficacy of anti-trafficking law and practice. This typology - referred to in this thesis as 'INI' - embodies the central obligations or 'benchmarks'¹⁴⁰ contained in the Trafficking Protocol and related instruments. These benchmarks are intended to serve as the backdrop against which the law and practice on human trafficking in Europe and the Commonwealth Caribbean will be assessed. The key consideration, in this regard, is the extent to which anti-trafficking law, when viewed in light of state practice, achieves the objects and purposes of the obligations outlined under the *INI* typology.

As illustrated in the table below, the *INI* typology consists of three paradigms. The first is the 'Normative' paradigm. This is concerned with the substantive norms that serve as standards which states must comply with in order to effectively prosecute traffickers, thereby implementing core aspects of their international obligations. While the norms that potentially fall under the normative paradigm are manifold in nature, only seven of these norms are dealt with in this thesis, primarily because of space limitations.¹⁴¹ The second element of the typology, the 'Institutional' paradigm, is concerned with the interaction between state officials and the agencies within which they operate. The key areas of interest in this regard relate to the role that these personnel and bodies play in making, applying and enforcing law. According to Galligan, an institutional paradigm of this nature raises a number of key questions about organisational capacity, procedures, practices, attitudes and understandings that invariably influence how law is implemented in practice.¹⁴² And, finally, the third element of the 'INI' typology can be described as the 'Individual' paradigm because it is concerned with what Galligan describes as the state's responsibilities towards its citizens, and, more generally, the

¹³⁸ Ibid 333

¹³⁹ Ibid 38

¹⁴⁰ Ibid 312

¹⁴¹ Other normative issues which could be considered in great detail include the exercise of jurisdiction, the existence of sentencing guidelines, and cooperation of victims.

¹⁴² Galligan (n 128) 324 - 25

provision of services to those in need.¹⁴³ For the purposes of this thesis, this paradigm is essential, as it allows for an assessment of the law and practice with respect to the rights of trafficked victims, who have traditionally been regarded by the law as vulnerable persons who require support and assistance commensurate with their needs. In short, then, chapters 3 and 6 exclusively address *normative* considerations, chapters 4 and 7 are concerned with *institutional* consideration, while chapters 5 and 8 address *individual* considerations at both the European and Commonwealth Caribbean levels.

The table below outlines the specific benchmarks that are applicable under the respective paradigms of the *INI* typology. These benchmarks largely reflect the central obligations that arise under the Trafficking Protocol, and related instruments.

¹⁴³ Ibid 123

Figure 1: Typology of Action

'INI' TYPOLOGY

| INSTITUTIONAL | NORMATIVE | INDIVIDUAL |
|---|--|---|
| National Agenda ¹⁴⁴ | Criminalisation ¹⁴⁵ | Primacy of Victims' Rights ¹⁴⁶ |
| Awareness-Raising ¹⁴⁷ | Regulation of Legal Persons ¹⁴⁸ | Basic Supplies ¹⁴⁹ |
| Victim Identification and Referral ¹⁵⁰ | Penalties ¹⁵¹ | Medical and Psychological Assistance ¹⁵² |
| Court Proceedings ¹⁵³ | Aggravating Circumstances ¹⁵⁴ | Special Measures for Children ¹⁵⁵ |
| Stakeholder Collaboration ¹⁵⁶ | Forfeiture ¹⁵⁷ | Safe and Secure Accommodation ¹⁵⁸ |
| Training ¹⁵⁹ | Compensation ¹⁶⁰ | Privacy and Confidentiality ¹⁶¹ |
| | Investigation ¹⁶² | Information, Documentation & Translation ¹⁶³ |
| | | Regularisation of Immigration Status ¹⁶⁴ |
| | | Repatriation ¹⁶⁵ |
| | | Reintegration ¹⁶⁶ |

¹⁴⁴ Article 9 Trafficking Protocol; see also International human rights law obligations to address the root causes of human trafficking, e.g. poverty, discrimination, unemployment, and violence against women etc. Article 2(2), 6, 11 and 12 of ICESCR; Article 2(1) of ICCPR, amongst others.

¹⁴⁵ Article 5 Trafficking Protocol; see also Article 6 CeDaW and Article 35 CrC.

¹⁴⁶ Ibid Article 6(5) witness protection ('physical safety'); The Trafficking Protocol is silent on the question of the non-punishment of trafficked victims, but when viewed in light of the Guidance provided by the Committee of the Parties to the Protocol, it is clear that this obligation arises. See Conference of the Parties to the United Nations Convention on Transnational Organized Crime, Working Group on Trafficking in Persons, 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009,' UN Doc. CTOC/COP/WG.4/2009/2, Apr. 21, 2009, [12]

¹⁴⁷ Article 9 Trafficking Protocol

¹⁴⁸ Ibid Article 11(3)

¹⁴⁹ Ibid Article 6(3) ('measures to provide for the physical, psychological and social recovery of victims of trafficking in persons' can be interpreted non-exhaustively to include obligation to provide basic supplies since this is crucial to victims' physical, psychological and social recovery)

¹⁵⁰ The Trafficking Protocol is silent on the question of identification and referral, but when viewed in light of the instrument's 'statement of purpose' contained in Article 2(b), as well as the Guidance provided by the Committee of the Parties to the Protocol (above), it is clear that this obligation arises. See Conference of the Parties to the United Nations Convention on Transnational Organized Crime (n 146)[12]

¹⁵¹ The Trafficking Protocol is silent on the question of penalties, but, in accordance with Article 1(1) of said instrument, the Protocol must be interpreted in light of the UN Organised Crime Convention; therefore, Article 11(1) of the UN Organised Crime Convention on penalties appears to be applicable.

¹⁵² Article 6(3) (c) Trafficking Protocol

¹⁵³ Ibid Article 6(2)(a) - (b)

¹⁵⁴ The Trafficking Protocol is silent on the question of aggravating circumstances, but, in accordance with Article 1(1) of said instrument, the Protocol must be interpreted in light of the UN Organised Crime Convention; therefore, Article 11(2) of the UN Organised Crime Convention appears to be applicable.

¹⁵⁵ Ibid Article 6(3)(4); Article 9(1)(b) and 4

¹⁵⁶ Ibid Article 6(3), Article 9(3) - (5); Article 10(1)

¹⁵⁷ The Trafficking Protocol is silent on the question of forfeiture, but, when interpreted in light of the UN Organised Crime Convention (Article 1(1) Trafficking Protocol), it appears that Article 12 of UN Organised Crime Convention on forfeiture appears is applicable.

¹⁵⁸ Ibid Article 6(3) (a)

¹⁵⁹ Ibid Article 10(2)

¹⁶⁰ Ibid Article 6(6)

¹⁶¹ Ibid Article 6(1)

¹⁶² Ibid Article 4

¹⁶³ Ibid Article 6(2)(a) (information); Article 8(4) (documentation); Article 6(2)(b) (translation)

¹⁶⁴ Ibid Article 7(1)

¹⁶⁵ Ibid Article 8

¹⁶⁶ Ibid Article 6(3) (the phrase 'provide for the physical, psychological and social recovery' can be interpreted to include the obligation to provide reintegration)

C. METHODOLOGY

2.10. General

This section will examine the role played by the doctrinal, socio-legal and comparative methodological approaches in the development of the thesis. More specifically, this section will explore how these approaches, both individually and collectively, served to inform the important processes of research design, data collection and analysis. While the doctrinal approach was used to ascertain and evaluate the existing *law* on human trafficking, the socio-legal approach was used to assess the concomitant *practice* of states pursuant to these laws, so as to determine whether there is indeed a 'disconnect' between anti-trafficking law and practice. The comparative approach was also employed by the thesis so as to evaluate the similarities and differences in the manner in which human trafficking is regulated, as well as the relative efficacy of anti-trafficking law and practice, in Europe and the Commonwealth. Finally, ethical considerations are also appropriately addressed in this section.

2.11. Doctrinal Approach

The first of the three methodological approaches employed in the development of this thesis is the doctrinal approach. Through this approach, the thesis seeks to ascertain the precise state of the existing law¹⁶⁷ on human trafficking in the jurisdictions surveyed through a rigorous analysis of applicable legal norms.¹⁶⁸ This process involves an examination of several primary source materials, including international instruments, domestic legislation and case law, in order to determine what the applicable law on human trafficking is. It also involves an examination of the coherence, relevance, and applicability of various provisions of anti-trafficking law at both the European and Commonwealth Caribbean levels. Doctrinal analyses of the primary source materials relied upon in this thesis were informed by myriad secondary source materials, including, *inter alia*, official reports, policy papers, books, journal articles, encyclopaedias, conference papers, blogs and leading newspaper articles. These materials, and, in particular, the primary source materials, were retrieved from various libraries and archives, both in the

¹⁶⁷ Ian Dobinson and Francis Johns, 'Qualitative Legal Research', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press 2007) 19 (arguing that the doctrinal research methodology is concerned with 'ascertaining the precise state of the law on a particular point').

¹⁶⁸ Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 1.

UK and in the Commonwealth Caribbean, as well as from a number of electronic repositories, including 'Google Scholar', 'Google Books', 'Heinonline', 'Westlaw' and 'LexisNexis', amongst others. The secondary materials utilised throughout the development of the thesis were strategically employed so as to better understand, interpret, and analyse applicable anti-trafficking norms, thus providing a clearer picture as to the precise state of the existing law on human trafficking.

The jurisdictions in relation to which this thesis is concerned can be categorized into two taxonomies. The first is the *regional* taxonomy. This is concerned with the law and practice on human trafficking in Europe. Europe, as a *region*, was selected for the purposes of this thesis not only because of the sheer amount of, and ease of access to, relevant information, but also because it boasts what is arguably the most progressive regional anti-trafficking machinery in the world today,¹⁶⁹ the nuances of which can potentially inform anti-trafficking law and practice in other regions. Doctrinal analyses of the law and practice on human trafficking at the European level, which invariably involve an examination of the practices of specific European countries, will arguably provide a *general picture* of the region's progress to date, in addition to identifying areas where European anti-trafficking law¹⁷⁰ remains ineffective. Such analyses can also provide useful lessons from which other regions and countries can learn. Secondly, the *domestic* taxonomy is also examined, to the extent that the thesis involves a critical evaluation of not only the extent to which the obligations contained in the Trafficking Protocol are effective in the Commonwealth Caribbean countries examined,¹⁷¹ but also the similarities and differences gleaned from the *general picture* painted by an assessment of Commonwealth Caribbean anti-trafficking law and practice, on the one hand, and European anti-trafficking law and practice, on the other. The comparative theme is further explored in section 2.13 below.

¹⁶⁹ See Cornelius Friesendorf, 'Pathologies of Security Governance: Efforts against Human Trafficking in Europe' (2007) 38(3) Security Dialogue 379.

¹⁷⁰ In the context of this thesis, 'European anti-trafficking law' is a generic term used to describe the existing corpus of rules and principles that characterise the anti-trafficking regimes in both the EU and CoE.

¹⁷¹ While there are 12 English-speaking or 'Commonwealth Caribbean countries', for the purposes of this thesis, only four of these countries are examined: Guyana, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago. The rationales for selecting these countries are discussed in section 2.14.

2.12. Socio-Legal Approach

The socio-legal approach, whilst sharing some similarities with the doctrinal approach,¹⁷² goes further than the latter,¹⁷³ by specifically analysing the operationalisation of law in its particular social contexts.¹⁷⁴ The socio-legal approach is an appropriate methodological tool for a thesis of this nature, primarily because it informs the use of empirical research methods, such as the semi-structured interviews¹⁷⁵ utilised in this study, as well as the fact that its central focus lies in assessing ‘law in action’,¹⁷⁶ that is, the extent to which existing state practice in the countries surveyed comports with the respective anti-trafficking norms applicable in said regions and countries.¹⁷⁷ As intimated in chapter 1, this is a notable contribution to the existing literature¹⁷⁸ which has, to date, been largely concerned with unpacking the push and pull factors that characterise the phenomenon, the profile of victims and perpetrators, as well as the law, though not the practice, on human trafficking.¹⁷⁹ Unlike the doctrinal methodology discussed in section 2.11, however, the socio-legal approach goes beyond an examination of the law ‘on the books’, by engaging in the ‘social-auditing of law’. In other words, the primary focus of this approach within the context of this thesis is to unpack the ‘gaps’ which currently exist between ‘legal idealism’ and ‘social reality’¹⁸⁰ in ways that could inform policy in the jurisdictions examined.

¹⁷² Both the doctrinal and socio-legal approaches attempt to ascertain what the law is, though the latter goes further by determining how law is operationalized in practice in particular social contexts.

¹⁷³ Mike MacConville and Wing Hong Chui, ‘Introduction’ in Mike MacConville and Wing Hong Chui (eds), *Research Methods For Law* (Edinburgh University Press 2007) 5 (arguing that the doctrinal research methodology is ‘intellectually inflexible, inward-looking’ and too narrow in scope and application).

¹⁷⁴ Hillyard Paddy and Joe Sim, ‘The Political Economy of Socio-Legal Research’, in Thomas (ed) *Socio-Legal Studies*, (Aldershot 1997) 45 (noting that Socio-legal research ‘takes all forms of law and legal institutions, broadly defined, and attempts to further our understanding of how they are constructed, organised and operate in their social, cultural, political and economic contexts’).

¹⁷⁵ While these methods were specifically chosen because best support the objectives of this thesis, it must be noted that, generally, in socio-legal research, there are no particular methods as such, and researchers gather ‘data wherever appropriate to the problem’ and ‘use any variety of methods which will generate that data’. See, Alan Bradshaw, ‘Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods’, in Phillip Thomas (ed), *Socio-Legal Studies* (Aldershot 1997) 99.

¹⁷⁶ Roger Cotterrell, ‘Why Must Legal Ideas be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 2, 171.

¹⁷⁷ Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works, Final Report and Recommendations* (The Nuffield Foundation: London, 2006) (arguing that because socio-legal research uses empirical data, it provides vital insights into the law in context, i.e. how the law works in the real world).

¹⁷⁸ Guri Tyldum, ‘Limitations in Research on Human Trafficking’ (2010) 48 (5) *International Migration* 13 (pleading for more empirically based studies as these will immensely assist in policy development and evaluation).

¹⁷⁹ See Elzbieta Gozdiak, *Data and Research on Human Trafficking: Bibliography of Research-based Literature* (Diane Publishing 2011)

¹⁸⁰ Ernest Jones, ‘Some Current Trends in Legal Research’ (1962) 15 *Journal of Legal Education* 121.

In keeping with the socio-legal approach, it is important to note that, for the purposes of this thesis, interviews were conducted with key stakeholders in the anti-trafficking field in four Commonwealth Caribbean countries. This is further elaborated upon in section 2.14 below.

2.13. Comparative Approach

The third methodological approach employed by this thesis is that of the comparative approach. This approach is concerned with examining how a particular problem is solved in at least two legal systems, as well as exploring the similarities and differences in the respective frameworks that are designed to address the problem.¹⁸¹ Whereas 'integrative' comparative scholars have traditionally emphasised the similarities between legal systems, 'contrastive' scholars concern themselves with the differences between legal systems.¹⁸² In the specific context of this thesis, both the 'integrative' and 'contrastive' approaches have been employed, against the backdrop of the *horizontal* as well as *vertical* dimensions of comparative law.¹⁸³ With regard to the *horizontal* dimension, the thesis compares the law and practice on human trafficking as between the four Commonwealth Caribbean countries under investigation. It also compares the law and practice on human trafficking as between the respective European countries in order to glean a *general picture* of the effectiveness of European anti-trafficking law. At the *vertical* level, the thesis compares the *general picture* painted by an assessment of the law and practice on human trafficking in the four Commonwealth Caribbean countries examined to the *general picture* gleaned from an assessment of European anti-trafficking law and practice. Additionally, it compares the law and practice of the individual Commonwealth Caribbean countries to that which obtains in individual European countries, so as to determine the extent to which similarities and differences exist.¹⁸⁴

¹⁸¹ David Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (Hart 2001) 199.

¹⁸² Antonios Platsas, 'The Functional and the Dysfunctional in the Comparative Method of Law: Some Critical Remarks' 12(3) *Electronic Journal of Comparative Law* 1

¹⁸³ Aleksandar Momirov and Andria Fourie, 'Comparative Law Methods: Tools for Conceptualising the International Rule of Law' (2009) 2 *Erasmus Law Review* 291 (noting that legal comparison is primarily 'horizontal' when it occurs among legal systems belonging to the same 'level' or 'echelon'), or 'vertical' when it occurs among legal systems not belonging to the same 'level', i.e. 'cross-echelon').

¹⁸⁴ Jaakko Husa, 'About the Methodology of Comparative Law - Some Comments Concerning the Wonderland' (Maastricht Working Papers Faculty of Law, Maastricht Faculty of Law Working Paper 2007/5, 2007) (noting that a comparative exercise seeks to unearth similarities and differences between legal systems, which can provide the impetus for reform).

That said, it must be borne in mind that there are a number of contextual differences which might affect the extent to which generalisations can be made from this comparative process. First, twenty-eight of the European countries examined by this thesis are members of the EU, a supranational organisation, which has competence in the field of human trafficking.¹⁸⁵ By contrast, the four Commonwealth Caribbean states investigated by this thesis are members of the Caribbean Community (CARICOM), which is an inter-governmental organisation that does not have supranational competence in the field of human trafficking.¹⁸⁶ Second, whereas all the European countries examined by this thesis are state parties to the European Convention on Human Rights (ECHR), only Jamaica¹⁸⁷ has ratified the American Convention on Human Rights, which in Article 6 prohibits ‘the traffic in women.’¹⁸⁸ These are not the only contextual differences, however. Other differences relate to, among other things, population sizes;¹⁸⁹ level of economic development;¹⁹⁰ and history,¹⁹¹ amongst others. That said, notwithstanding the argument that comparing a *region* with *domestic countries* is akin to comparing ‘apples and oranges’,¹⁹² it must be appreciated that human trafficking is largely a cross-border activity that has cross-border implications.¹⁹³ As such, legislative instruments enacted at both the European and Commonwealth Caribbean levels have the same objectives of prosecuting trafficking-related activities; preventing these activities from occurring; as well as protecting trafficked victims. Moreover, as will be illustrated in the subsequent 6 chapters, because European anti-trafficking law and Commonwealth Caribbean anti-trafficking law have been largely modelled after the Trafficking Protocol, the provisions of these laws are generally similarly worded, which suggests that comparisons are, indeed, possible.

¹⁸⁵ Frauke Austermann, *European Union Delegations in EU Foreign Policy: A Diplomatic Service of Different Speeds* (Palgrave Macmillan 2014) 20

¹⁸⁶ Matthew Bishop, ‘Whither Caribbean’ in Andy Knight, Julián Castro-Rea and Hamid Ghany, *Re-mapping the Americas: Trends in Region-making* (Ashgate Publishing 2014) 197

¹⁸⁷ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. This Convention was ratified by Jamaica on 8 July 1978.

¹⁸⁸ *Ibid* Article 6

¹⁸⁹ The four Caribbean countries examined by this thesis have a collective population size of just over 5 million persons (approximately the population size of Norway alone). Jamaica (2.7 million) is the largest by population size, while SVG (110, 000) is the smallest.

¹⁹⁰ No Caribbean country has ever been ranked in the top 10 list of countries with best GDPs, which is in contrast to Europe, wherein several European countries are generally listed in the top 10 best performing economies.

¹⁹¹ The Commonwealth Caribbean is marked by slavery and colonialism. Guyana and T&T, since independence, have become Republic states, while SVG and Jamaica remain headed by the British monarchy. This is largely in contrast to the majority of European countries.

¹⁹² Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 16

¹⁹³ UNGIFT, ‘Transnational organized Crime - Impact from Source to Destination’ (UNODC 2008)

2.14. RESEARCH DESIGN

In light of the fact that the overriding objectives of this thesis are to critically assess the existing law and practice on human trafficking in specific social contexts, and to explore and evaluate the possibilities for legal reform wherever gaps in implementation are found to exist, the research design of this thesis can be best described as qualitative.¹⁹⁴ More specifically, the fieldwork exercise¹⁹⁵ conducted in the Commonwealth Caribbean, as described in the subsequent sections, was a qualitative investigation because it sought to enquire into the experiences¹⁹⁶ and perspectives¹⁹⁷ of key stakeholders in the anti-trafficking field in an effort to provide a rich, deep and nuanced understanding of the extent to which existing state practice comports with applicable anti-trafficking norms.

2.14.1. Sample

The researcher conducted 35 interviews with key stakeholders in the anti-trafficking field in the four Commonwealth Caribbean states examined by this thesis. The selection of interviewees was based on them satisfying four criteria:

- a. Affiliation with at least one type of organisation: the state or civil society organisation actively working in the anti-trafficking field in the respective sample states;
- b. Knowledge, experience and expertise in the anti-trafficking field in the countries concerned;
- c. Willingness to participate in the study; and
- d. Providing written consent so that the data ascertained could be used as part of the researcher's thesis.

In light of the overarching objectives of the thesis, the selection of key stakeholders actively working in the anti-trafficking field was both necessary and appropriate. These stakeholders, all

¹⁹⁴ Dale Schunk, *Learning Theories: An Educational Perspective* (Pearson Education 2004) (noting that a qualitative research approach is 'characterized by intensive study, description of events, and interpretation of meanings').

¹⁹⁵ See Howard Sacks, 'Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility' (1967-1968) 20 *Journal of Legal Education* 294 (noting that the field work exercise allows for the collection of data that might not otherwise be available in printed form.)

¹⁹⁶ Isadore Newman and Carolyn Benz, *Qualitative-quantitative Research Methodology: Exploring the Interactive Continuum* (SIU Press 1998) 2 (noting that the qualitative methodology holds that multiple realities exist and multiple interpretations are available from different individuals that are all equally valid. Reality is a social construct. In contrast, the quantitative position rejects this proposition, assuming instead that a common objective reality across individuals).

¹⁹⁷ Michael Patton, *Qualitative Evaluation and Research Methods* (Sage Publications Inc. 1990)

of whom possessed technical expertise in the field, had either a statutory or contractual duty to actively develop and implement anti-trafficking policies; as such, they were best-placed to provide practical insights, given their access to primary data and their active involvement in preventing and prosecuting trafficking, as well as protecting its victims. Additionally, these stakeholders possessed a diversity of experiences, perspectives and concerns which shed light on myriad complexities involved in regulating the increasingly sophisticated phenomenon of human trafficking. The diversity of views expressed in the interviews, supplemented by doctrinal perspectives, ensured that the thesis was holistic in nature, and not a purely reductionist exercise.¹⁹⁸ Moreover, selecting key stakeholders as interviewees provided an opportunity for the views of these policy makers to be ascertained, thereby opening up a useful avenue for the use of the findings presented by this thesis to inform improvements in the anti-trafficking landscape in the countries under investigation.

2.14.2. Sampling Context

Field interviews were conducted between 13th December 2013 and 10th April 2014.

The four countries examined were specifically selected as sample countries for the purposes of this study for a number of reasons. First, although the four countries in question have long been described as ‘origin, transit and destination countries for trafficking in persons’,¹⁹⁹ no comprehensive or sustained piece of research has been conducted to date to evaluate the existing law and practice on human trafficking in these countries.²⁰⁰ The lack of detailed research on human trafficking in these countries can be explained on the basis of the (false) assumption that human trafficking does not exist in these countries, and thus no investigation is required;²⁰¹ the lack of funding to commission such a resource-intensive exercise; as well as the practical difficulties that arise in terms of accessing data in small-island developing states with

¹⁹⁸ Jean d'Aspremont, 'Reductionist Legal Positivism in International Law' (2012) 106 Proceedings of the Annual Meeting of the American Society of International Law 368 (construing 'reductionism', in the legal context, to mean that a piece of legal writing has one central concern: the ascertainment of the law. In this regard, such a piece will not engage in any determination of the content of the law in question, and does not entail much, if any, interpretation).

¹⁹⁹ See e.g. US Department of State, *Annual Trafficking in Persons Report* (US Government, 2013)

²⁰⁰ The closest to such an assessment was conducted by the IOM some five years ago; IOM, *Exploratory Assessment of Trafficking in Persons in the Caribbean Region* (2nd edn, International Organization for Migration, 2010). This report, however, was not concerned with the law and practice on human trafficking in the region, per se, but rather on the prevalence and profile of trafficking, as well as the lived experiences of trafficked victims.

²⁰¹ 'Guyana, St Vincent object to human trafficking report' *Caribbean360 News* (Kingstown, 19 June 2009) <www.caribbean360.com/index.php/news/15331.html> accessed 8 June 2014.

weak data collection and research capacity.²⁰² It is against the backdrop of these countries being ‘invisible cases’²⁰³ in the existing literature, and amongst the ‘most under-researched and under-funded [countries] in the world’²⁰⁴ in respect of trafficking in persons, that this study was undertaken. The aim, in this regard, is to provide a holistic, up-to-date and accurate account of the effectiveness of anti-trafficking law and practice in these countries, the results of which can positively inform both national and regional anti-trafficking policies in the Caribbean.

A second factor which influenced the selection of the countries in question was that of their respective locations, a factor which research has shown may predispose these countries to transnational trafficking.²⁰⁵ Jamaica, for example, is located to the North-West of the archipelago of islands that comprise the ‘Commonwealth Caribbean.’²⁰⁶ More specifically, in contrast to the other sample countries, it is located in the Greater Antilles and therefore surrounded by Cuba, Haiti, and the Dominican Republic, countries wherein which transnational trafficking in persons has been observed.²⁰⁷ On the other end of the spectrum, although Guyana is located on the South American continent, because of its shared historical, cultural and political association with the English speaking Caribbean, it is typically regarded as a ‘Commonwealth Caribbean’ country.²⁰⁸ Guyana is located to the east of Venezuela and Brazil and to the west of Suriname, states wherein sizeable numbers of trafficked victims have been observed, and for which there is a high likelihood of incidents of transnational trafficking into Guyana.²⁰⁹ The third country investigated by this study is Trinidad and Tobago, which is located in the Southern Caribbean, and which, because of strategic location and relatively large oil reserves, potentially serves as a hub for transnational trafficking, particularly from the Dominican Republic, Venezuela and Columbia, countries where sizeable numbers of

²⁰² See Julia Rawlins-Bentham, ‘AG: Caribbean Statistics on Human Trafficking Needed’ (*Government Information Service*, 18 November 2013) <http://gisbarbados.gov.bb/index.php?categoryid=9&p2_articleid=11577> accessed 8 June 2014.

²⁰³ ACP, *Global Phenomenon, Invisible Cases: Human Trafficking in sub-Saharan Africa, the Caribbean and the Pacific* (ACP, 2011)

²⁰⁴ Laura Langberg, ‘A Review of Recent OAS Research on Human Trafficking in the Latin American and Caribbean Region’ (2005) 43(1) *International Migration* 129

²⁰⁵ Noël Busch-Armendariz, Maura Nsonwu and Laurie Cook Heffron, ‘Understanding Human Trafficking: Development of Typologies of Traffickers’ (Institute on Domestic Violence and Sexual Assault Centre for Social Work Research School of Social Work, the University of Texas at Austin, 2009) 12

²⁰⁶ Rupert Bent and Enid Bent-Golding, *A Complete Geography of Jamaica* (Collins 1966)

²⁰⁷ See US Department of State, *Trafficking in Persons Report* (US Government, 2013) 94, 154, 187

²⁰⁸ Michael DaCosta, *Colonial Origins, Institutions and Economic Performance in the Caribbean: Guyana and Barbados* (International Monetary Fund, 2007)

²⁰⁹ See US Department of State, *Trafficking in Persons Report* (n 199) 73, 103, 391

trafficked victims have been observed.²¹⁰ St. Vincent and the Grenadines, by contrast, is located in the Eastern Caribbean.²¹¹ More specifically, it is geographically positioned between St. Lucia and Grenada, countries with which it shares unrestricted freedom of movement under the auspices of the Organisation for Eastern Caribbean States (OECS),²¹² and in relation to which there is a high likelihood of incidents of transnational trafficking.

The final factor underlying the researcher's choice of the four countries in question relates to the relative newness of their respective anti-trafficking legislation. This factor was thought to be important because newer legislation tends to be more comprehensive and up-to-date, in keeping with the quickly evolving dynamics of human trafficking.²¹³ In this regard, Guyana and Jamaica were selected to provide useful comparisons as to the efficacy of their (older) anti-trafficking laws which were enacted in 2006 and 2007 respectively,²¹⁴ as opposed to St. Vincent and the Grenadines and Trinidad and Tobago, whose anti-trafficking legislation were enacted in 2011 and 2013, respectively.

2.14.3. Sample size

Although 50 requests were made to stakeholders working in the anti-trafficking field in the four countries examined, only 35 ultimately agreed to participate in the study. The specific profile of the sample was as follows:

- i. **six** stakeholders from St. Vincent and the Grenadines (5 state officials; 1 NGO representative);
- ii. **seven** stakeholders from Guyana (7 state officials);
- iii. **ten** stakeholders from Trinidad and Tobago (6 state officials; 1 NGO representative; 3 representatives from international organisations working in that country); and

²¹⁰ See Irene Medina, 'National Security team to visit Venezuela, Colombia to hold talks on human trafficking' *Trinidad Express* (Port of Spain, 17 November 2013) <<http://www.trinidadexpress.com/news/National-Security-team-to-visit-Venezuela-Colombia-232279751.html>> accessed 16 April 2014.

²¹¹ Agency for International Development et al, *St. Vincent and the Grenadines: Country Environmental profile* (The Association, 1991)

²¹² See *Organisation of Eastern Caribbean States*, 'About the OECS' (OECS, 2014) <<http://www.oecs.org/>> accessed 8 June 2014.

²¹³ Mohammed Mattar, 'Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International and Comparative Law* 357

²¹⁴ Cf. Jamaica's Trafficking in Persons (Amendment) Act 2013.

- iv. **twelve** stakeholders from Jamaica (9 state officials; 2 NGO representatives; and 1 representative from an international organisation working in that country).

For the purposes of this thesis, all interviewees were anonymously coded so as to protect their identities.²¹⁵

2.14.4. Sampling process

The sampling process involved the use of a *non-probability* sampling technique. More specifically, the researcher used his judgement to select the interviewees who were eventually included as part of the study's sample, based on whether they satisfied the criteria described above. While acknowledging the limitations of this process,²¹⁶ such an approach to sampling was nevertheless employed as it allowed the researcher improved access to his target population, relative ease and speed of setting up interviews with those who were willing to assist in the process, and ultimately, a large volume of rich data that served to augment the doctrinal aspects of the thesis.

The non-probability sampling techniques employed in the development of this study were the *purposive* sampling technique as well as the *snowball* sampling technique. With regard to the former, the researcher deliberately chose those 'information-rich' stakeholders who were eventually included in the study based on their affiliation, expertise as well as their willingness to provide the necessary data required to complete the analysis²¹⁷ in relation to the 'INI' typology described in this chapter. With regard to the latter, stakeholders with whom contact had initially been made used their networks to refer the researcher to other stakeholders,²¹⁸ most of whom eventually agreed to participate in the study. This ultimately increased the

²¹⁵ In the main text and footnotes of this thesis, interviewees from Guyana are coded (G-1 - G-7); interviewees from Jamaica are coded (J-1 - J-12); interviewees from SVG are coded (S-1 - S-6); and Interviewees from T&T are coded (T-1 - T-10).

²¹⁶ Lynn Connaway and Ronald Powell, *Basic Research Methods for Librarians* (5th edn, ABC-CLIO 2010) 117 (noting that 'the non-probability method does not permit generalising from the sample to the population because the researcher has no assurance that the sample is representative of the population).'

²¹⁷ Sharan Merriam, *Qualitative Research: A Guide to Design and Implementation* (John Wiley & Sons 2009) 77. This method is based 'on the assumption that the investigator wants to discover, understand, and gain insight and therefore must select a sample from which the most can be learned.'

²¹⁸ Douglas Heckathorn, Respondent-Driven Sampling II: Deriving Valid Population Estimates from Chain-Referral Samples of Hidden Populations (2002) 49(1) *Social Problems* 11, 34

number of participants included in the sample.²¹⁹ In short, the snowballing technique was indispensable to the development of the study because, without further recommendations from initial contacts, the researcher would have encountered major difficulties attempting to access many interviewees, especially those who were initially distrustful of the exercise. Notwithstanding this, however, among others,²²⁰ one of the major challenges faced in relation to the use of the *snowballing* technique was that certain subgroups, such as state officials, were arguably oversampled, while some subgroups, such as NGO representatives, were arguably under-sampled. This could be explained by the fact that very few civil society representatives actively work in the anti-trafficking field in the countries surveyed, but even accepting this as the reality, the researcher readily concedes, at the very outset, in the same vein as other researchers have done,²²¹ that the sampling results from this study might not be generalizable.

2.14.5. Sampling Procedure

The researcher utilised strategic searches of electronic media repositories operating in the respective sample countries to identify potential interviewees. Based on the contact details retrieved, the researcher then underwent a further pre-selection process that sought to identify those prospective interviewees who met the stipulated criteria described in section 2.14. The researcher then made contact with the prospective interviewees through the dissemination of emails, hard copies of letters, as well as follow-up telephone calls. The aims and objectives of the study were explained to the prospective interviewees, and they were asked whether they were inclined to participate in the study. Those who agreed to participate in the study were asked whether they were inclined to refer the researcher to some of their colleagues who may also have shared similar expertise in the field, and who might have been willing to be interviewed. The researcher then made follow up contacts with the persons to whom referrals were made.

²¹⁹ Cf. Denise Polit and Cheryl Beck, *Nursing Research: Generating and Assessing Evidence for Nursing Practice* (Lippincott Williams & Wilkins 2008) 355 (arguing that making generalisations is a weakness of this method, since the sample is restricted to a 'restricted network of acquaintances.')

²²⁰ See Douglas Heckathorn, 'Snowball Versus Respondent-Driven Sampling' (2011) 41 *Sociological Methodology* 355 (Snowball sampling suffers from several other drawbacks that can lead to large bias. The first source of bias is called volunteerism, that is, respondents who ended up in the sample tend to be more cooperative and accessible. The second is homophily, whereby affiliations between initial contacts and contacts to whom referrals were made are likely to share similar characteristics).

²²¹ Bonnie Erickson, 'Some Problems of Inference from Chain Data' (1979) 10 *Sociological Methodology* 276; Ove Frank and Tom Snijders, 'Estimating the size of hidden populations using snowball sampling' (1994) 10 *Journal of Official Statistics* 53

2.15. DATA COLLECTION

2.15.1. The Instrument

Semi-structured interviews were employed as the data collection instrument for the purposes of this study. This instrument was specifically chosen because it allowed for a reasonable degree of flexibility in terms of the questions asked, a relatively narrow focus on key issues rather than general, unrelated issues, in addition to affording the researcher the opportunity to probe the views of interviewees beyond a superficial level, especially where there was a lack of clarity.²²²

An interview guide with a draft list of questions was initially disseminated to prospective interviewees. Follow-up questions, based on the responses provided during the interviews, were asked, taking into account the need for clarity, as well as the volume and depth of data that was needed to satisfy the requirements of the 'INI' typology.

Notwithstanding the fact that asking follow-up questions meant that there might not have been complete uniformity between interviews as different participants raised different issues for which specific follow-up questions had to be employed, the use of semi-structured interviews in this study nevertheless allowed the researcher to establish a positive rapport with the interviewees, thereby facilitating the ascertainment of pertinent information in respect of human trafficking with relative ease. More specifically, the interviewees were able to speak on the issue of the efficacy of anti-trafficking law and practice in great detail,²²³ often times unearthing the reasons behind decisions taken and the practical, normative and institutional challenges faced in this respect. Through the use of semi-structured interviews, complex questions and issues which arose during the interviews were also adequately teased out, thereby providing clarification to both the researcher and the interviewees. The researcher was able to probe difficult aspects of interviewees' responses, especially where the information provided was controversial or issues in relation to which the researcher had no prior knowledge. This invariably allowed the researcher to gain important insights into the subject matter of the study,²²⁴ which he might not have otherwise been able to ascertain had another data collection instrument been employed. Moreover, the use of semi-structured interviews allowed the

²²² Anne Adams and Anna Cox, 'Questionnaires, in-depth interviews and focus groups' in Paul Cairns, and Anna Cox (eds), *Research Methods for Human Computer Interaction* (Cambridge University Press 2008) 17

²²³ See generally Diana Kendall, *Sociology in Our Times: The Essentials* (Cengage Learning 2008)

²²⁴ Robert Yin, *Case Study Research: Design and Methods. Applied Social Research Methods* (Sage Publications 2003)

researcher, who more or less shared the same language with the interviewees, to better understand particular words or expressions, which a non-bicultural researcher might arguably have found difficult to understand. This was only made possible through the use of semi-structured interviews, as some expressions given in response to questionnaires, for example, might have otherwise been difficult to fully understand and, indeed, contextualise.

2.16. Data Collection Process

To begin the interview process, the researcher introduced himself to the interviewees; thanked them for having agreed to participate in the study; informed them about the aims and objectives of the study; provided them with the participant information sheets and consent forms; and afforded them the opportunity to ask any question that they might have had in relation to the study. The researcher then explained that in order to ensure the validity of data collected, they should consider agreeing to have the interview tape recorded. If they agreed to this, the interview was recorded; if not, the researcher notified them that he would be simultaneously taking notes while their responses were being provided. Once the interviews began, the researcher wrote down the responses provided as quickly as possible, being careful to ask the interviewee(s) to repeat, where necessary.

Questions were asked deductively, from general to more specific questions. The interviewer used *grand-tour* as well as *mini-tour* questions²²⁵ to elicit as much information as possible from the interviewees. In relation to the former, questions, such as, ‘to what extent does human trafficking exist in your country?’ were asked to put the topic in its proper context. In relation to the latter, more specific questions were asked, such as, ‘what support services are currently in place to assist victims of trafficking after they have been identified?’ Where appropriate, the researcher utilised the technique of *probing*; in particular, he asked follow-up questions, such as, ‘could you elaborate more on that point?’ or ‘was this what you meant by [such and such]?’ If the researcher was unclear about something that was said, clarification was always sought, even if that meant repeating what had already been written.²²⁶

To conclude the interviews, the researcher asked the interviewee(s) whether they had anything else they wished to add. Following this, the interviewees were asked to sign and return the

²²⁵ Beth Leech, ‘Asking questions: techniques for semi-structured interviews’ (2002) 30(4) *Political Science & Politics* 665

²²⁶ Immy Holloway and Stephanie Wheeler, *Qualitative Research in Nursing* (2nd edn, Blackwell 2002).

consent form. They were also advised that they would be provided with 'country reports', based on the data they provided, augmented by doctrinal analyses. In those cases where interviewees specifically requested a copy of interview notes, these were provided immediately upon transcription.

In the few cases in which interviewees agreed to have the interview(s) recorded, the proceedings of such interviews were voice recorded. The recordings were stored on a recorder, in the first instance, and then transferred to a password-protected external hard-drive. Back-up copies of the recordings were stored in a designated University filing cabinet that was kept locked at all times. Upon completion of the study, all data stored on the device, as well as in backup form, was deleted.

2.17. Challenges Experienced During the Data Collection Stage

Despite best efforts, some minor challenges, however, arose during the data collection stage of the study.

2.17.1. Situational Factors

Interviewees' awareness of the presence of the researcher, and their potential desire to provide answers which they thought he might have expected, was arguably one of the difficulties faced at the data collection phase of the study.

2.17.2. Response-Set Bias

Interviewees' affiliation (to the respective states, NGOs or international organisations); their acute awareness of their professional responsibilities; the possibility of retaliation from traffickers if certain sensitive information were released; as well as a basic lack of trust for outsiders were some of the major challenges faced in the data collection phase of this study. Thorough and truthful explanations as to the purpose and importance of the study, in addition to assurances of confidentiality, however, served to allay at least some of these fears.

2.17.3. Sensitive and Politicised Nature of the Issue

The study of human trafficking in the context of the four countries under investigation was invariably an attempt to explore the clandestine world in which traffickers operate. Interviewees, being cognizant of the myriad adverse consequences that could potentially arise, especially in

respect of vulnerable victims of trafficking and support staff should sensitive information have gotten into the wrong hands, sought to guard against releasing information which they regarded as ‘sensitive’. This was a perfectly legitimate concern, particularly when viewed in light of the legislative requirement that the stakeholders must ensure, to the greatest extent possible, the primacy of trafficked victims’ rights, as will be discussed in chapters 5 and 8.

A related challenge was political in nature. Since the United States Department of State begun assessing the domestic response to human trafficking of the Commonwealth Caribbean countries in question since 2005 by use of a dubious methodology,²²⁷ officials have become very mindful of releasing adverse information.²²⁸ Notwithstanding this, however, thorough and truthful explanations as to the nature of the study, its intended uses, and the researcher’s non-political affiliation, in most cases, served to allay the fears of interviewees who might not have initially been inclined to participate in the study.

That said, another of the practical issues faced during the data collection stage was the fact that most interviewees, for the reasons discussed above, did not agree to have the interviews tape-recorded. As such, notes, written contemporaneously as the interviews were being conducted, had to be taken by the researcher. These notes were immediately transcribed following the completion of the interviews. The question which, however, invariably arises in this connection is, to what extent the findings ultimately derived from these interviews which were not recorded can be regarded as valid, notwithstanding? In an article authored by Lamb and colleagues²²⁹ regarding the accuracy of interview notes which were compiled in the absence of tape recorded interviews, the authors found that in 20 such cases involving real child witnesses interviewed in Israel, errors of commission were quite rare, although errors of omission occurred frequently in the study.²³⁰ Against the backdrop of this study, then, it is at least arguable that the real concern in the instant study might have been the non-inclusion of important information,

²²⁷ Anne Gallagher, ‘Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports’ (2011) 12(3) Human Rights Review 381.

²²⁸ Clare Seelke, ‘Trafficking in Persons in Latin America and the Caribbean’ (Congressional Research Service, 2005) 3 (noting that Caribbean countries are reluctant to publish data for fear of being cited by the U.S. government as having a major trafficking problem.)

²²⁹ Michael Lamb and Others, ‘Accuracy of Investigators’ Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims’ (2000) 24 Law and Human Behaviour 699

²³⁰ Ibid. Note, however, that a limitation of the Lamb and Others’ study is that interviewer notes taken during the interview were not distinguished from those taken shortly after. It is therefore unclear whether these two types of notes differ (what the authors meant by ‘shortly after’ was also not specified). It seems reasonable to assume that taking notes while conducting an interview, when attention is divided, will result in quite different notes than after the interview, when investigators can pay full attention but have to base their notes on memory.

rather than a deliberate attempt to skew what was said.²³¹ The researcher does not regard this, notwithstanding, as something to which a blind eye could be turned, but readily submits that in the peculiar circumstances of this study, the use of contemporaneously written interview notes, in the absence of tape recorded interviews, was the only reasonable alternative, though, admittedly, a cognitively demanding one.²³² Even further, as the retention interval between the compilation of the interview notes and the generation of their comparable electronic version(s) was minimal (a matter of minutes), the likelihood of ‘after-the-fact reconstruction’ to fill in the gaps of memory from the interviews was also minimal.²³³

In short, then, it is submitted that apart from the fact that contemporaneously written interview notes were the only reasonable alternative to recorded interviews available, such a technique is not at all a new phenomenon,²³⁴ and may have in fact reduced the impact of pre-interview expectations in this study.²³⁵

2.18. DATA ANALYSIS

2.19. Method of Data Analysis

At the data analysis phase of the study, the researcher sought to organise the data ascertained at the data collection stage; provide structure; and elicit meaning to the myriad interviewees’ responses. In particular, the researcher sought to extract significant statements made by the interviewees; organise them into clusters and, ultimately, themes similar to those outlined under the ‘INI’ typology. In short, this process saw the researcher engaging in the systematic

²³¹ Amy Gregory, ‘Investigative Interviewing and Memory: How Accurate Are Interviewers’ Recollections of Investigative Interviews?’ (2009) (FIU Electronic Theses and Dissertations Paper 199). <<http://digitalcommons.fiu.edu/etd/199>> accessed 16 April 2014

²³² Nanja Kolk and Others, ‘Assessment centre procedures, Cognitive load during the observation phase’ (2002) 10 *International Journal of Selection and Assessment* 271 (noting that the interviewer’s attention has to shift from listening and writing down witness information to generating follow-up questions to elicit additional witness information.)

²³³ Daniel Reisberg, *Cognition: Exploring the Science of the Mind* (Norton & Company Publishing 2006) (noting that there is increased forgetting of interview information with longer delays).

²³⁴ James Hartley, ‘Note-taking in non-academic settings: A review’ (2002) 16 *Applied Cognitive Psychology* 559 (explaining that note-taking is quite common in domains such as legal situations, and counselling sessions).

²³⁵ Jeremy Biesanz and Others, ‘When interviewers desire accurate impressions: The effects of note-taking on the influence of expectations’ (1999) 29 *Journal of Applied Social Psychology* 2529 (the authors concluded that note-taking can reduce the impact of biased information and pre-interview expectations).

tasks of comprehending, synthesising and theorising²³⁶ interviewees' responses, whilst simultaneously taking into account the information derived from doctrinal sources.

2.20. Validity and Reliability of Data

Notwithstanding the criticism that the qualitative research method is a 'soft' approach²³⁷ to research, most scholars in the field of social science remain convinced that it is the 'most-preferred method of inquiry',²³⁸ primarily because sufficiently stringent mechanisms are available to ensure the validity of data collected in this context. Some of these mechanisms, as outlined by Creswell,²³⁹ were utilised in this study.

Perhaps the most important of these mechanisms is that of *triangulation*. For the purposes of this thesis, it is important to note that the researcher not only relied on interview data to arrive at his conclusions, but also on a wide range of doctrinal sources, such as legislation, case law, books, journal papers, official reports, policy papers, and newspaper reports. This important process enabled the researcher to better distinguish between accurate and inaccurate information. The researcher also employed the *reflexivity* technique²⁴⁰ when conducting this study, by adopting a self-critical stance; carefully monitoring his preconceptions and assumptions about the study in order to prevent bias. The researcher also employed the *bracketing* technique,²⁴¹ whereby, at the very outset, he wrote out fully everything that he thought about the topic; expressed his thoughts, and, ultimately, set them aside. This helped the researcher to maintain an open-mind when interviewing the interviewees and analysing the findings. Finally, the researcher employed the *intuiting* technique,²⁴² in that he avoided all criticisms, evaluations and opinions while interviews were being conducted, thereby allowing the interviewees to be the ones expressing their thoughts on the issues in question.

²³⁶ Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (5th edn, Routledge 2000) 55 (noting that 'in qualitative data the data analysis [process] is almost inevitably interpretive').

²³⁷ Steinar Kvale, 'To validate is to question' in Steinar Kvale (ed.), *Issues of Validity in Qualitative Research* (Studentlitteratur 1989) 73

²³⁸ Yvonna Lincoln and Egon Guba, 'Paradigmatic Controversies, Contradictions, and Confluences' in Norman Denzin & Yvonna Lincoln (eds.), *Handbook of qualitative research* (2nd edn, SAGE Publications 2000) 163

²³⁹ John Creswell, *Research design: Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publications 2003)

²⁴⁰ Mats Alvesson and Kaj Sköldbberg, *Reflexive Methodology: New Vistas for Qualitative Research* (SAGE 2009) 77

²⁴¹ Ibid

²⁴² Ibid

On the question of reliability,²⁴³ it is submitted that, notwithstanding the lack of generalisability of the findings presented in this study,²⁴⁴ a demonstration of validity, as described above, is implicitly sufficient to establish reliability.²⁴⁵

2.21. ETHICAL CONSIDERATIONS

The researcher acted fully in compliance with the ethical standards stipulated by Durham Law School, the body which granted him ethical approval for this study. Specifically, the researcher provided each interview with a 'Participant Information Sheet', a copy of which can be found in the appendices attached to this thesis. Further, interviewees were provided with consent forms,²⁴⁶ which they were asked to sign. Those who ultimately consented,²⁴⁷ however, expressed the wish to remain anonymous. This request was adhered to by the researcher.²⁴⁸ As such, the names of interviewees are not published in the thesis; anonymous codes are, however, used.

Additionally, the researcher also fully adhered to disclosure restrictions that were placed upon him, in accordance with the *sub-judice* rule.²⁴⁹ Moreover, all sensitive information provided by the interviewees, such as specific names of persons, the locations of shelters and staff composition of key organisations in the field, was omitted from the study.

²⁴³ Kevin Durrheim, 'Quantitative measurement' in Martin Terre Blanche and Kevin Durrheim (eds.), *Research in practice: Applied methods for the social sciences* (Cape Town: University of Cape Town Press, 1999) 72 (reliability refers to the extent to which the data collection instrument employed, i.e. semi-structured interviews, will yield the same results in subsequent studies enquiring into the same issues as this study.)

²⁴⁴ Raymond Opdenakker, 'Advantages and disadvantages of four interview techniques in qualitative research' (Vol. 7. No. 4, Forum Qualitative Sozialforschung/Forum: Qualitative Social Research 2006).

²⁴⁵ Yvonna Lincoln and Egon Guba, *Naturalistic inquiry* (SAGE Publications 1985) 316 (arguing that since there can be no validity without reliability, a demonstration of the former is sufficient to establish the latter).

²⁴⁶ A copy of the consent form can be found in the appendices to this thesis.

²⁴⁷ Note that no prejudicial treatment was directed at those persons who subsequently withdrew from the study, notwithstanding their initial agreement to participate therein. On the importance of consent, see Denise Polit and Others, *Essentials of Nursing Research: Methods, Appraisal and Utilisation* (Lippincott 2001)

²⁴⁸ On the importance of affording anonymity in the context of sensitive issues, see L. Taylor and M. Sullivan, 'Raising the Standard of Ethics and Human Rights Among Anti-human Trafficking Responders in the Mekong Region' (Asia-Pacific Human Rights Information Centre, 2012) 55, 68

²⁴⁹ See generally, Tobias Roberts, 'Is Sub Judice Passe?' (1998) 23 *Alternative Law Journal* 22 (matters which are on-going before the courts cannot be discussed, particularly where such discussion can prejudice a fair determination of said matters).

CONCLUSION

This chapter attempted to lay the thesis' foundation, by exploring a number of elementary issues in light of the existing body of literature. The key conclusions reached by this chapter can be summarized as follows. First, two overlapping regulatory approaches currently inform anti-trafficking law and practice - the criminal justice and human rights approaches. While these approaches have traditionally been viewed as being in tension with each other, this thesis suggests that both are, in fact, mutually reinforcing. On a related point, this chapter considers that there is a need to not only eradicate the various 'hegemonic assumptions' that currently underlie these approaches, but also that there is a need for synergy as between these approaches. Second, while an increasing number of scholars are embarking on projects that aim to theorize human trafficking, the existing theories - Economic, Criminology and Feminist theories - are largely parochial in their orientation, which necessitates the application of the Socio-legal theory to this thesis. Finally, given the complex and dynamic nature of human trafficking, several methodological approaches needed to have been employed to elicit the volume and depth of data that was required to effectively answer the thesis' research question; that is, to what extent, and in what ways, is there a need for reform of anti-trafficking law and practice?

CHAPTER 3

NORMATIVE ASPECTS OF EUROPEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

Europe¹ is no stranger to the phenomenon of human trafficking. In fact, since the dawn of the twentieth century,² European countries have been faced with the perennial problem of human trafficking, the dynamics of which are constantly evolving.³ In more recent years, following the collapse of the Soviet Union,⁴ and the gradual expansion in free movement rights in the EU,⁵ the struggle against the phenomenon has greatly intensified.⁶ In view of the serious threat posed by traffickers to the security of Europe,⁷ the two leading regional organisations in this region⁸ – the EU and the CoE – have individually and collectively resolved to combat human trafficking through the adoption of appropriate measures.⁹ Notwithstanding the existence of these measures, however, there remains some uncertainty about their effectiveness in practice.¹⁰ Given that this question has not been comprehensively assessed in the existing literature to date,

¹ For the purposes of this thesis, ‘Europe’ is broadly construed to include those countries which are members of the European Union and Council of Europe, though there is, of course, some overlap in membership. In short, 47 countries are deemed to comprise ‘Europe’ for the purposes of this thesis.

² Jo Doezema, ‘Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women’ (1999) 18(1) *Gender Issues* 23, 24 (discussing the struggle to combat ‘White Slave Traffic’ in Europe in the early parts of the 20th century.)

³ Anna Jonsson, *Human Trafficking and Human Security* (Routledge 2012) 39

⁴ Michael Palmiotto, *Combating Human Trafficking: A Multidisciplinary Approach* (n 200) xx

⁵ Piotr Bąkowski, ‘The problem of human trafficking in the European Union’ (European Parliamentary Research Service, 2014) 3

⁶ Ingrid Jonsson, ‘Prostitution and Trafficking in a European Context: Recent Trends and Developments’ in Max Koch, Lesley McMillan and Bram Peper (eds), *Diversity, Standardization and Social Transformation: Gender, Ethnicity and Inequality in Europe* (Ashgate Publishing 2011) 46

⁷ Donna Hughes, ‘Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies’ (2014) (4)(4) *SAGE Open* 1

⁸ Focus on the EU and CoE is without prejudice to the work of the Organisation for Security and Cooperation in Europe (OSCE). Special consideration of the EU and CoE is, however, warranted on the basis that, unlike the OSCE, these two organisations have enacted several pieces of hard law, as opposed to mere soft law, instruments. The OSCE has, however, produced academic commentaries in the areas of trafficking for the removal of organ, trafficking as amounting to torture and other forms of ill-treatment, as well as the non-punishment of trafficked victims. These will be referred to from time to time throughout this chapter, as well as the next two chapters.

⁹ Both hard law and soft law measures will be relied upon in the next three chapters.

¹⁰ Sylvia Maier and Frank Schimmelfenning, ‘Shared Values: Democracy and Human Rights’ in Katja Weber, Michael Smith and Michael Baum (eds), *Governing Europe’s Neighbourhood: Partners Or Periphery?* (Manchester University Press 2007) 52; Liliana Blum, *Sex Trafficking and Political Discourse: A Case Study of the Perceptions and Definition of the Problem and Its Victims in Moldova* (ProQuest 2008) 198

this chapter, as well as chapters 4 and 5, attempts to provide a critical evaluation of the efficacy of European anti-trafficking law, in light of existing state practice. The conclusion reached by this chapter is that while, for the most part, the EU and CoE have operationalized a robust regional anti-trafficking framework, there nevertheless remains a ‘disconnect’ between the normative obligations prescribed by this framework, and the existing practice of a number of European countries. This normative ‘disconnect’, it is argued, is best illustrated in the areas relating to the criminalisation of human trafficking; the imposition of penalties; the provision of compensation; the institution of forfeiture proceedings; and in investigating trafficking-related incidents.

A. BRIEF SITUATIONAL OVERVIEW

With the exception of Andorra¹¹ and San Marino,¹² the vast majority of European countries have reported the occurrence of at least one form of human trafficking. In a comprehensive statistical study recently published by the Statistic Office of the EU (EUROSTAT),¹³ it was reported that, although the vast majority of victims of trafficking are women and girls (80 %), a growing number of men (17 %) and boys (3 %) are also being trafficked. The majority of these victims are trafficked into sexual exploitation (69 %), a sizeable minority into labour exploitation (19 %), and a small minority (12 %) into other forms of exploitation, such as the removal of organs, forced begging and other criminal activities. Contrary to sensationalist reports which may sometimes give the impression that it is only foreign women who are trafficked,¹⁴ the study concluded that the majority (65 %) of trafficked victims come from within Europe, with the top five countries of origin being Romania, Bulgaria, the Netherlands, Hungary and Poland.¹⁵ The study also found that the majority of non-European victims of trafficking come from Nigeria, Brazil, China and Viet Nam.¹⁶ In terms of the likelihood of being trafficked, the study further suggests that Bulgarian, Romanian, Latvian, Hungarian,

¹¹ GRETA, *Report on Andorra* (GRETA(2014)16, 2014) [10]

¹² GRETA, *Report on San Marino* (GRETA(2014)19, 2014) [10]

¹³ EUROSTAT, *Trafficking in Human Beings* (2nd edn, European Union 2014) 10. This report included statistical data from all 28 EU Member States and the following EU Candidate and EFTA/EEA (Iceland, Norway) countries: Montenegro, Serbia, Switzerland and Turkey. Given that 13 other countries are omitted from this study, the statistics provided must be treated with caution, as they may only paint a partial picture of the existing profile of human trafficking in Europe, broadly defined.

¹⁴ Maroussia Hajdukowski-Ahmed, ‘Reconceptualising Identities’ in Maroussia Hajdukowski-Ahmed (ed), *Not Born A Refugee Woman: Contesting Identities, Rethinking Practices* (Berghahn Books 2013) 26

¹⁵ EUROSTAT, *Trafficking in Human Beings* (n 13) 11

¹⁶ Ibid

Slovakian, Lithuanian and Dutch citizens are most likely to come into contact with authorities as victims of trafficking.¹⁷

In so far as the profile of traffickers is concerned, although the study conceded that the vast majority of traffickers are male (70 %), it was also considered that a growing number of females are being implicated in trafficking-related offenses.¹⁸ Additionally, the study dispelled the view that traffickers primarily originate from outside of Europe, finding instead that about two thirds of suspected traffickers are actually European citizens (69 %).¹⁹ In this context, the study found that the top five countries of citizenship of traffickers are Bulgaria, Romania, Belgium, Germany and Spain, although a growing number of traffickers originate from Nigeria, Turkey, Brazil and Morocco.

The foregoing statistics, while not intending to be an exhaustive account of the profile of human trafficking in Europe, suggest that human trafficking, in its myriad forms, is a contemporary challenge faced by most European countries. More specifically, the statistics provided intimate that trafficking is a problem that adversely affects male and female; wealthy and poorer countries; and, more importantly for the purposes of this thesis, notwithstanding the myriad anti-trafficking measures adopted to date to combat the phenomenon, there is still a need for consistent action aimed not only at prosecuting traffickers, but also preventing the occurrence of the phenomenon, and, where appropriate, protecting victims of trafficking.

B. LEGAL FRAMEWORKS

The EU and CoE have, for several decades, been at the forefront of anti-trafficking efforts in Europe. Notwithstanding the fact that both organisations share the common goals of preventing trafficking, prosecuting traffickers and protecting victims, it must be borne in mind that they aim to achieve these important goals through different means. This section therefore briefly explores the legal underpinnings of these organisations, which in practice impact the scope and method of anti-trafficking regulation in Europe.

¹⁷ Ibid

¹⁸ Ibid 12

¹⁹ Ibid

I. EUROPEAN UNION

In accordance with Article 2(2) of the Treaty on the Functioning of the European Union (TFEU), both the EU and its 28 member states have, in principle, *shared-competence* in the area of freedom, justice and security,²⁰ which includes action against human trafficking.²¹ That said, once the EU, as it has done, decided to adopt legally binding instruments in this area, Member States are effectively pre-empted from exercising competence that was previously shared.²² The EU's exercise of competence in respect of human trafficking has not, however, been unchecked. In purporting to legislate in this area, the EU has had to comply with the principle of *conferral*,²³ which stipulates that it could only act within the limits of the competence conferred upon it by the member states so as to attain the objective of 'combat[ing] trafficking in human beings.'²⁴ The EU has also had to comply with the principle of *subsidiarity*,²⁵ that is, before directives on human trafficking could be adopted, the Commission, in particular, had to demonstrate that the objective of combating human trafficking could not have been sufficiently achieved by Member States and could, therefore, by reason of the scale and effects of the action required, be better achieved at Union level.²⁶ In addition, the EU has also had to demonstrate, in accordance with the principle of *proportionality*,²⁷ that the respective directives on human trafficking did not 'go beyond what [was] necessary' to achieve the objective of combating trafficking in persons. Moreover, the EU, in seeking to introduce directives on human trafficking, has also had to comply with the fundamental rights recognized by the Charter of Fundamental Rights (CFR), including Article 5(3) which expressly prohibits human trafficking.²⁸ If these requirements had not been satisfied, EU member states could have,

²⁰ Article 4(2)(j) TFEU

²¹ Article 79(1) and 2(d) TFEU

²² See generally, Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 208; Hermann-Josef Blanke, Stelio Mangiameli *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2011) 318; Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos, *The European Union After the Treaty of Lisbon* (Cambridge University Press 2012) 63

²³ Article 5(1) TEU

²⁴ Article 79(1) TFEU

²⁵ Article 5(3) TEU

²⁶ See e.g. Recital 32 of Directive 2011/36/EU ('Anti-Trafficking Directive')

²⁷ Article 5(4) TEU

²⁸ Charter of Fundamental Rights of the European Union (entered into force 21 December 2009) Art 5(3) (CFR)

ex post, applied to the Court of Justice of the European Union (CJEU) to have the relevant directives rendered null and void.²⁹

Having satisfied the preconditions identified above, EU anti-trafficking law, primarily in the form of Directives, has to be afforded *primacy* in the domestic jurisdiction of each EU member state.³⁰ In other words, given the supranational status of EU law, as well as the need to secure its effectiveness,³¹ domestic laws of EU Member States, including their constitutions,³² must be consistent with EU anti-trafficking law, failing which they will be dis-applied to the extent of their inconsistency.³³

For the purposes of this thesis, it must be noted that, pursuant to Article 83(1) TFEU, the EU has been empowered to adopt directives so as combat human trafficking, a phenomenon which has been explicitly identified by said Treaty as a ‘serious crime with a cross-border dimension.’³⁴ More specifically, the EU has to date adopted a number of directives aimed at achieving the Article 79(1) TFEU objective of preventing and combating trafficking in persons. The most relevant of these directives,³⁵ for the purposes of this thesis, are the Anti-Trafficking Directive,³⁶ the Standing of Victims Directive,³⁷ the Residence Permit Directive³⁸ and the Compensation Directive.³⁹

²⁹ *Ex ante* control in respect of subsidiarity, for example, is achieved through the application of Protocol 2 attached to the Treaty of Lisbon, Articles 1 -7. In contrast, *ex post* control is achieved by virtue of Article 263 TFEU. See e.g. Case C-376/98, *Ban on Advertising of Tobacco Products*, 2000 E.C.R. I-8419. See also, Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 261; Klaus Mathis, *Law and Economics in Europe: Foundations and Applications* (Springer 2013) 292

³⁰ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585

³¹ Lorna Woods and Philippa Watson, *Steiner & Woods EU Law* (12th edn, Oxford University Press 2014) 86

³² Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

³³ Case 264/96 *ICI v Colmer* [1998] ECR I-4695

³⁴ Article 83 (1) TFEU

³⁵ Note that although the EU has signed, but not ratified, the Trafficking Protocol to date, a vast majority of the Protocol’s provisions are included in the relevant EU anti-trafficking directives. See – ‘Ratification Status’ (*UN Treaty Collection*, 6 September 2006) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en> accessed 5 December 2014. On the effect of international instruments in the EU legal order, See Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219.

³⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

³⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA.

³⁸ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

³⁹ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Although the aforementioned directives are *not* directly applicable in the national law of EU Member States,⁴⁰ they may nevertheless be relied upon in domestic courts (direct effect)⁴¹ in those circumstances where sufficiently clear, precise and unconditional⁴² provisions of said directives have been incorrectly transposed or, though correctly transposed, are not properly applied in practice.⁴³ Of note, however, is the fact that any action brought in this regard is against the infringing member state,⁴⁴ and not against other private individuals, as the latter would amount to horizontal,⁴⁵ as opposed to vertical, direct effect.⁴⁶ That said, even those provisions of the relevant EU Anti-trafficking directives which are not sufficiently precise, clear and unconditional may nevertheless be subject to the principle of indirect effect,⁴⁷ wherein which national courts are under an obligation to interpret, in so far as it is possible to do so,⁴⁸ conflicting national legislation in a way which ensures that the objectives of EU anti-trafficking law are achieved.⁴⁹ Additionally, in those circumstances where a trafficked victim can prove that a provision of an EU anti-trafficking directive conferred a right upon her/him; that that right was breached in a sufficiently serious way;⁵⁰ and that damage resulted as a consequence of said

⁴⁰ Article 288 TFEU (Directives are binding on member states as to the result to be achieved, but leave the means of implementation to those states)

⁴¹ Alina Kaczorowska, *European Union Law* (Routledge 2013) 271

⁴² Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5375; Case 148/78 *Pubblico Ministero v. Ratti* [1979] ECR 1629. Note that sufficiently clear, precise and unconditional provisions of the EU Anti-Trafficking Directive can be relied upon by trafficked victims in Belgium and Germany, notwithstanding the fact that these member states have not notified the Commission of any measures taken to transpose the Directive (this is because the deadline for transposition was 6 December 2013). See Cecilia Malmström, ‘EU takes eradication of trafficking in human beings from words to action’ (*European Commission*, 17 October 2014) <http://europa.eu/rapid/press-release_SPEECH-14-700_en.htm> accessed 5 December 2014

⁴³ Case C-62/00 *Marks & Spencer Plc v. Commissioners of Customs & Excise* [2002] ECR I-6325.

⁴⁴ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723

⁴⁵ For the rationale behind the rejection of horizontal direct effect of Directive, see C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR I-3325

⁴⁶ Case C-188/89 *Foster v British Gas* [1990] ECR I-3313, [20]

⁴⁷ See generally, Catherine Barnard and Steve Peers, *European Union Law* (Oxford University Press 2014) 154 (noting that if a private entity carries out a public service, it could be treated as having special powers conferred by the state, and therefore an action on the basis of direct effect will be entertained).

⁴⁸ C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135

⁴⁹ Cases 14/83 *Von Colson and Kamann* [1984] ECR 1891. Note that such interpretation cannot, however, circumvent the rules relating to *contra legem*, the non-imposition of criminal sanctions and the principle of non-retroactivity (C-60/02 *X (Rolex), Criminal Proceedings against* [2004] ECR I-651). Note also that national courts are under a *negative* obligation to refrain from interpreting requisite domestic legislation in a way which would be incompatible with the objectives of un-transposed EU directives (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057).

⁵⁰ See Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 401. In considering the seriousness of the alleged breach, the CJEU will have regard to, *inter alia*, the clarity and precision of the rule breached; the measure of discretion left to national authorities; whether the infringement or damage was caused voluntarily or intentionally; whether there exist any errors of law which were excusable or inexcusable; whether the position taken by an EU institution contributed to the member state’s omission; and whether the member state continues to adopt or retain the allegedly infringing practice.

breach, s/he will be able to recover compensation for any harm caused⁵¹ under the principle of *state liability*.⁵² The European Commission may also, pursuant to Article 258 TFEU, exercise its *discretion*⁵³ to bring infringement actions before the CJEU so as to ensure that member states which do not comply with their EU anti-trafficking obligations are held accountable.⁵⁴ Apart from the EU Commission, the EU Anti-Trafficking Coordinator,⁵⁵ as well the EU Group of Experts on Trafficking in Human Beings (EUGET),⁵⁶ also play an important role in ensuring accountability in the anti-trafficking field in the EU.

II. COUNCIL OF EUROPE

For the purposes of this thesis, two main CoE legislative instruments will be examined;⁵⁷ these are the European Convention on Human Rights (ECHR) and the CoE Anti-Trafficking Convention. As will be discussed later in this chapter, although the ECHR does not contain a specific provision against ‘human trafficking’, at least one recently decided case – *Rantsev v Cyprus and Russia* – appears to suggest that the European Court of Human Rights (ECtHR) is nevertheless prepared to rely on the teleological approach so as to construe trafficking as falling

⁵¹ Case C-66/95 *Sutton v Secretary of State for Social Security* [1997] ECR I-2163, [1997] 2 CMLR 382 [33]-[34]. National courts have the jurisdiction to assess the amount of damage, whenever the national law does not treat breaches of EC law less favourable than similar domestic claims, nor make it virtually impossible / excessively difficult to obtain reparation.

⁵² Joined Cases C-6 and 9/90 *Francoovich and Bonifaci v Republic of Italy* [1991] ECR I-5375; C-48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029. Note that claims are not necessarily restricted to the allegedly infringing actions of the legislature or executive; it also extends to the allegedly unlawful actions of courts of last instance (see Case C-224/01 *Köbler v Austria* [2003] ECR-I 10239)

⁵³ Communication from the Commission to the Council and the European Parliament Updating the handling of relations with the complainant in respect of the application of Union law COM/2012/0154 final. Five steps must be taken by the Commission: (1) issuance of a letter of notification; (2) issuance of a formal notice if the state remains non-compliant; (3) issuance of a reasoned opinion; (4) provision of an opportunity for the member state to challenge the reasoned opinion; and (5) bringing of formal proceedings before the CJEU if the member state remains non-compliant.

⁵⁴ If the CJEU finds that there was a failure to comply with EU law, it may impose a lump sum payment or penalty payment (Article 260(2) TFEU). See also, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2011) 443

⁵⁵ – ‘Myria Vassiliadou: EU Anti-Trafficking Coordinator’ (*Europa*, March 2011) <http://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator_en> accessed 7 December 2014. She also oversees the implementation of the EU Anti-Trafficking Strategy. See Communication on The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 COM(2012) 286 final.

⁵⁶ – ‘Commission Expert Group’ (*Europa*, 5 December 2011) <<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2722>> accessed 7 December 2014

⁵⁷ Cf. since the 1990s, the CoE has adopted a number of Recommendations regarding several aspects of human trafficking. These were, however, non-binding, and not effectively implemented by member states. See e.g. Parliamentary Assembly Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and mail-order brides (text adopted by the Assembly on 22 June 2004 (19th Sitting)); Recommendation 1545 (2002) on a campaign against trafficking in women (*Adopted* on 21 January 2002) (1st Sitting).

within the ambit of Article 4 of the ECHR.⁵⁸ Less controversial, however, is the Anti-Trafficking Convention, which has been ratified by some 42 European countries to date,⁵⁹ and, as discussed below, is arguably the most comprehensive regional anti-trafficking treaty in existence today. The implementation of this Convention is supervised by the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties (CoP). The former is composed of 15 independent and impartial human rights experts, and serves to regularly evaluate the legal situation regarding human trafficking in each member state that is party to the Convention, drawing on information collected from a variety of sources, including country visits.⁶⁰ GRETA regularly issues ‘country’ reports on the implementation of the Convention which, while drawn up in a cooperative spirit, are intended to assist State parties to the Convention in their anti-trafficking efforts. For the purposes of this thesis, GRETA’s reports are primarily relied upon as the basis for many of the findings presented in respect of the law and practice on human trafficking in Europe. This is because of the rigorous methodology employed by GRETA, as described above, in so far as the collection of data is concerned, the robust analysis to which the data collected by GRETA is subject to, as well as the considerable expertise that underlie the findings and recommendations typically postulated in GRETA’s reports.

The CoP is composed of representatives from the Committee of Ministers of the Parties to the Convention, as well as representatives of non-member parties of the CoE.⁶¹ On the basis of GRETA’s reports, the CoP frequently adopts recommendations addressed to States Parties concerning the measures to be taken to implement GRETA’s conclusions.⁶²

⁵⁸ *Rantsev v Cyprus and Russia* [2010] ECHR 22 [282]

⁵⁹ To date, the Convention has not been ratified by Estonia and Turkey. The Greek Parliament has recently voted the ratification and is expected to formally deposit the instrument soon. Four CoE member States (the Czech Republic, Liechtenstein, Monaco and the Russian Federation) have not even signed the Convention as yet.

⁶⁰ GRETA, *First General Report on GRETA’s activities covering the period from February 2009 to July 2011* (Council of Europe 2011) 10

⁶¹ Note that the CoE Anti-Trafficking Convention allows for ratification by non-CoE state parties. See Council of Europe Convention on Action Against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (CoE Anti-Trafficking Convention) Art 42

⁶² For a full list of Recommendations, see Council of Europe, ‘Action Against Trafficking in Human Beings’ (*Council of Europe*, 26 September 2011) <http://www.coe.int/t/dghl/monitoring/trafficking/docs/monitoring/Country_Reports_en.asp#TopOfPage> accessed 5 December 2014

C. NORMATIVE CONSIDERATIONS

This section critically assesses the normative aspects of European anti-trafficking law and practice, against the backdrop of the benchmarks outlined under the *normative* paradigm of the *INI typology*. This assessment seeks to achieve one of the overarching objectives of the thesis, which is to evaluate the extent, and ways in which, the existing law and practice on human trafficking in Europe requires reform.

3.1. The Criminalisation of Trafficking-Related Offenses

As described in chapter 1, human trafficking is not only the fastest growing form of organised crime in the world today, but also a significant source of profits for those who engage therein as perpetrators.⁶³ In view of this, it is perhaps not surprising that European anti-trafficking law places an obligation on European countries to criminalise human trafficking in all of its forms. More specifically, the recently enacted EU Anti-trafficking Directive provides, in Article 2(1), that,

Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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.⁶⁴

On a plain textual construction of this provision, several points are noteworthy. The first is that this provision not only embodies *transnational* trafficking as between states, but also *internal* trafficking, defined as trafficking within the borders/territory of a particular state.⁶⁵ The second is that this provision implicitly countenances the international approach to defining human trafficking, in so far as the ‘action’, ‘means’ and ‘purpose’ elements are concerned.⁶⁶ In relation

⁶³ Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2013) 16 - 17

⁶⁴ Article 2(1) EU Anti-Trafficking Directive; See also Articles 4 and 18 CoE Anti-Trafficking Convention

⁶⁵ In relation to the CoE's equivalent provision, see e.g. Article 2 CoE Anti-Trafficking Convention

⁶⁶ Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2009) [74]

to ‘purpose’ element, it is noteworthy that said provision broadly defines ‘exploitation’ to ‘include’,

[...] the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.⁶⁷

It would appear that, unlike the now defunct 2002 Framework Decision against Human Trafficking,⁶⁸ the Anti-Trafficking Directive, in much the same manner as the CoE Anti-Trafficking Convention,⁶⁹ is non-exhaustive in its approach to defining ‘exploitation’. In other words, the use of the non-exhaustive term ‘include’ suggests that, although the most prominent forms of exploitation - sexual exploitation and forced labour - are explicitly addressed by the foregoing definition of exploitation, the provision does not restrict itself to these forms of exploitation; other forms of exploitation are also captured by this provision. These include, for example, the recent trend of trafficking of pregnant women for their babies;⁷⁰ trafficking for welfare benefits;⁷¹ and the increasingly prevalent phenomenon of trafficking for forced marriage.⁷² Moreover, it is also important to note that, although the phrase ‘exploitation of criminal activities’ is a relatively new addition to European, and, indeed, international anti-trafficking, law, such a phrase nevertheless appears to be broad enough to encompass the ‘exploitation of a person to commit, *inter alia*, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.’⁷³ This is an important development, which places the European anti-trafficking framework ahead of the curve in respect of the regulation of newer forms of trafficking.

More generally, based on GRETA’s authoritative interpretation of the provision criminalising human trafficking in the CoE,⁷⁴ it appears that exploitation need not *actually* occur for human trafficking to be found to exist.⁷⁵ Rather, because human trafficking is a crime of *specific intent*, the presence of at least one of the ‘actions’ listed above, in addition to at least one of the applicable ‘means’, with evidence of an *intention* to commit one of the ‘purposes’ described

⁶⁷ Article 2(1) EU Anti-Trafficking Directive; See also Article 4 CoE Anti-Trafficking Convention

⁶⁸ 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings

⁶⁹ Article 4(a) CoE Anti-Trafficking Convention

⁷⁰ Louise Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press 2010) 15

⁷¹ EUROPOL, *Trafficking in Human Beings in the European Union* (2565-84, 2011) 14

⁷² GRETA, *Report on Bosnia and Herzegovina* (GRETA(2013)7, 2013) [10]

⁷³ Recital 11 EU Anti-Trafficking Directive

⁷⁴ GRETA, *Report on Italy* (GRETA(2014)18, 2014) [48]

⁷⁵ GRETA, *Report on Macedonia* (GRETA (2014)12, 2014) [187]

above, will give rise to trafficking. There is, however, one caveat to this; for there to be child trafficking, only the ‘actions’ and ‘purpose’ elements must necessarily be satisfied;⁷⁶ that is, there will be child trafficking if a trafficker recruits a child with the *intention* of subsequently sexually exploiting him/her, though actual exploitation need not occur. The ‘means’ element is an irrelevant consideration in this regard. On a related issue, it is also important to note that the alleged consent of a trafficked victim is, by law, irrelevant for the purposes of determining whether such a person was exploited, provided that any of the ‘means’ described above was used.⁷⁷

That said, apart from the foregoing forms of exploitation, European anti-trafficking law also envisages that European countries will criminalise other illegal activities linked to human trafficking. These might include, for example, the offense of inciting, aiding and abetting or attempting to commit a trafficking-related offense;⁷⁸ the offense of concealing, damaging or destroying a trafficked victim’s identity documents;⁷⁹ and, more controversially, the offense of unlawfully using the services of individuals with the knowledge that they are victims of trafficking.⁸⁰

In view of the deleterious effect which human trafficking has on its victims, the ECtHR has, in recent years, been at the forefront of efforts aimed at ensuring that CoE member states have in place effective laws designed to criminalise human trafficking. The Court’s activist approach in stipulating in no uncertain terms that states are under a positive obligation to, among other things, criminalise activities falling within the scope of Article 4 of the ECHR is of special import, given that the ECHR does not itself expressly mention ‘human trafficking’. Several

⁷⁶ Article 2(5) EU Anti-Trafficking Directive; Article 4(c) CoE Anti-Trafficking Convention; see also Tomoya Obokata, ‘Implementing International Law on Human Trafficking: State Practice of United Kingdom and Ireland’ (2015) 2(2) *State Practice & International Law Journal* 85, 86 (arguing that ‘the [...] definition [of human trafficking] does not require that victims must be exploited for an act to be classified as trafficking. This is so because the purpose element relates to mens rea, ulterior intention in particular, rather than actus reus of the crime. A good comparison is the offence of burglary in the United Kingdom. This offence is complete as soon as one enters into premises as a trespasser with intention to steal, even when one does not actually steal anything.’) An important question here is what one is thinking at the time of entry. By analogy, the definition under the Trafficking Protocol suggests that trafficking is established when a trafficker moves people from one place to another with intention to exploit them subsequently or with full knowledge that they will be exploited by others at their destination. When trafficked victims are actually exploited, that would technically be regarded as a separate offence of slavery or forced labour and/or as an aggravating factor which would increase the level of punishment.’)

⁷⁷ Article 2(4) EU Anti-Trafficking Directive; Article 4(b) CoE Anti-Trafficking Convention

⁷⁸ Article 21 CoE Anti-Trafficking Convention

⁷⁹ Ibid Article 20

⁸⁰ Article 18 EU Anti-Trafficking Directive; Article 19 CoE Anti-Trafficking Convention

cases are instructive in this regard. The first is that of *Siliadin v. France*.⁸¹ In that case, a Togolese girl, aged 15, was brought to France to work in the home of a Mrs D, supposedly until she had reimbursed the cost of her flight. While it was initially agreed that the girl would be permitted to attend school after her immigration status had been regularized, this never materialized. Rather, *Siliadin* became an unpaid housemaid for D's family; her passport was taken away; and she was even 'lent' to a Mr and Mrs B as a housemaid - cooking, cleaning and taking care of their children seven days per week from 7.30 a.m. to 10.30 p.m. Having been made aware of this situation, French authorities brought criminal actions against Mr and Mrs B, who were initially prosecuted, but later acquitted following a successful appeal. In view of this unfavourable outcome, the applicant alleged that Article 4 of the ECHR⁸² had been violated in light of the fact that France had failed to comply with its positive obligation under the ECHR to, *inter alia*, provide adequate criminal-law provisions so as to prevent and punish the perpetrators of the exploitation committed against her.

Although the ECtHR did not consider the situation complained of as amounting to slavery,⁸³ it nevertheless found that the applicant's situation qualified as forced labour⁸⁴ and servitude.⁸⁵ More profoundly, for the purposes of this discussion, the Court concluded that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions complained of,⁸⁶ and, that accordingly, France had breached its positive obligation under Article 4 of the Convention.⁸⁷

Notwithstanding the jurisprudential significance⁸⁸ of this decision, several concerns are nonetheless worth noting. The first is that, apart from the Court's misconstruction of the concept of 'slavery', it could also be faulted for having failed to establish a clear link between

⁸¹ [2005] ECHR 545

⁸² Article 4 ECHR provides that, '[N]o one shall be held in slavery or servitude' (paragraph 1) and that '[n]o one shall be required to perform forced or compulsory labour' (paragraph 2).

⁸³ *Siliadin* (n 81) [122]

⁸⁴ *Ibid.* The court referred to the definition of forced labour as contained in Article 2(1) of the ILO Forced Labor Convention ('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').

⁸⁵ *Ibid* [129]. The court defined servitude as 'an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of "slavery"'.

⁸⁶ *Ibid* [148]

⁸⁷ *Ibid* [149]

⁸⁸ See Holly Cullen, 'Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 Human Rights Law Review 585; Jean Allain, 'Trafficking in Human Beings: Modern Slavery' (2009) 20 European Journal of International Law 453; Vanessa Munro, 'Of rights and rhetoric: discourses of degradation and exploitation in the context of sex trafficking' (2008) 35 Journal of Law and Society 240; Siddharth Kara, 'Designing More Effective Laws Against Human Trafficking' (2010) 9 North Western Journal of International Human Rights 123.

human trafficking and Article 4,⁸⁹ although brief references to the Anti-Trafficking Convention can be found in the judgment.⁹⁰ It is submitted that, although the case was decided on the basis of the prohibition of forced labour and servitude, the Court should have been more pragmatic in at least considering whether the situation complained of by the applicant did in fact amount to trafficking, and, more importantly, whether Article 4 ECHR was broad enough to be construed to include the prohibition of trafficking. Indeed, given the facts of the case, one might very well be correct in arguing that, the ‘action’ and ‘purpose’ elements of the definition of human trafficking,⁹¹ as contained in Article 4(a) of the CoE Anti-Trafficking Convention, were satisfied, given that the applicant was brought to France by a relative of her father’s; she was a minor who was uneducated, without resources and isolated; as well as the fact that she was forced to work for Mr. and Mrs. B without remuneration. In short, therefore, notwithstanding the importance of *Siliadin* in explicating the positive obligations that arise under Article 4 ECHR, the Court was perhaps too timid in its assessment of the factual matrix of the case, to the extent that it considered, but did not ultimately decide on, the issue of human trafficking.

The opposite is, however, true in relation to the latter case of *Rantsev v Cyprus and Russia*.⁹² In that case, Rantseva, the applicant’s daughter, had been recruited from Russia by Cypriot cabaret owners to work on an artiste visa in a cabaret in Cyprus. Upon arrival in Cyprus, she decided to quit after only three days of work. Upon realizing that Rantseva had attended a discotheque instead of work, her employer took her to the police, requesting that they deport her back to Russia on the grounds that she was an illegal migrant. Having reviewed Rantseva’s status, the police however indicated that she was in the country legally and therefore handed her back over to her employer. On the following day, however, *Rantsev* was found dead in the street below her apartment’s balcony. In a complaint by Rantseva’s father before the ECtHR, the Court ultimately ruled in favour of the applicant on several grounds. For the purposes of this thesis, one of the most significant findings of the ECtHR was that, notwithstanding the absence of an explicit provision against human trafficking in the ECHR, ‘trafficking itself, within the meaning of Article 3(a) of the Trafficking Protocol and Article 4(a) of the Anti-Trafficking

⁸⁹ Vladislava Stoyanova, ‘Dancing on the borders of article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case’ (2012) 30(2) Netherlands Quarterly of Human Rights 182 (arguing that the court did not explicitly state the specific link between slavery and servitude).

⁹⁰ *Siliadin* (n 81) [50].

⁹¹ Note that in the case of persons under the age of 18, the ‘means’ element need not be satisfied for trafficking to exist. See Article 4(c) CoE Anti-Trafficking Convention

⁹² *Rantsev* (n 58)

Convention, falls within the scope of Article 4 of the Convention.⁹³ By seemingly adopting the teleological approach,⁹⁴ the ECtHR considered that ‘it was unnecessary to identify whether the treatment about which the applicant complained constituted slavery, servitude or forced and compulsory labour.’⁹⁵ Instead, the Court concluded that, in light of the proliferation of both trafficking itself and of measures taken to combat it, it was appropriate on the facts of the case to only 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 by that Article without the need to assess which of the [three] proscribed conduct [slavery, forced labour or servitude] were engaged by Rantseva’s treatment’⁹⁶ in the case in question. While it is clear that the Court was inclined, following the criticisms levelled against it in the previous *Siliadin* judgment, to be proactive in its approach, it is nonetheless regrettable that it failed to explain precisely how the factual circumstances of this case amounted to human trafficking within the meaning of Article 4 ECHR. In other words, in finding that it was ‘unnecessary to indicate which of the elements of Article 4 were engaged’, the Court has arguably opened itself up to the criticisms of intellectual incoherence⁹⁷ and uncertainty, which were also levelled against it in its previous decision of *Siliadin*.⁹⁸

Notwithstanding this, however, it is important to note that while Cyprus was found to have had an appropriately robust legislative framework in place at the time that adequately criminalised human trafficking, which was in contradistinction to France in the *Siliadin* case, the ECtHR was nevertheless emphatic in stating that one of the primary positive obligations that arises under Article 4 is the obligation to criminalise human trafficking. At least one later case has shed some light on the precise scope of this obligation. In *C.N. v The United Kingdom*,⁹⁹ the ECtHR ruled that the criminalisation obligation under Article 4 ECHR does not merely require that states adopt laws to this effect; rather, such laws must be *specific* enough to

⁹³ Ibid [279]

⁹⁴ Steve Peers and Others, *The EU Charter of Fundamental Rights: A Commentary* (Bloomsbury Publishing 2014) 116

⁹⁵ Rantsev (n 58) [282]

⁹⁶ Ibid

⁹⁷ Ryszard Piotrowicz, "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations" (2012) 24 (2) International Journal of Refugee Law 181.

⁹⁸ See generally, Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) Human Rights Law Review 546. Noting that one of the problems with the *Siliadin* judgement was the fact that it provided an incorrect definition of 'slavery'. It ruled that slavery arises when a perpetrator exercises a genuine right of ownership over another person. On the contrary, however, and as later accepted by the Court in *Rantsev*, slavery arises where a perpetrator exercises powers *attaching* to the right of ownership.

⁹⁹ *C.N. v The United Kingdom*, no. 4239/08, 13 November 2012.

distinguish between ‘trafficking for the purposes of domestic servitude’, for example, and the separate offense of ‘domestic servitude’. The case of *C.N* concerned a Ugandan woman who was trafficked to the UK on falsified identity documents to allegedly escape from the sexual and physical violence which she had experienced at home. While in the UK, she stayed with a relative who not only confiscated her travel documents, but also constantly reminded her that she would be seriously reprimanded if she made contact with anyone. During this time, the applicant was, however, allowed to work for a man in London, caring for one of his patients who was at the time suffering from Parkinson’s disease. Notwithstanding having collapsed, and then later identified as both HIV-positive and a victim of trafficking,¹⁰⁰ British police nevertheless refused to find that she was a victim of trafficking. Against this backdrop, she brought an action before the ECtHR alleging that, at the time of her ill-treatment, the British Government was in breach of its positive obligation under Article 4 to have in place criminal laws penalising forced labour and servitude. While the Court ultimately found in the applicant’s favour, holding that she was a victim of domestic servitude, perhaps the most striking aspect of this judgement was the Court’s finding that, in the context of Article 4 ECHR, ‘trafficking for the purpose of domestic servitude’ and ‘domestic servitude’ are two *separate* offenses which must be criminalised separately. As the UK had failed to do so at the relevant time, it was held to be in breach of Article 4 ECHR. Since this decision, and in light of the many criticisms levelled against the country’s piece-meal legislative approach to human trafficking,¹⁰¹ the UK has recently passed the Modern Slavery Act.¹⁰² This is, indeed, a positive development.

In view of the continued insistence of the ECtHR that the obligation to criminalise human trafficking must be complied with, the vast majority of European countries have either amended their criminal codes or altogether implemented new legislation aimed at criminalising

¹⁰⁰ At the time of the incident, the ‘Poppy Project’ was the relevant authority vested with power by the state to identify and assist victims of trafficking.

¹⁰¹ Before the Modern Slavery Act, there were several applicable pieces of legislation in the UK regarding the criminalisation of various aspects of human trafficking, including: a) section 57, 58, 58A or 59 of the Sexual Offences Act 2003 (trafficking for sexual exploitation); (b) section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking for exploitation); (c) section 71 of the Coroners and Justice Act 2009 (slavery, servitude and forced or compulsory labour). See John Spencer, ‘International law, people trafficking and the power to stay criminal proceedings for abuse of process’ (2014) 73(1) Cambridge Law Journal 11, 14 (Referring to the UK’s approach to the regulation of human trafficking as ‘sprawl untidily across a range of different statutes.’)

¹⁰² Modern Slavery Act 2015 (this Act received Royal Assent on 26 March 2015. Apart from consolidating the current offences relating to trafficking and slavery, the Act also creates two new civil orders to prevent modern slavery; establishes an Anti-Slavery Commissioner; and makes provision for the protection of modern slavery victims).

trafficking-related offenses in the manner prescribed by European anti-trafficking law.¹⁰³ In fact, some European countries have even gone further than this by criminalising trafficking-related offenses not explicitly envisaged by European anti-trafficking law, such as the trafficking of pregnant women for their babies in the context of Bulgaria.¹⁰⁴ Several countries, including Macedonia¹⁰⁵ and Bosnia and Herzegovina,¹⁰⁶ amongst others, have also criminalised the use (with knowledge) of the services of trafficked victims.¹⁰⁷ That said, it is also important to note that the inconsistent practices on the part of several European countries continues to raise some concerns which are ripe for consideration. Perhaps the most significant of these concerns relates to the fact that, despite the existence of laws criminalising trafficking-related offenses, very rarely are these applied in practice to prosecute, much less convict, traffickers.¹⁰⁸ The second concerns the practice of some European countries, such as Bulgaria,¹⁰⁹ Luxembourg,¹¹⁰ Slovenia¹¹¹ and Hungary,¹¹² of designing and enforcing domestic anti-trafficking laws that do not substantively comport with the European and, indeed, the internationally agreed, definition of human trafficking. In these countries, the ‘means’ element i.e. threat, use of force, abduction, fraud, deception etc., rather than being treated as a constitutive element of the offense of trafficking, is instead treated as aggravating circumstances. While this formulation has reportedly had the advantage of increasing the number of traffickers prosecuted for trafficking-related offenses in Bulgaria,¹¹³ Luxembourg,¹¹⁴ Slovenia¹¹⁵ and Hungary,¹¹⁶ as prosecutors only have to prove the ‘action’ and ‘purpose’ elements, it nevertheless raises some important questions as to whether these countries are fully compliant with their positive obligation, as

¹⁰³ Hans-Joerg Albrecht, ‘Transnational Organised Crime: The German Response’ in Shiro Okubo and Louise Shelley (eds), *Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives* (Routledge 2011) 61 (noting that most European countries have amended both their basic criminal codes and procedural laws to date).

¹⁰⁴ Article 159a (3) Criminal Code; GRETA, *Report on Bulgaria* (GRETA(2011)19, 2011) [60]

¹⁰⁵ See Article 418a (3) Criminal Code; GRETA, *Report on Macedonia* (n 75) [113]

¹⁰⁶ Article 186 (6) Criminal Code; GRETA, *Report on Bosnia and Herzegovina* (n 72) [81]

¹⁰⁷ See e.g. The Policing and Crime Act (UK) imposes a fine of £1000 for the use of the sexual services of trafficked victims. The effectiveness of a fine, in light of the 6 month limitation for bringing an action, is, however, in issue.

¹⁰⁸ William McDonald, ‘Explaining the under-performance of the anti-human-trafficking campaign: experience from the United States and Europe’ (2014) 61(2) *Crime, Law and Social Change* 125

¹⁰⁹ The use of ‘means’ is considered as an aggravating circumstance under Article 159a (2) 1-6 Criminal Code; GRETA, *Report on Bulgaria* (n 104) [62]

¹¹⁰ Article 382(2) Criminal Code of Luxembourg

¹¹¹ Article 113(2) Criminal Code; GRETA, *Report on Slovenia* (GRETA(2013)20, 2013) [39]

¹¹² Article 192 Criminal Code; US Department of State, *Trafficking in Persons Report - Hungary* (2014) 200

¹¹³ GRETA, *Report on Bulgaria* (n 104) 62

¹¹⁴ Article 382 (2) Criminal Code CC; GRETA, *Report on Luxembourg* (GRETA(2013)18, 2013)[38]

¹¹⁵ Article 113(2) Criminal Code, GRETA, *Report on Slovenia* (n 111) [39]

¹¹⁶ US Department of State, *Trafficking in Persons Report - Hungary* (2014) 200

outlined by *C.N v UK*¹¹⁷ to criminalise specific trafficking-related offenses in a way which distinguishes them from other related offenses. More importantly, such a formulation also has a potentially adverse impact on the efficacy of requests for mutual legal assistance,¹¹⁸ given that differences in the definition of human trafficking as between these countries and other countries might result in such requests being denied.

More generally, there appears to be uneven implementation of the criminalisation obligation across a number of European countries. For example, in Andorra,¹¹⁹ no specific law outlawing human trafficking has been adopted to date.¹²⁰ Additionally, in Malta, anachronistic anti-trafficking law, in the form of the White Slave Traffic (Suppression) Ordinance,¹²¹ is cause for some concern, as victim identification procedures made pursuant to this Ordinance risk marginalising victims of colour, as well as those who are trafficked into forms of exploitation, other than prostitution. Moreover, in several other countries, such as Italy,¹²² Poland,¹²³ Slovenia¹²⁴ and San Marino,¹²⁵ existing anti-trafficking law does not specifically criminalise the offense of using (with knowledge) the services of trafficked victims, while in Iceland¹²⁶ and Montenegro,¹²⁷ there appears to be vague, or altogether no, legal recognition of the offenses of trafficking for the purposes of slavery and servitude. On the other hand, in some countries, such as Portugal, overly broad definitions of ‘human trafficking’ in municipal law run the risk of including less serious, unrelated crimes within the ambit of trafficking.¹²⁸

In view of the foregoing, a strong argument can be made that while European anti-trafficking law provides a robust framework on the basis of which all forms of trafficking must be criminalised, the existing practice of at least some European countries does not appear to fully comport with the substantive requirements of such a framework. This ‘disconnect’ between law

¹¹⁷ [2012] ECHR 1911

¹¹⁸ GRETA, *Report on Luxembourg* (n 114) [38]

¹¹⁹ GRETA, *Report on Andorra* (n 11) [12]

¹²⁰ CAT, ‘Concluding observations on the initial report of Andorra’, Adopted by the Committee at its fifty-first session (28 October–22 November 2013), CAT/C/AND/CO/1, 20 December 2013 [14]

¹²¹ White Slave Traffic (Suppression) Ordinance 1930 criminalises forced prostitution and overlaps with the Criminal Code’s provisions on trafficking for the purpose of sexual; GRETA, *Report on Malta* (GRETA(2012)14, 2014) [45]

¹²² GRETA, *Report on Italy* (n 74) [184]

¹²³ GRETA, *Report on Poland* (GRETA(2013)6, 2013) [119]

¹²⁴ GRETA, *Report on Slovenia* (n 111) [155]

¹²⁵ GRETA, *Report on San Marino* (n 12) [108]

¹²⁶ Article 227(a) Penal Code; GRETA, *Report on Iceland* (GRETA(2014)17, 2014) [48]

¹²⁷ Article 444 Penal Code; GRETA, *Report on Montenegro* (GRETA(2012)9, 2012) [43]

¹²⁸ See e.g. Article 160 Penal Code; see also, Human Rights Committee, ‘Concluding observations on the fourth periodic report of Portugal, adopted by the Committee at its 106th session (15 October–2 November 2012)’, CCPR/C/PRT/CO/4, 23 November 2012 [13]

and practice has serious implications, particularly in respect of the prosecution of trafficking-related offenses as well as victim identification.

3.2. The Regulation of Legal Persons

In light of an increasing number of incidents whereby legal entities have reportedly been engaged in the exploitation of trafficked victims,¹²⁹ European anti-trafficking places an obligation on European countries to take the necessary legislative and administrative measures so as to hold legal persons liable for their involvement in the commission of trafficking-related offenses. Such liability will only arise, however, where the offense in question is committed for that entity's benefit by a natural person who either acts individually or as part of an organ of the legal person.¹³⁰ In other words, where that person exercises a power of representation in respect of that entity;¹³¹ or has authority to take decisions on behalf of that entity;¹³² or exercises control within that entity,¹³³ courts must not hesitate to find such persons guilty of trafficking-related offenses, and, by extension, the entity, by way of attribution. Moreover, such a person should not escape liability in those circumstances where a lack of supervision or control over the legal person has resulted in the commission of a trafficking-related offense.¹³⁴ This obligation extends to commercial carriers as well, who are required, for example, to ascertain whether each passenger is in possession of valid travel documents.¹³⁵

The relevant sanctions envisaged by European anti-trafficking law include criminal penalties, such as fines, as well as administrative penalties, such as the closure of infringing establishments.¹³⁶ In all circumstances, though, such penalties must be effective, proportionate and dissuasive.¹³⁷ The importance of European countries complying with the foregoing obligation was recently explored in the *Rantsev* decision. In that case, the ECtHR considered the role of Cypriot cabarets in the commission of alleged trafficking-related incidents, and, held that, in view of circumstances which gave rise to a credible suspicion that trafficking might have

¹²⁹ See generally OSCE *Ending Exploitation - Ensuring that Businesses do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector* (OSCE, 2014)

¹³⁰ Article 5 EU Anti-Trafficking Directive; Article 22(1) CoE Anti-Trafficking Convention

¹³¹ Ibid Article 5 (1) (a) EU Anti-Trafficking Directive; Article 22(1)(a) CoE Anti-Trafficking Convention

¹³² Ibid Article 5 (1) (b) EU Anti-Trafficking Directive; Article 22(1)(b) CoE Anti-Trafficking Convention

¹³³ Ibid Article 5 (1) (c) EU Anti-Trafficking Directive; Article 22(1)(c) CoE Anti-Trafficking Convention

¹³⁴ Ibid Article 5 (2) EU Anti-Trafficking Directive; Article 22(2) CoE Anti-Trafficking Convention

¹³⁵ Article 7(3) CoE Anti-Trafficking Convention

¹³⁶ Article 6 (a) - (e) EU Anti-Trafficking Directive; Article 23 (2) CoE Anti-Trafficking Convention

¹³⁷ Article 23(2) CoE Anti-Trafficking Convention

been occurring, it was incumbent upon Cyprus to not only to put in place an effective criminal law for the purposes of punishing traffickers, but also adequate measures designed to ‘regulate businesses which are often used as a cover for human trafficking.’¹³⁸

While the foregoing legislative and, indeed, broader normative prescriptions appear to be robust in nature and scope, existing state practice in the vast majority of European countries suggests that such prescriptions are hardly ever applied in practice. Although it is certainly commendable that there have been several closures of establishments which serve as fronts to trafficking-related activities in Malta¹³⁹ and Luxembourg,¹⁴⁰ for example, in a number of European countries, legal persons have reportedly not been properly regulated. More specifically, in some countries, such as Armenia,¹⁴¹ applicable legislation does not sufficiently impose responsibility on private companies for making jobs available abroad which result in exploitation, while in Bulgaria,¹⁴² legal entities cannot incur criminal liability because the subjective element of guilt cannot legally exist in respect of such entities. In other countries, such as Romania,¹⁴³ the situation is more nuanced, given that, while there is a framework in place to criminalise legal entities, competent national authorities do not typically review reports concerning companies who are allegedly involved in the trafficking of persons abroad. Recruitment agencies which have been implicated in human trafficking have also not been routinely prosecuted in some countries, such as Russia.¹⁴⁴

In light of the foregoing, it is submitted that, although there has been some progress in terms of the regulation of legal persons in Europe in recent years, and, in particular, in the UK, pursuant to the Gangmasters (Licensing) Act,¹⁴⁵ there nonetheless remains a gap between what European anti-trafficking law prescribes and what obtains in practice in the majority of European

¹³⁸ Rantsev (n 58) [284]

¹³⁹ GRETA, *Report on Malta* (n 121) [168]

¹⁴⁰ GRETA, *Report on Luxembourg* (n 114) [154] - [155]

¹⁴¹ GRETA, *Report on San Armenia* (GRETA(2012)8, 2012) [114]

¹⁴² GRETA, *Report on Bulgaria* (n 104) [203]; Note, however, that administrative responsibility of legal persons for the crime of trafficking is provided for under Article 83(a) of the Law on Administrative Violations and Sanctions.

¹⁴³ Article 19 Criminal Code; GRETA, *Report on Romania* (GRETA(2012)2, 2012) [184]

¹⁴⁴ Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation’, CRC/C/RUS/CO/4-5, 25 February 2014 [67]

¹⁴⁵ The Gangmasters (Licensing) Act 2004, section 6. This Act, in general, applies to labour providers, employment agencies and businesses who supply workers to the *regulated* sectors anywhere in the UK, including the sea bed, shore, and any estuary or tidal river adjacent to the UK. It sets up the licensing scheme for labour providers operating in the regulated sectors. It also created the offences of acting as an unlicensed gangmaster and using an unlicensed gangmaster.

countries. This is best illustrated in the very limited number of enforcement actions currently being brought against such infringing entities.

3.3. Penalties

European anti-trafficking law places an obligation on European states to impose ‘effective, proportionate and dissuasive penalties’ on those who are found to have engaged in trafficking-related offenses.¹⁴⁶ More specifically, at the EU level, these penalties, in accordance with the Council of Ministers Conclusions of 2002, must fall into one of two distinct levels: level 3, which entails terms of imprisonment of between 5-10 years imprisonment, or level 4, which embodies terms of imprisonment of at very least 10 years imprisonment.¹⁴⁷ In determining the appropriate sentence to be imposed in each particular case, European countries are also required to take account of traffickers’ previous convictions in other European countries.¹⁴⁸

The obligation to penalise trafficking-related offenses makes theoretical as well as practical sense. Without the imposition of stringent penalties, traffickers will act with impunity, which will, in turn, not only have a deleterious effect on the rights of victims of trafficking, but also circumvent the rule of law.¹⁴⁹ This is perhaps why the ECtHR in *Rantsev* considered that not only are European countries under a positive obligation to put in place a robust framework that criminalises trafficking-related offenses, but also to penalise such offenses.¹⁵⁰ While this is, indeed, a positive development, which has resulted in a growing number of traffickers being convicted and penalised for their involvement in trafficking-related incidents across Europe,¹⁵¹ the reality is that there remains a ‘disconnect’ between what obtains as a matter of European anti-trafficking law, on the one hand, and the practices of a vast majority of European countries, on the other. Perhaps the most striking consideration in this connection is the fact that, in a number of jurisdictions, the penalties imposed in respect of trafficking-related offenses are not generally commensurate with the gravity of the offense in question,¹⁵² which raises questions

¹⁴⁶ Article 4 (4) EU Anti-Trafficking Directive; Article 23 CoE Anti-Trafficking Convention

¹⁴⁷ Council of Ministers, *2423rd Council meeting Luxembourg, 25/26 April 2002* (7991/02 [Presse 104], 2002) 15

¹⁴⁸ Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

¹⁴⁹ Kristina Touzenis, *Trafficking in human beings - N° 3 - human rights and transnational criminal law, developments in law and practices* (UNESCO 2010) 52

¹⁵⁰ *Rantsev* (n 58) [285]

¹⁵¹ Jan Van Dijk and Fanny Klerx-Van Mierlo, "Quantitative indices for anti-human trafficking policies: based on reports of the US State Department and the Council of Europe" (2014) 61(2) *Crime, Law and Social Change* 229

¹⁵² See e.g. Committee against Torture, ‘Concluding observations on the fifth periodic report of Estonia, adopted by the Committee at its fiftieth session (6–31 May 2013)’, CAT/C/EST/CO/5, 17 June 2013 [8]

about the dissuasiveness of such penalties.¹⁵³ This is particularly the case in Austria,¹⁵⁴ Bosnia and Herzegovina,¹⁵⁵ Cyprus,¹⁵⁶ Norway¹⁵⁷ and Slovakia,¹⁵⁸ where sentences as low as one year imprisonment have reportedly been imposed on persons found guilty of trafficking-related offenses. For the purposes of illustration, it is also worth noting that, in Lithuania, there has been at least one instance in which a trafficker was sentenced to 120 hours of community service for having trafficked three girls between the ages of 14 – 15 years old into prostitution,¹⁵⁹ while in Denmark, there have been instances whereby traffickers have been imprisoned for a meagre period of 6 months.¹⁶⁰ More generally, there is also a growing trend¹⁶¹ whereby the domestic courts of several European countries, including Portugal,¹⁶² Latvia,¹⁶³ Malta,¹⁶⁴ Russia,¹⁶⁵ Switzerland,¹⁶⁶ Slovakia¹⁶⁷ and the UK,¹⁶⁸ have imposed lenient or, in many instances, suspended sentences in respect of traffickers, often times without even considering whether such sentences are capable of having a deterrent effect, both from an individual and community standpoint. The fact that some judges, particularly in Poland,¹⁶⁹ sometimes reduce the penalties ultimately imposed on traffickers where the victim is proved to have a history of engagement in prostitution, for example, is also cause for concern.¹⁷⁰ Unfortunately, the situation is no different

¹⁵³ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fourth and fifth periodic reports of the Republic of Moldova', CEDAW/C/MDA/CO/4-5, Adopted by the Committee at its fifty-sixth session (30 September-18 October 2013) [21]

¹⁵⁴ GRETA, *Report on Austria* (GRETA(2011)10, 2011) [135] and [143]

¹⁵⁵ GRETA, *Report on Bosnia and Herzegovina* (n 72) [154]

¹⁵⁶ Committee against Torture, 'Concluding observations on the fourth report of Cyprus', Adopted by the Committee at its fifty-second session (28 April-23 May 2014), CAT/C/CYP/CO/4, 16 June 2014 [10]

¹⁵⁷ GRETA, *Report on Norway* (GRETA(2013)5, 2013) [227]

¹⁵⁸ GRETA, *Report on Slovakia* (GRETA(2011)9, 2011) [143]

¹⁵⁹ US Department of State, *Trafficking in Persons Report - Lithuania* (2014) 250

¹⁶⁰ GRETA, *Report on Denmark* (GRETA(2011)21, 2011) [215]

¹⁶¹ See for e.g. US Department of State, *Trafficking in Persons Report - Germany* (2014) 184. In Germany, out of 115 convicted traffickers, only 32 were actually imprisoned (serving terms of between 2 and 10 years). The vast majority had been subject to a suspended sentence.

¹⁶² GRETA, *Report on Portugal* (GRETA(2012)17, 2012) [176]

¹⁶³ GRETA, *Report on Latvia* (GRETA(2012)15, 2012) [256]

¹⁶⁴ GRETA, *Report on Malta* (n 121) [185]

¹⁶⁵ US Department of State, *Trafficking in Persons Report - Russia* (2014) 325

¹⁶⁶ US Department of State, *Trafficking in Persons Report - Switzerland* (2014) 366

¹⁶⁷ Committee on the Rights of the Child, 'Concluding observations on the initial report of Slovakia submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-second session (14 January-1 February 2013)', CRC/C/OPSC/SVK/CO/1, 3 July 2013 [32]

¹⁶⁸ GRETA, *Report on the United Kingdom* (GRETA(2012)6, 2012) [342]

¹⁶⁹ GRETA, *Report on Poland* (n 123) [217]

¹⁷⁰ See also Committee on the Rights of the Child, 'Concluding observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, adopted by the Committee at its sixty-first session (17 September-5 October 2012)', CRC/C/BIH/CO/2-4, 29 November 2012 [72(b)]

in other countries, such as Cyprus,¹⁷¹ Latvia,¹⁷² Moldova¹⁷³ and France,¹⁷⁴ where it is frequently the case that, because of those states' approaches to the classification of offenses, traffickers often get penalised for misdemeanours, in lieu of trafficking.

In view of the foregoing, it is submitted that while European anti-trafficking law provides for a relatively robust framework that requires the imposition of stringent penalties, the practice of some European countries in this regard suggests that the effectiveness, proportionality and dissuasiveness of existing penalties, as applied to traffickers, remains a cause for some concern.

3.4. Aggravating Circumstances

In a non-exhaustive number of circumstances, European anti-trafficking law envisages that the maximum penalty imposed on traffickers for their involvement in trafficking-related offenses should be increased above and beyond those identified in the foregoing section to take account of the gravity and, indeed, special nature of the offense in question. More specifically, European countries are under an obligation to impose a minimum sentence of *at least* 10 years of imprisonment where:

- a. the victim is a child;¹⁷⁵
- b. the offense is committed as part of an organised crime framework;¹⁷⁶
- c. the offense was committed deliberately or by gross negligence;¹⁷⁷
- d. the offense caused particularly serious harm;¹⁷⁸ or
- e. the offense is committed by a public official in the performance of his official duties.¹⁷⁹

While, in general, aggravating circumstances, similar to those listed above, do exist in the domestic legislation of some European countries, there are, however, a few countries which do not apply these in practice or, alternatively, apply them in a way that does not comport with European anti-trafficking law.¹⁸⁰ With regard to the former, it is noteworthy that Montenegro,¹⁸¹

¹⁷¹ GRETA, *Report on Cyprus* (GRETA(2011)8, 2011) [208]

¹⁷² GRETA, *Report on Latvia* (n 163) [181]

¹⁷³ GRETA, *Report on Moldova* (GRETA(2011)25, 2011) [154]

¹⁷⁴ GRETA, *Report on France* (GRETA(2012)16, 2013) [205]

¹⁷⁵ Article 4(2)(a) EU Anti-Trafficking Directive; Article 24(b) CoE Anti-Trafficking Convention

¹⁷⁶ Article 4(2)(b) EU Anti-Trafficking Directive; Article 24(d) CoE Anti-Trafficking Convention

¹⁷⁷ Article 4(2)(c) EU Anti-Trafficking Directive; Article 24(a) CoE Anti-Trafficking Convention

¹⁷⁸ Article 4(2)(d) EU Anti-Trafficking Directive

¹⁷⁹ Article 24(c) CoE Anti-Trafficking Convention

¹⁸⁰ GRETA, *Second General Report on GRETA's activities covering the period from 1 August 2011 to 31 July 2012* (GRETA(2012)13) 5

¹⁸¹ Article 444 Criminal Code; GRETA, *Report on Montenegro* (n 127) [174]

Portugal,¹⁸² Cyprus,¹⁸³ Georgia¹⁸⁴ and Demark¹⁸⁵ do not have in place at least one of the foregoing aggravating circumstances, while in France,¹⁸⁶ the penalty prescribed for offenses which give rise to aggravating circumstances is 7 years imprisonment, as opposed to 10 years, as stipulated by European anti-trafficking law. The fact that these aggravating circumstances are sometimes not enshrined in domestic law, as in Ireland¹⁸⁷ or, alternatively, the fact that their application is in practice subject to prosecutors' discretion, as in Norway,¹⁸⁸ also raises questions regarding the consistency of their application in practice.

3.5. Forfeiture

Human trafficking is essentially a profit-driven crime that is fuelled by the exploitation of persons, whilst simultaneously fuelling the often lavish lifestyles of traffickers.¹⁸⁹ In view of this, European anti-trafficking law places an obligation on European countries to take the necessary measures to seize and confiscate the instrumentalities used, and proceeds derived from trafficking-related offenses.¹⁹⁰ Forfeiture, in this context, is intended to act as a deterrent against the commission of such offenses; if traffickers are deprived of the benefits involved in the exploitation of others, it is felt that it is more likely that they will be hesitant to engage in exploitation in the first place, as the risks will outweigh the benefits.¹⁹¹

A review of existing state practice suggests that, notwithstanding European anti-trafficking law's strong normative commitment to forfeiture, there is uneven enforcement across the majority of European countries. On the one hand, there have been positive results in the freezing, seizure and confiscation of traffickers' assets in Belgium,¹⁹² Denmark,¹⁹³ Luxembourg,¹⁹⁴ Norway,¹⁹⁵

¹⁸² Article 160 Criminal Code; GRETA, *Report on Portugal* (n 162) [162]

¹⁸³ Article 12 Law 87; GRETA, *Report on Cyprus* (n 171) [172]

¹⁸⁴ Article 143 Criminal Code; GRETA, *Report on Georgia* (GRETA(2011)24, 2011) [197]

¹⁸⁵ Article 81 Criminal Code; GRETA, *Report on Denmark* (n 160) [188]

¹⁸⁶ Article 225-4-2 Criminal Code; GRETA, *Report on France* (n 174) [52]

¹⁸⁷ GRETA, *Report on Ireland* (GRETA(2013)15, 2013)[226]

¹⁸⁸ Section 60(a) Criminal Code; GRETA, *Report on Norway* (n 157) [229]

¹⁸⁹ Min Liu, *Migration, Prostitution, and Human Trafficking: The Voice of Chinese Women* (Transaction Publishers 2013) 135

¹⁹⁰ Article 7 EU Anti-Trafficking Directive; Article 23 CoE Anti-Trafficking Convention

¹⁹¹ Alexis Aronowitz, Gerda Theuermann and Elena Tyurykanova, *Analysing the business model of trafficking in human beings to better prevent the crime* (OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010)31

¹⁹² See *Tas v Belgium* (44614/06) (12 May 2009). Here, the ECtHR ruled as 'manifestly unfounded' a claim from an applicant alleging that the confiscation of premises used in connection with offence of human-trafficking violated Article 1 para. 2 of Protocol No. 1 to the ECHR.

¹⁹³ GRETA, *Report on Denmark* (n 160) [193]

¹⁹⁴ GRETA, *Report on Luxembourg* (n 114) [154]

Bulgaria¹⁹⁶ and Macedonia,¹⁹⁷ which have arguably resulted in traffickers now more carefully weighing up the risks associated with engaging in human trafficking.¹⁹⁸ Additionally, in Albania, there have also reportedly been positive results in the confiscation of traffickers' assets, which is primarily due to the fact that the relevant law in that country places the burden of proof on traffickers to prove that the assets in question are not the proceeds of trafficking-related offenses.¹⁹⁹ On the other hand, however, despite the existence of legislative instruments intended to secure seizure and confiscation of traffickers' assets in other European countries, these have largely produced disappointing results. In Bosnia and Herzegovina,²⁰⁰ Romania²⁰¹ and the UK,²⁰² for example, these poor results have been attributed to a lack of effective enforcement mechanisms, while in Portugal,²⁰³ the difficulty of linking traffickers' assets to the offense of trafficking has reportedly hindered effective enforcement of the forfeiture obligation. In other countries, such as the Netherlands²⁰⁴ and Ireland,²⁰⁵ a number of practical difficulties have reportedly been encountered in tracing money flows abroad or, alternatively, in third countries' recognition of international civil forfeiture orders issued in Europe. This situation is further compounded by competent national authorities' lack of adequate investigative capacity into the financial aspects of human trafficking in Spain,²⁰⁶ for example.

In view of the foregoing, the European Commission has recently decried the lack of 'systematic enforcement' of the forfeiture obligation across the majority of European countries.²⁰⁷ More specifically, it is concerned that without forfeiture of traffickers' assets, traffickers might be inclined to continue to engage in trafficking-related offenses, since the proceeds of the crime would in all likelihood outweigh the risks associated therewith. Notwithstanding this, however,

¹⁹⁵ GRETA, *Report on Norway* (n 157) [235]

¹⁹⁶ GRETA, *Report on Bulgaria* (n 104) [204]

¹⁹⁷ GRETA, *Report on Macedonia* (n 75) [191]

¹⁹⁸ See generally Nir Artzi, *Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings* (OSCE, 2014)

¹⁹⁹ Article 23 (3) Law on the Prevention of and Fight against Organised Crime and Trafficking through Preventive Measures against Assets; GRETA, *Report on Albania* (GRETA(2011)22, 2011) [171]

²⁰⁰ GRETA, *Report on Bosnia and Herzegovina* (n 72) [154]

²⁰¹ GRETA, *Report on Romania* (n 143) [194]

²⁰² GRETA, *Report on the United Kingdom* (n 168) [322] (reference made to Scotland).

²⁰³ GRETA, *Report on Portugal* (n 162) [174]

²⁰⁴ GRETA, *Report on the Netherlands* (GRETA(2014)10, 2014)[228]

²⁰⁵ GRETA, *Report on Ireland* (GRETA(2013)15, 2013) [241]

²⁰⁶ GRETA, *Report on Spain* (GRETA(2013)16, 2013) [224]

²⁰⁷ EU Commission, 'Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings' COM (2014) 635 final

the continued efforts of various EU Agencies, including EUROPOL,²⁰⁸ in respect forfeiture must be commended. These efforts are only likely to be enhanced when the newly adopted Confiscation Directive is fully transposed in 2016.²⁰⁹

3.6. Compensation

Trafficked victims face some of the most degrading forms of physical and emotional harms that can be envisaged.²¹⁰ These harms are often further compounded by victims' existing vulnerabilities, which might include large scale disenfranchisement at both the social and economic levels, as well as the multitude of costs typically associated with the post-exploitation recovery process. In view of these challenges, European anti-trafficking law places an obligation on European countries to put in place the necessary framework to ensure that these vulnerable persons are afforded compensation.²¹¹ More specifically, compensation is envisaged to be paid either by those convicted of trafficking-related offenses or, alternatively, through the respective state's compensation funds/schemes.²¹² Any compensation that is awarded must be 'fair and appropriate',²¹³ and, in light of *Rantsev*, must be capable of covering both pecuniary as well as non-pecuniary losses.²¹⁴ Additionally, trafficked victims must be given requisite information so as to enable them to be aware of, and make informed choices about, possible options for compensation.²¹⁵

A critical review of existing state practice across Europe reveals the existence of some positive developments with regard to the implementation of the obligation to provide compensation to

²⁰⁸ John Winterdyk, Benjamin Perrin and Philip Reichel, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 138

²⁰⁹ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

²¹⁰ Courtney Farrell, *Human Trafficking* (ABDO 2011) 77

²¹¹ Article 17 EU Anti-Trafficking Directive; Article 1 – 9 Compensation Directive; Article 16 Standing of Victims Directive; Article 15 CoE Anti-Trafficking Convention

²¹² Article 15(4) CoE Anti-Trafficking Convention

²¹³ Article 12(2) Compensation Directive

²¹⁴ On the facts of *Rantsev*, the Court held that as Cyprus had not been responsible for Rantseva's death, it was not appropriate to make any award in respect of pecuniary damage arising from her death. However, on the question of non-pecuniary damage, the Court, having found that the Cypriot authorities had failed to take steps to protect Rantseva from trafficking and to investigate whether she had been trafficked, held that the applicant had suffered anguish and distress as a result of the unexplained circumstances of his daughter's death, which merited the award of EUR 40,000 in damages. With regard to Russia, as it was found to be in breach of its procedural violation under Article 4, the applicant was awarded EUR 2,000 in non-pecuniary damages.

²¹⁵ GRETA, *Second General Report* (n 180) [61]

victims of trafficking.²¹⁶ The first relates to the fact that several European countries, including Croatia,²¹⁷ France,²¹⁸ Iceland,²¹⁹ Ireland,²²⁰ Luxembourg,²²¹ Norway,²²² Poland,²²³ Slovenia²²⁴ and the Netherlands²²⁵ have put in place compensation schemes, pursuant to their respective Compensation Acts, allowing for victims of trafficking to be compensated for any injury suffered, notwithstanding the fact that the perpetrator is unknown or has no assets. Although the number of trafficked victims who have, in practice, benefited from such schemes is reportedly low,²²⁶ the mere existence of such schemes is nonetheless an important development, given that only in very cases are traffickers convicted,²²⁷ and, by parity of reasoning, very few cases in which trafficked victims are compensated through the ordinary criminal or civil process. The second, and perhaps more revolutionary development, is the fact that some European countries, such as Georgia²²⁸ and Azerbaijan,²²⁹ have established specific Compensation Funds for the purpose of compensating victims of trafficking for injury suffered in those circumstances where the trafficker has not been convicted. More specifically, payment from these Funds is intended to enure without prejudice to the victim's right to claim compensation in a subsequent criminal case where the trafficker might be convicted for the exploitation in question.

One of the most significant developments in the field of compensation in recent years, albeit in the limited context of England and Wales, is the willingness of courts to find traffickers liable under the civil law for trafficking-related offenses. In the landmark case of *AT & Others v Dulghieru & Anor*,²³⁰ the Court awarded a total of £601,000 to four female nationals of Moldova who were recruited through false promises, and then subsequently trafficked into sexual exploitation in the UK. The two defendants, who were a married couple, were first

²¹⁶ See generally, Petra Timmermans (ed), *Findings and Results of the European Action for Compensation for Trafficked Persons* (COMP.ACT, 2012)

²¹⁷ The Act on Pecuniary Compensation of Damage to Crime Victims; GRETA, *Report on Croatia* (GRETA(2011)20, 2011) [108]

²¹⁸ Article 706-3 Code of Criminal Procedure; GRETA, *Report on France* (n) [184]

²¹⁹ GRETA, *Report on Iceland* (n 126) [153]

²²⁰ GRETA, *Report on Ireland* (n 205) [211]

²²¹ GRETA, *Report on Luxembourg* (n 114) [129]

²²² Victims of Violent Crimes Act (No. 13/2001); GRETA, *Report on Norway* (n 157) [209]

²²³ Act on State Compensation for Victims of Certain Crimes; GRETA, *Report on Poland* (n 123) [181]

²²⁴ Crime Victims Compensation Act; GRETA, *Report on Slovenia* (n 111) [140]

²²⁵ GRETA, *Report on the Netherlands* (n 204) [197]

²²⁶ Anti-Trafficking Monitoring Group, 'Compensation for trafficked persons' (Anti-Slavery International, 2012) 2

²²⁷ UNODC, *Globalization of Crime, The: A Transnational Organized Crime Threat Assessment* (United Nations Publications 2014) 52

²²⁸ GRETA, *Report on Georgia* (n 184) [182]

²²⁹ GRETA, *Report on Azerbaijan* (GRETA(2014)9, 2014) [155]

²³⁰ [2009] EWHC 225

convicted in the context of criminal proceedings, and sentenced to 9 and 5 years' imprisonment, respectively. Subsequently, however, in view of the fact that the victims had not received compensation in those proceedings, an action for damages was brought in the torts of assault, battery, false imprisonment and harassment. Mr. Justice Treacy, in reviewing the facts of the case, felt compelled to award substantial damages to the claimants for the pain, suffering and loss of amenity they sustained,²³¹ notwithstanding the fact that they had already been awarded a sum of money by the Criminal Injuries Compensation Authority. Additionally, his Lordship awarded substantial sums in aggravated damages to cover injury to the victims' feelings, humiliation, loss of pride and dignity.²³² More importantly, for the purposes of this discussion, it is also noteworthy that his Lordship went even further by awarding exemplary damages which were intended to compensate for the defendants' cynical disregard for the victims' rights, evidenced by the calculated manner in which they sought to engage in a cost-benefit analysis of the risks.²³³ Of note, however, is the fact that the Court did not award exemplary damages so as to punish the defendants, but rather to prevent unjust enrichment in light of the fact that the criminal proceedings did not result in any order of compensation to being afforded the victims.

Although the *Dulghieru & Anor* case is an undoubtedly positive development, it can nevertheless be argued that, based on existing state practice across Europe, compensation remains, in general, a mere theoretical right for victims of trafficking. In the first instance, it is important to note that, in a number of countries, including Andorra,²³⁴ Armenia,²³⁵ Bosnia and Herzegovina,²³⁶ San Marino²³⁷ and Serbia,²³⁸ if a trafficker is not convicted within the context of criminal or civil proceedings, victims would arguably have no realistic chance of being awarded compensation since those countries do not at present have in place State Compensation Funds/Schemes. In other countries, such as Poland,²³⁹ Slovenia²⁴⁰ and Romania,²⁴¹ although

²³¹ Ibid [51] Awards under the head of 'pain, suffering and loss of amenity' were made to AT £125,000.00, NT £117,000.00, ML £82,000.00 and AK £97,000.00.

²³² Ibid [66]. Awards under the head of 'aggravated damages' were made to AT and ML (£35,000.00) as well as NT and AK (£30,000.00).

²³³ Ibid [75]. A sum of £60,000.00 was awarded by way of exemplary damages, divided equally between the four victims.

²³⁴ GRETA, *Report on Andorra* (n 11) [85]

²³⁵ GRETA, *Report on Armenia* (n 141) [138]

²³⁶ GRETA, *Report on Bosnia and Herzegovina* (n 72) [127]

²³⁷ GRETA, *Report on San Marino* (n 12) [98]

²³⁸ GRETA, *Report on Serbia* (GRETA(2013)19, 2013) [194]

²³⁹ GRETA, *Report on Poland* (n 123) [186]

²⁴⁰ GRETA, *Report on Slovenia* (n 111) [140]

mechanisms for securing compensation are reportedly in place, it has been felt that such mechanisms do not generally benefit third-country nationals, for example, presumably due to the operation of hegemonic assumptions which prejudice and stereotype²⁴² the ‘other’; that is, third-country nationals are arguably viewed as being less worthy of protection, at least in so far as the provision of compensation is concerned, than victims of internal trafficking. Additionally, complex and often lengthy legal proceedings in some countries, such as Serbia²⁴³ and Latvia,²⁴⁴ which ultimately do not result in compensation being awarded to victims, also serve also deter victims from seeking compensation against their traffickers. Furthermore, despite the European legislative stipulation that States must keep to a minimum the administrative formalities required for the purposes of applying for compensation, a number of procedural difficulties continue to arise in some countries, including Austria,²⁴⁵ Bulgaria²⁴⁶ and Croatia,²⁴⁷ where the requirement that the offense must have been committed in the territory of the state; the unavailability of medical bills; and the inability of victims to prove physical injury, respectively, often result in a denial of claims for compensation. The major challenge, particularly in the latter context, appears to be rooted in the hegemonic assumption that victims of labour exploitation who might not have suffered discernible physical injury are less worthy of protection than victims of sexual exploitation.

More generally, victims’ continued lack of awareness as to the possibilities available for compensation, which is typically linked to the failure of competent national authorities to provide requisite information about compensation options to these victims, has resulted in very few victims ascertaining compensation in a number of countries, including Denmark,²⁴⁸ France,²⁴⁹ Italy,²⁵⁰ Luxembourg,²⁵¹ Montenegro,²⁵² Portugal,²⁵³ Sweden²⁵⁴ and the UK,²⁵⁵ amongst

²⁴¹ GRETA, *Report on Romania* (n 143) [163]

²⁴² *Ibid*

²⁴³ GRETA, *Report on Serbia* (n 238) [193]

²⁴⁴ GRETA, *Report on Latvia* (n 163) [158]

²⁴⁵ GRETA, *Report on Austria* (n 154) [120]

²⁴⁶ GRETA, *Report on Bulgaria* (n 104) [188]

²⁴⁷ GRETA, *Report on Croatia* (GRETA(2011)20, 2011) [108]

²⁴⁸ GRETA, *Report on Denmark* (n 160) [170]

²⁴⁹ GRETA, *Report on France* (n 174) [186]

²⁵⁰ GRETA, *Report on Italy* (n 74) [169]

²⁵¹ GRETA, *Report on Luxembourg* (n 114) [131]

²⁵² GRETA, *Report on Montenegro* (n 127) [164]

²⁵³ GRETA, *Report on Portugal* (n 162) [152]

²⁵⁴ Committee Against Torture, ‘Concluding observations on the sixth and seventh periodic reports of Sweden’, Adopted by the Committee at its fifty-third session (3–28 November 2014), CAT/C/SWE/CO/6-7, 12 December 2014 [17(b)]

²⁵⁵ GRETA, *Report on the United Kingdom* (n 168) [292]

others. The lack of access to legal aid in Cyprus²⁵⁶ and Italy,²⁵⁷ its reportedly poor quality in Montenegro,²⁵⁸ as well as strict reporting requirements, such as the need for victims to have reported the crime within 72 hours after its commission in Denmark,²⁵⁹ are also key factors that account for the presently low number of victims that benefit from compensation in these countries. On a related issue, it also appears that even in those cases where compensation has been awarded in trafficking-related cases, either such orders are not effectively enforced against traffickers, as has been reported in Macedonia²⁶⁰ or, alternatively, that the compensation awarded is so low that it begs the question as to whether the essence of the ‘fair and appropriate compensation’ obligation is actually being complied with by Spain,²⁶¹ for instance.

In view of the foregoing, it can be argued that, in many respects, the right to compensation in the majority of European countries remains a mere theoretical right, the implementation of which is largely unsupported by existing state practice.

3.7. Investigation

Without effective investigations into trafficking-related offenses, traffickers will operate with such impunity that the trite principle of the rule of law might itself be effectively circumvented. Against this backdrop, European ant-trafficking law places an obligation on European countries to conduct proactive investigations into trafficking-related incidents in an effort to uncover the involvement of traffickers, whilst freeing victims from their exploitative conditions.²⁶² To achieve this objective, European countries are urged to utilize various mechanisms, including telephone surveillance, secret searches, controlled delivery, controlled purchase, sting operations, wiretapping, and surveillance of correspondence, amongst others.²⁶³ Of note, however, is the fact that in the process of utilizing these mechanisms, competent national authorities must have regard to the rights of trafficked victims.²⁶⁴

²⁵⁶ GRETA, *Report on Cyprus* (n 171) [160]

²⁵⁷ GRETA, *Report on Italy* (n 74) [169]

²⁵⁸ Human Rights Committee, ‘Concluding observations on the initial report of Montenegro’, Adopted by the Committee at its 112th session (7–31 October 2014), CCPR/C/MNE/CO/1, 21 November 2014 [16]

²⁵⁹ GRETA, *Report on Denmark* (n 160) [170]

²⁶⁰ GRETA, *Report on Macedonia* (n 75) [171]

²⁶¹ GRETA, *Report on Spain* (n 206) [224]

²⁶² Article 9(1) – (2) EU Anti-Trafficking Directive; Article 27 CoE Anti-Trafficking Convention

²⁶³ Recital 15 EU Anti-Trafficking Directive

²⁶⁴ Article 33 (2)(a) – (d) Standing of Victims Directive

The importance of the obligation to investigate trafficking-related offenses was recently considered in the *Rantsev* case. In that case, the ECtHR implicitly ruled that there were at least three facets to the investigation obligation. The first is general in nature, and requires that states take operational measures to investigate human trafficking where the authorities are:

[...] aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention.²⁶⁵

While this obligation is not absolute, and cannot therefore be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities,²⁶⁶ an investigation must nonetheless be *effective*. The concept of effectiveness was construed by the ECtHR in *Rantsev* to mean that not only must the authorities who investigate trafficking-related offenses be independent from those implicated in those offenses, but also that the investigation must be capable of leading to the identification and punishment of perpetrators. The latter is, however, an obligation of *means* and not result.²⁶⁷ That said, competent national authorities must also ensure that investigations into trafficking-related offenses are both prompt and reasonable; in that is, the decision to remove the victim from the exploitative situation must be taken as a matter of urgency.²⁶⁸

While the foregoing is quite revolutionary within the context of Article 4 ECHR, at least one author, Stoyanova, remains sceptical about the Court's apparent modification of the traditional positive obligation to investigate criminal activities,²⁶⁹ as posited by the Court itself in the earlier case of *Osman v UK*.²⁷⁰ In *Osman*, although the ECtHR had held that the UK was not in breach of its positive obligation to investigate the circumstances surrounding the wounding of a 15-year old school boy and the death of his father by an obsessive former teacher, in principle, public authorities would nevertheless be held to have failed to prevent the treatment complained of where:

²⁶⁵ *Rantsev* (n 58) [286]

²⁶⁶ *Ibid* [219]

²⁶⁷ *Ibid* [288]

²⁶⁸ *Ibid*

²⁶⁹ Vladislava Stoyanova, 'Dancing on the borders of article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' (2012) 30(2) *Netherlands Quarterly of Human Rights* 182

²⁷⁰ *Osman v. United Kingdom* (23452/94) [1998] ECHR 101

[... they] knew, or ought to have known, of a real and immediate risk to the life of an identified individual and that they had failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.²⁷¹

Having reviewed *Osman*, Stoyanova contends that, in using the formulation ‘*circumstances giving rise to a credible suspicion*’ in *Rantsev*, the Court may have, albeit slightly, modified the *Osman* test. Given that the *Rantsev* formulation, albeit in respect of Article 4 ECHR, was repeated in the subsequent case of *M and Others and Bulgaria and Italy*, the controversial question arises as to whether it can be said that the *Osman* test was in fact modified in *Rantsev*.

At least one domestic court has attempted to provide some clarification as to how this difficult question is to be addressed. In the England and Wales case of *OOO and Others v. Commissioner of Police*,²⁷² three Nigerian women, who had been trafficked to the UK for the purpose of domestic servitude in London, brought a claim alleging that the Metropolis police had breached Articles 3 and 4 of the ECHR by virtue of having failed to investigate the treatment meted out to them. Faced, for the first time, with the question of whether the police should be held liable for this alleged failure to investigate, Justice Williams in the High Court began his analysis by first explaining that, although the common law imposes no duty on police officers in England and Wales to investigate crime in general, such a duty nevertheless arises by virtue of the operation of the ECHR where it is alleged that Articles 2, 3 and 4 of said instrument were breached.²⁷³ He then proceeded to consider how the ECtHR has construed the investigative duty, and concluded that, on the basis of *Rantsev*, once a credible allegation of an infringement of Article 4 has come to the attention of the police, they are under a duty to act on their own motion.²⁷⁴ In other words, the existence of a duty to investigate does not depend upon an actual complaint from a victim or next-of-kin. The second significant point made by Justice Williams was that the duty to investigate carries with it a requirement to investigate promptly and/or with reasonable expedition.²⁷⁵ And, thirdly, once the duty to investigate has been triggered, the investigation must be effective; that is, it must be capable of leading to the identification and punishment of the individual(s) responsible.²⁷⁶ Against this backdrop, the Court ultimately found that the police officers in question were in breach of their investigative duty by virtue of having failed to commence an effective investigation when the victims’ names,

²⁷¹ Ibid 116

²⁷² [2011] EWHC 1246 (QB)

²⁷³ Ibid [158]

²⁷⁴ Ibid [152]

²⁷⁵ Ibid

²⁷⁶ Ibid

as well as their desire to have their complaints investigated, were made known.²⁷⁷ More profoundly, for the purposes of this thesis, Justice Williams considered that while some strands of the reasoning in *Osman* were relevant to the case at hand, such as the fact that a police officer's decision about the manner, scope or timing of an investigation may be informed by available resources and priorities as between different investigations, the '*Osman* test [was] not applicable, directly, in the present case.'²⁷⁸ In short, his Lordship was of the view that:

[...] ultimately, *Osman* is concerned to lay down the test for determining whether a public authority has failed in its duty to prevent a person from suffering treatment which amounts to an infringement of Articles 2, 3 and 4 ECHR. The specific test formulated in the second paragraph of paragraph 116 of *Osman* cannot be used to determine the scope of the duty to investigate alleged infringements of those Articles when the infringements alleged have taken place i.e. when they are historical.²⁷⁹

Based on this view, it would seem that, for the purposes of determining the *scope* of the duty to investigate the offense of trafficking in persons within the context of Article 4 ECHR, reliance must be placed on the sentiments expressed in *Rantsev*, and not on those expressed in *Osman*. In other words, the *duty* to investigate would appear to *arise* when police officers are aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked. The subsequent, and altogether different, question of whether police officers have *failed* in the fulfilment of the duty to prevent that identified person from suffering exploitation appears, however, to be determined on the basis of the *Osman* test. Bearing these considerations in mind, on the facts of the instant case, it was held that the police officers in question did in fact breach their investigative duty, which warranted the award of damages in the amount of £5000 to each claimant.²⁸⁰

That said, another important question that arose in *Rantsev*, and which is also relevant for the purposes of this thesis, is whether it can be said that investigating authorities in European countries are under an obligation to investigate situations of *potential* trafficking. This question was emphatically answered in the affirmative in *Rantsev*, when the ECtHR concluded that the Russian authorities were in breach of their obligation to investigate *potential* trafficking because

²⁷⁷ Ibid [178]

²⁷⁸ Ibid [147]

²⁷⁹ Ibid [157]

²⁸⁰ Ibid [190]

they had failed to undertake an investigation into how and where Rantseva was recruited.²⁸¹ This line of reasoning was also countenanced in the subsequent case of *M. and Others v. Italy and Bulgaria*.²⁸² In that case, one of four applicants, a teenage girl of Roma origin residing in Bulgaria, petitioned the ECtHR alleging, among other things, a breach of article 4 ECHR in relation to beatings, death threats, constant surveillance, forced stealing and repeated rapes committed against her while in Italy. The circumstances of the case were such that the applicants travelled to Italy in search of jobs as domestic workers, but having been unable to find work, were required to leave Italy, albeit without the young girl who stayed behind after allegedly getting married to a man according to Roma customs. Upon their return to Bulgaria, the parents of the teenage girl filed a report with the relevant authorities alleging that their daughter had been kidnapped and forced into prostitution in Italy. Within two weeks of their complaint being lodged, Italian police raided the house of the alleged perpetrator, making a number of arrests. However, in view of the alleged failure of Italian authorities to proactively institute criminal proceedings against the perpetrator, the teenage applicant argued before the ECtHR that, among other things, Italy had failed in its positive obligation to take the necessary measures to ensure that she received an adequate level of protection. For the purposes of this thesis, it is important to note that while, on the facts, the ECtHR ultimately concluded that the teenage girl had not been trafficked, it nevertheless found that Italy had breached its positive obligation to investigate the *potential* trafficking of the first applicant, in light of the serious nature of the allegations made by her.²⁸³ The fact that no medical examination was conducted to determine if she was, indeed, raped and beaten, as well as the untenable excuse provided by the Italian authorities that they considered that the applicant's situation well within the context of a Roma marriage, appear to bear heavily on the ECtHR's conclusion that Italy was liable for having breached its positive obligation to investigate *potential* trafficking.²⁸⁴

The final facet of the positive obligation to investigate trafficking-related offenses, according to *Rantsev*, arises in those circumstances where the offenses in question have cross-border elements. In those situations, an investigative obligation is placed on the authorities of one state to cooperate effectively with the authorities in other states in the investigation of events

²⁸¹ *Rantsev* (n 58) [308] – [309]

²⁸² Application no. 40020/03, 31 July 2012

²⁸³ *Ibid* [157]

²⁸⁴ *Ibid* [106]

occurring *outside their territory*.²⁸⁵ This is, indeed, a positive development, as it recognises the fact that trafficking is, in a number of respects, a transnational issue, the eradication of which requires that all states actively cooperate in the investigation of its various elements.

Notwithstanding the increasingly wide scope of the obligation to investigate trafficking-related offenses, as well as the attendant efforts of FRONTEX, EUROPOL, EUROJUST, CEPOL and INTERPOL as will be described in chapter 4, existing state practice in a number of countries suggests that there is, in many respects, a ‘disconnect’ between European anti-trafficking law on the question of investigation and that which obtains in practice. At the elementary level, there have been reports of investigating officers conflating trafficking for sexual exploitation and the distinct offense of prostitution, or, alternatively, trafficking for forced labour and non-exploitative labour offenses in countries such as Moldova,²⁸⁶ Albania,²⁸⁷ Cyprus²⁸⁸ and Slovenia.²⁸⁹ On a related issue, it is also felt that in Denmark, for example, there is a perennial failure on the part of labour inspectors to check the social conditions of alleged victims which might be indicators that human trafficking might be occurring, whilst in Italy,²⁹⁰ Poland²⁹¹ and Portugal,²⁹² a basic lack of requisite resources, the inability to enter private households, as well as the lack of training on the part of labour inspectors, respectively contribute to inefficacious investigations into trafficking-related offenses. More generally, the lack of proactive efforts on the part of some lead investigators, particularly regarding non-sexual forms of exploitation, appears to impede the overall effectiveness of trafficking investigations in Latvia,²⁹³ Slovakia²⁹⁴ and Ireland,²⁹⁵ for example. Of equal concern are the numerous reports which suggest that, in countries such as Montenegro,²⁹⁶ the hegemonic assumption that views forced marriages as merely part of the Roma tradition seriously impairs the investigation of trafficking-related offenses involving victims of Roma decent.

²⁸⁵ Rantsev (n 58) [289]

²⁸⁶ GRETA, *Report on Moldova* (n 173) [154]

²⁸⁷ GRETA, *Report on Albania* (n 199) [164]

²⁸⁸ GRETA, *Report on Cyprus* (n 171) [100]

²⁸⁹ GRETA, *Report on Slovenia* (n 111) [53]

²⁹⁰ GRETA, *Report on Italy* (n 74) [62]

²⁹¹ GRETA, *Report on Poland* (n 123) [144]

²⁹² GRETA, *Report on Portugal* (n 162) [119]

²⁹³ GRETA, *Report on Latvia* (n 163) [123]

²⁹⁴ GRETA, *Report on Slovakia* (n 158) [71]

²⁹⁵ GRETA, *Report on Ireland* (n 205) [87]

²⁹⁶ GRETA, *Report on Montenegro* (n 127) [134]

Several practical challenges, including legislative gaps which do not allow for the full use of investigative techniques, as well as recurring difficulties in securing the cooperation of authorities in third countries in the investigation of trafficking-related offenses, also impede investigations in Poland,²⁹⁷ Norway²⁹⁸ and Ukraine,²⁹⁹ amongst others. Moreover, despite the European obligation to ensure that competent national authorities are trained in the investigation of trafficking-related offenses,³⁰⁰ there have been reports in countries such as Spain³⁰¹ and Lithuania³⁰² of a general lack of expertise on the part these authorities or, alternatively, sheer lethargy. In Lithuania, for example, there was at least one instance in which a child reported himself to the police as having been trafficked, but was told to go back to his traffickers and wait for the police to raid the facility. Later, however, when the raid was completed, the child in question was arrested and prosecuted for using illegal drugs with his traffickers whilst he waited for the police to conduct their raid.³⁰³ In short, it is arguable that the hegemonic assumption which views victims who are trafficked for non-sexual purposes as unworthy of protection was in operation in this case. This case, in particular, is very unfortunate, particularly when viewed in light of the multi-faceted nature of the obligation to proactively investigate trafficking-related incidents, as discussed above.

In view of the above, it is submitted that, while European anti-trafficking law establishes a framework through which the obligation to investigate trafficking-related incidents is afforded primacy, the existing state practice on the part of a number of European countries suggests that, there is, in many respects, still a ‘disconnect’ between what European law considers as obligatory and that which often obtains in practice.

CONCLUSION

Although the absence of concrete data on the existence of human trafficking in countries like Andorra and San Marino suggests that definitive statements cannot be made about the effectiveness of anti-trafficking law in those countries, the findings discussed in the foregoing sections of this chapter are nonetheless quite revealing on a number of fronts. On the one hand,

²⁹⁷ GRETA, *Report on Poland* (n 123) [143]

²⁹⁸ GRETA, *Report on Norway* (n 157) [92]

²⁹⁹ Committee against Torture, ‘Concluding observations on the sixth periodic report of Ukraine’, Adopted by the Committee at its fifty-third session (3–28 November 2014) CAT/C/UKR/CO/6, 12 December 2014 [15]

³⁰⁰ Article 9 EU Anti-Trafficking Directive

³⁰¹ GRETA, *Report on Spain* (n 206) [135]

³⁰² US Department of State, *Trafficking in Persons Report - Lithuania* (2014) 250

³⁰³ *Ibid*

they suggest that both the EU and CoE have in place a comprehensive 'European anti-trafficking framework' which augurs well for the protection of trafficked victims, the prevention of the phenomenon, as well as the prosecution of perpetrators. This framework does not exist in isolation, however. As Galligan intimates, this framework influences, and is influenced by, the social, political and economic contexts within which it operates. On the other hand, however, the findings also suggest that, in keeping with Galligan's notion of 'creative compliance', states at times adopt a minimalist approach to the execution of their normative obligations, especially in light of competing interests. More specifically, when European anti-trafficking law and practice is assessed from a Socio-legal perspective, it becomes apparent that there is a 'disconnect' between 'law on the books' and 'law in action' in a number of European countries, which is cause for concern. Going forward, however, it must be borne in mind that,

We do not need more law; we need full and effective implementation of the existing law.³⁰⁴

This theme is further explored in the next chapter, which addresses the *institutional* aspects of European anti-trafficking law and practice.

³⁰⁴ Ryszard Piotrowicz, *Co-operation between Member States in Fighting Human Trafficking* (Home Office, European Commission, EMN National Network and British Library, 2013) [7]

CHAPTER 4

INSTITUTIONAL ASPECTS OF EUROPEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

The previous chapter critically assessed the *normative* aspects of European anti-trafficking law and practice, and, concluded that, in many respects, there is a normative ‘disconnect’ between what obtains as a matter of law and that which typically obtains in practice in a number of European countries. This chapter, which addresses the second paradigm of the ‘INI’ typology, will critically assess the *institutional* aspects of European anti-trafficking law and practice. It will begin by critically evaluating the extent to which human trafficking has been prioritised on the regional and national agendas in Europe. This will be followed by an examination of the efficacy of awareness-raising initiatives embarked upon to date to raise the profile of human trafficking in Europe. The chapter will then assess the effectiveness of victim identification and referral procedures in Europe, followed by an evaluation of the nature and efficacy of court proceedings involving trafficked victims. Further, there will be an evaluation of the effectiveness of stakeholder collaboration in Europe, in addition to an examination of the efficacy of the numerous anti-trafficking training programs embarked upon to date. The conclusion reached by this chapter is that while European anti-trafficking law establishes a robust *institutional* framework in so far as the regulation of human trafficking is concerned, existing state practice on the part of a number of European countries suggests that, in many respects, a ‘disconnect’ exists between the specific prescriptions of this framework and that which obtains in practice. It is the contention of this chapter that the existence of this ‘disconnect’ suggests that, in many respects, reform is required.

4.1. Human Trafficking on the Regional / National Agenda

As outlined in chapter 3, human trafficking is not a new phenomenon within the context of Europe.¹ What is relatively new, however, is sustained action against the phenomenon that is both targeted and comprehensive.² Indeed, a diachronic assessment of European anti-trafficking law and practice reveals that, for a long time, human trafficking in Europe was largely addressed in a piecemeal and inconsistent manner, with a near-ubiquitous criminal justice focus on sexual exploitation.³ It was only at the beginning of the twenty-first century that this narrow, and largely inefficacious, approach was supplanted by a more pragmatic approach that viewed trafficking from a multidisciplinary perspective.⁴ In more recent years, a so called ‘victim-centred’ approach has emerged so as to better reflect the lived experiences of trafficked victims.⁵

The successful development of the institutional framework to combat human trafficking in Europe is largely due to the pioneering work of several key actors and institutions.⁶ At the EU level, the European Commission, with assistance from EUGET, has been at the forefront of regional action against human trafficking.⁷ More specifically, the Commission has periodically assessed EU member states’ implementation of their anti-trafficking obligations; provided guidance on areas where improvements might be required; and, in rare cases, has even taken enforcement action against EU member states for their alleged infringement of the obligations imposed by EU anti-trafficking law.⁸ The work of the Commission has been augmented by the

¹ Giovanna Campani, ‘Trafficking for Sexual Exploitation and the Sex Business in the New Context of International Migration: The Case of Italy’ in Joaquin Arango and Martin Baldwin-Edwards (eds), *Immigrants and the Informal Economy in Southern Europe* (Routledge 2014) 238

² Jo Goodey, ‘Sex trafficking in women from Central and East European countries: Promoting a “victim-centred” and “woman-centred” approach to criminal justice intervention’ (2004) 76(1) *Feminist Review* 26, 30

³ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 99

⁴ Sharron FitzGerald, ‘Putting Trafficking on the Map: The Geography of Feminist Complicity’ in Marina della Giusta and Vanessa Munro (eds), *Demanding Sex: Critical Reflections on the Regulation of Prostitution: Critical Reflections on the Regulation of Prostitution* (Ashgate Publishing 2013) 102. Cf. Sarah Krieg, ‘Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights’ 15(6) *European Law Journal* 775, 790 (arguing that ‘using multi-facets of different legal fields to answer the problem of human trafficking is limited by its dominant representation as criminal conduct.’)

⁵ Jeanette Bell and Others, ‘Fortress Europe: Restrictive Immigration Policies as a Trigger of Potential Conflict(s)?’ In Paula Lopes and Stephen Ryan (eds), *Rethinking Peace and Security: New Dimensions, Strategies and Actors* (Universidad de Deusto 2009) 117

⁶ Cornelius Friesendorf, ‘Pathologies of security governance: Efforts against human trafficking in Europe’ (2007) 38(3) *Security Dialogue* 379, 382

⁷ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy* (Ashgate Publishing 2013) 51

⁸ See e.g. Case C-266/08 *Commission v Spain*, Judgment of the Court (Sixth Chamber) of 14 May 2009. The CJEU held that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with the

EU Anti-Trafficking Coordinator, who is responsible for improving coordination and coherence among EU institutions, Member States and international actors in the anti-trafficking field.⁹ Additionally, the EU Network of National Rapporteurs has played an important role in raising the profile of human trafficking across the EU, by monitoring the implementation of EU anti-trafficking law within the respective EU Member States.¹⁰ In more recent years, the work of these institutions has been strongly augmented by the ongoing activities of several European Agencies, including EUROPOL, EUROJUST and FRONTEX.¹¹

At the CoE level, apart from GRETA and the CoP,¹² which have done an exceptional amount of work in terms of monitoring member states' implementation of their anti-trafficking obligations, the Parliamentary Assembly of the CoE (PACE) as well as the Committee of Ministers (CoM) have also worked assiduously in an effort to place pressure on CoE member states to effectively implement, and comply with, European anti-trafficking law.¹³ Collectively, these institutions, as well as the various country-specific National Rapporteurs, have sought to ensure that action against human trafficking in Europe is afforded the level of primacy that it deserves.¹⁴

Notwithstanding the marked shift in policy at the European level with regard to the regulation of human trafficking in recent years, the existing state practice on the part of a number of European countries suggests that more needs to be done to prioritise the prevention of human trafficking, the prosecution of traffickers, as well as the protection of trafficked victims. Several examples of inconsistent state practice are illustrative in this regard. First, there have been reports that in Spain, competent national authorities' implicit focus on the controversial issue of illegal migration has meant that the protection of trafficked victims has been viewed as a mere

Residence Permit Directive, and by failing to communicate to the Commission of the European Communities the provisions of national law intended to contribute to ensuring such compliance, the Kingdom of Spain has failed to fulfil its obligations under that directive. See also Steve Peers, *EU Justice and Home Affairs Law* (Oxford University Press 2011) 557

⁹ – 'Myria Vassiliadou: EU Anti-Trafficking Coordinator' (*Europa*, 2014) <http://ec.europa.eu/anti-trafficking/eu-anti-trafficking-coordinator_en> accessed 23 December 2014

¹⁰ – 'National Rapporteurs and/or Equivalent Mechanisms' (*Europa*, 2014) <http://ec.europa.eu/anti-trafficking/national-rapporteurs_en> accessed 23 December 2014

¹¹ John Winterdyk, Benjamin Perrin and Philip Reichel, *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 43

¹² In all these recommendations, the Committee set a period of two years for the Party concerned to provide information on the measures taken to comply with the recommendation.

¹³ Rosario Pardo, *Handbook for Parliamentarians: The Council of Europe Convention on Action against Trafficking in Human Beings* (Council of Europe 2009) 12 - 14

¹⁴ Ernesto Savona and Sonia Stefanizzi, *Measuring Human Trafficking: Complexities And Pitfalls* (Springer 2007) 42

secondary consideration.¹⁵ The situation in other European countries reflects a similarly inconsistent approach to the prioritisation of human trafficking. In Albania,¹⁶ Cyprus,¹⁷ Latvia¹⁸ and Malta,¹⁹ for example, there is reportedly a near-ubiquitous focus on the trafficking of women for sexual exploitation, which has effectively meant that non-sexual forms of exploitation, such as the trafficking of men and boys for labour exploitation, have for a long time been overlooked in the development of anti-trafficking law and policy, as well as in programs aimed at identifying, supporting and assisting this particular group of victims. This, as discussed in chapter 2, is, however, unsurprising, given the hegemonic assumption that non-sexual forms of exploitation are implicitly lesser crimes. On a related issue, reports also indicate that, although trafficking for the purpose of the removal of organs is on the rise in countries like Bulgaria,²⁰ national action against this serious form of exploitation has not been forthcoming, which has serious implications for victims of the crime who might be unwilling to either self-identify or seek medical assistance. Additionally, the issues of forced begging, child trafficking, internal trafficking, as well as the trafficking of internally displaced persons (IDPs) and refugees, have reportedly not received the level of national priority that is warranted for crimes of such serious nature in France,²¹ Ireland,²² Albania²³ and Georgia,²⁴ respectively. This unfortunate state of affairs is compounded by the fact that, in Andorra, for example, most forms of human trafficking have reportedly not been directly addressed in national policy to date. This is presumably because competent national authorities in that country do not perceive human trafficking to be a serious threat.²⁵

Moreover, economic difficulties, often linked to fiscal austerity measures, have meant that the regulation of human trafficking, and, in particular, the protection of trafficked victims, has not garnered the level of attention envisaged by European anti-trafficking law in some countries.²⁶ For example, fiscal austerity measures in Portugal have reportedly had a deleterious effect on

¹⁵ GRETA, *Report on Spain* (GRETA(2013)16, 2013)[51]

¹⁶ GRETA, *Report on Albania* (GRETA(2011)22, 2011) [58]

¹⁷ GRETA, *Report on Cyprus* (GRETA(2011)8, 2011) [50]

¹⁸ GRETA, *Report on Latvia*(GRETA(2012)15, 2012) [51]

¹⁹ GRETA, *Report on Malta* (GRETA(2012)14, 2014) [59]

²⁰ GRETA, *Report on Bulgaria* (GRETA(2011)19, 2011) [74]

²¹ GRETA, *Report on France* (GRETA(2012)16, 2013)[69]

²² GRETA, *Report on Ireland* (GRETA(2013)15, 2013)[72]

²³ GRETA, *Report on Albania* (n 16) [58]

²⁴ GRETA, *Report on Georgia* (GRETA(2011)24, 2011) [107]

²⁵ GRETA, *Report on Andorra* (GRETA(2014)16, 2014) [35]

²⁶ – ‘Europe’s Austerity Leaves Thousands At-Risk To Trafficking’ (*Not For Sale*, 23 March 2013) <<http://notforsalecampaign.org/stories/2013/03/22/europes-austerity-leaves-thousands-at-risk-to-trafficking/>> accessed 23 December 2014

the protection of those who are most vulnerable to human trafficking, including children of Roma decent,²⁷ while in Armenia,²⁸ Bosnia and Herzegovina,²⁹ Bulgaria,³⁰ Serbia³¹ and Macedonia³² overreliance on, and the delayed provision³³ of, funding by international donors have created uncertainty and dependence,³⁴ and in some cases, even a total failure to implement anti-trafficking policies.³⁵ Reductions in the provision of government funding to key actors and institutions in the anti-trafficking field in Romania,³⁶ Albania,³⁷ Armenia³⁸ and the UK³⁹ have also reportedly resulted in a diminished response to the regulation of human trafficking in these countries. Similarly, the disproportionate delay in the provision of funding to national actors and institutions in Italy,⁴⁰ as well as the systemic failure to address in a timely fashion the structural conditions which render victims of trafficking vulnerable in the first place, in the context of Bulgaria⁴¹ and Croatia,⁴² for example, are also serious impediments to the prioritisation of human trafficking in Europe. On the point of structural conditions, it is noteworthy that limited employment opportunities, sustained poverty, as well as limited access to educational opportunities in several countries, including Poland⁴³ and Slovakia,⁴⁴ have also meant that sustained anti-trafficking efforts have, in many respects, been compromised.

More generally, even in countries where action against human trafficking has arguably been afforded increasing attention in recent years, it is nevertheless felt that there are serious discrepancies between the levels of primacy afforded victim protection, for example, across the

²⁷ GRETA, *Report on Portugal* (GRETA(2012)17, 2012)[95]

²⁸ GRETA, *Report on San Armenia* (GRETA(2012)8, 2012) [122]

²⁹ GRETA, *Report on Bosnia and Herzegovina* (GRETA(2013)7, 2013) [53], [61]

³⁰ GRETA, *Report on Bulgaria* (n 20) [76]

³¹ GRETA, *Report on Serbia* (GRETA(2013)19, 2013)[65]

³² GRETA, *Report on Macedonia* (GRETA (2014)12, 2014) [63]

³³ See e.g. OSCE, 'Report on the Special Representative visit to Italy from 17-18 June and 15-19 July 2013', 14 July 2014 [14]

³⁴ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina', CEDAW/C/BIH/CO/4-5, Adopted by the Committee at its fifty-fifth session (8-26 July 2013) [23]

³⁵ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the second periodic report of Lithuania', E/C.12/LTU/CO/2, Adopted by the Committee at its fifty-second session (28 April-23 May 2014), 24 June 2014 [16]

³⁶ GRETA, *Report on Romania* (GRETA(2012)2, 2012) [139]

³⁷ GRETA, *Report on Albania* (n 16) [62]

³⁸ GRETA, *Report on Armenia* (n 28) [122] - [123]

³⁹ GRETA, *Report on the United Kingdom* (GRETA(2012)6, 2012) [184]

⁴⁰ GRETA, *Report on Italy* (GRETA(2014)18, 2014) [146]

⁴¹ Committee on the Elimination of Discrimination against Women, 'Concluding observations of the Committee on the Elimination of Discrimination against Women, Bulgaria' CEDAW/C/BGR/CO/4-7, 9-27 July 2012 [27]

⁴² GRETA, *Report on Croatia* (GRETA(2011)20, 2011) [75]

⁴³ GRETA, *Report on Poland* (GRETA(2013)6, 2013)124]

⁴⁴ GRETA, *Report on Slovakia* (GRETA(2011)9, 2011) [65]

various geographic districts of certain countries, including Austria,⁴⁵ Spain⁴⁶ and the UK.⁴⁷ Even further, in several other European countries, such as Bulgaria,⁴⁸ Italy,⁴⁹ Macedonia⁵⁰ and Moldova,⁵¹ the absence of gender mainstreaming in current anti-trafficking plans of action, as well as the continued marginalisation and discrimination of victims of Roma descent,⁵² remain serious concerns.⁵³ The absence of a national anti-trafficking strategy in Russia,⁵⁴ for example, also suggests that more needs to be done to enhance the presently low political priority currently ascribed to human trafficking in some European countries.

In light of the foregoing, it is submitted that although various European actors and institutions have sought to raise, and have been successful in raising, the profile of human trafficking in Europe, the existing practice on the part of a number of European countries, as described in this section, suggests that there is, in many respects, still a ‘disconnect’ between the prescriptions contained in European anti-trafficking law and the primacy accorded the regulation of human trafficking in practice. This has serious adverse implications, not only in terms of the coherence, uniformity and effectiveness of European anti-trafficking law, particularly in the fields of prevention, prosecution and protection.

4.2. Awareness-Raising

It is perhaps axiomatic that without an acute awareness of the unique and, indeed, evolving dynamics of human trafficking, it is difficult to properly identify, refer or support victims of

⁴⁵ GRETA, *Report on Austria* (GRETA(2011)10, 2011) [45]

⁴⁶ GRETA, *Report on Spain* (GRETA(2013)16, 2013)[71]

⁴⁷ GRETA, *Report on the United Kingdom* (n 39) [184]

⁴⁸ GRETA, *Report on Bulgaria* (n 20) [73]

⁴⁹ GRETA, *Report on Italy* (n 40) [114]

⁵⁰ GRETA, *Report on Macedonia* (n 32) [68]

⁵¹ GRETA, *Report on Moldova* (GRETA(2011)25, 2011) [95]

⁵² Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined second and third periodic reports of Montenegro’, Adopted by the Committee at its eighty-fourth session (3–21 February 2014), CERD/C/MNE/CO/2-3, 13 March 2014 [14]

⁵³ See e.g. Committee on the Rights of the Child, ‘Concluding observations on the report submitted by Hungary under article 12, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography’, CRC/C/OPSC/HUN/CO/1, 3 November 2014 [17]; Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the combined third to fifth periodic reports of Romania’, E/C.12/ROU/CO/3-5, Adopted by the Committee at its fifty-third session (10 – 28 November 2014), 9 December 2014 [9(d)]

⁵⁴ US Department of State, *Trafficking in Persons Report - Russia* (2014)

trafficking.⁵⁵ More specifically, without a firm appreciation of the nuances associated with the phenomenon, there will be, among other things, conflation between trafficking and other closely related criminal activities such as smuggling, as well as misplaced hegemonic assumptions about who the ‘real’ victims of trafficking are.⁵⁶ In view of this, European anti-trafficking law places an obligation on competent national authorities to take the necessary measures to educate their nationals about the risks associated with human trafficking, the practical steps which can be taken to correctly identify, refer and support victims, as well as that which can be done to discourage the demand for services of these victims.⁵⁷ Cognizant of the significance of this obligation, as well as the challenges associated with its implementation, European anti-trafficking law also envisages that this obligation will be executed in a multidisciplinary manner that embraces the contribution of the average citizen, civil society, the media as well as public authorities and policy makers.⁵⁸ The means through which European anti-trafficking law envisages the operationalisation of awareness-raising programs are manifold, but include, at a minimum, research and education programs, as well as the utilisation of modern forms of technology.⁵⁹

While a number of European countries have sought to comply with the awareness-raising obligation through a number of means,⁶⁰ it is perhaps regrettable that in several countries, there is sporadic implementation of this important obligation. At the outset, it is important to note that, despite suggestions that human trafficking might be occurring, albeit on a limited scale, in Andorra⁶¹ and San Marino,⁶² no specific anti-trafficking awareness program has been reported to have been operationalized in those countries to date. That said, even in those countries where anti-trafficking awareness-raising programs have been executed, it is still felt that these

⁵⁵ Erin O’Brien, ‘Ideal victims in trafficking awareness campaigns’ in Kerry Carrington, Matthew Ball, Erin O’Brien and Juan Tauri (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave Macmillan 2012) 315

⁵⁶ Susanne Schatral, ‘Awareness Raising Campaigns against Human Trafficking in the Russian Federation: Simply Adding Males or Redefining a Gendered Issue?’ (2010) 28(1) *Anthropology of East Europe Review* 239, 240

⁵⁷ Article 18(1) EU Anti-Trafficking Directive; Articles 5(2) and (4) and 6 CoE Anti-Trafficking Convention

⁵⁸ Article 18(2) EU Anti-Trafficking Directive; Article 26(2) Standing of Victims Directive; Article 5(1) CoE Anti-Trafficking Convention

⁵⁹ Article 18(2) EU Anti-Trafficking Directive; Article 26(2) Standing of Victims Directive

⁶⁰ European Commission, *Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings* {COM(2014) 635 final 9, 16, 18, 24, 26, 27 (awareness-raising programs have included Roadshows, webinars, campaigns and specialist courses, amongst others).

⁶¹ GRETA, *Report on Andorra* (n 25) [51]

⁶² GRETA, *Report on San Marino* (GRETA(2014)19, 2014)[65]

have produced limited, if not wholly inconsistent, results. For example, in Lithuania,⁶³ Italy⁶⁴ and Albania,⁶⁵ there are indications that the special measures which have been designed to discourage the demand for the sexual services of trafficked victims have largely been ineffective or not implemented in practice at all, while in Norway⁶⁶ and Iceland,⁶⁷ spasmodically executed awareness-raising programs have arguably not produced sustained results. The absence of adequate funding for the purposes of operationalizing awareness-raising programs in Portugal,⁶⁸ the over-reliance on NGOs to facilitate awareness-raising in France⁶⁹ or, alternatively, the inability of NGOs to sufficiently engage in awareness-raising in Luxembourg⁷⁰ have also impeded the extent to which citizens in those countries are sufficiently educated about the risks associated with human trafficking. Additionally, there are indications that in a number of European countries, including Bulgaria⁷¹ and Poland,⁷² there is still very little awareness about certain aspects of transnational trafficking and labour exploitation, for example, while in Luxembourg,⁷³ even basic awareness about the existence of the national anti-trafficking hotline is lacking. The situation is hardly different in Georgia,⁷⁴ Norway⁷⁵ and the UK,⁷⁶ wherein which there is reportedly a lack of awareness about, *inter alia*, non-sexual forms of exploitation and child trafficking. The lack of awareness among some groups of key stakeholders, such as media personnel in Slovenia⁷⁷ and medical staff in Romania,⁷⁸ has also reportedly contributed to the sensationalization of the problem, and, in some cases, unsatisfactory victim identification. Moreover, prejudicial attitudes against certain groups of trafficked victims in Bulgaria,⁷⁹ Latvia⁸⁰ and Romania,⁸¹ such as persons of Roma decent, remain a cause for concern, notwithstanding

⁶³ Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the fifth periodic report of Lithuania’, CEDAW/C/LTU/CO/5, Adopted by the Committee at its fifty-eighth session (30 June-18 July 2014) [26]

⁶⁴ GRETA, *Report on Italy* (n 40) [101] and [107]

⁶⁵ GRETA, *Report on Albania* (n 16) [88]

⁶⁶ GRETA, *Report on Norway* (GRETA(2013)5, 2013) [102]

⁶⁷ GRETA, *Report on Iceland* (GRETA(2014)17) [93]

⁶⁸ GRETA, *Report on Portugal* (n 27) [85]

⁶⁹ GRETA, *Report on France* (n 21) [104]

⁷⁰ GRETA, *Report on Luxembourg* (GRETA(2013)18, 2013)[73]

⁷¹ GRETA, *Report on Bulgaria* (n 20) [99]

⁷² GRETA, *Report on Poland* (n 43) [65]

⁷³ GRETA, *Report on Luxembourg* (n 70) [76]

⁷⁴ GRETA, *Report on Georgia* (n 24) [61]

⁷⁵ GRETA, *Report on Norway* (n 66) [104]

⁷⁶ GRETA, *Report on the United Kingdom* (n 39) [185]

⁷⁷ GRETA, *Report on Slovenia* (GRETA(2013)20, 2013)[86]

⁷⁸ GRETA, *Report on Romania* (GRETA(2012)2, 2012) [97]

⁷⁹ GRETA, *Report on Bulgaria* (n 20) [119]

⁸⁰ GRETA, *Report on Latvia* (n 18) [182]

⁸¹ GRETA, *Report on Romania* (n 78) [97]

the existence of myriad awareness-raising programs. Limited awareness about human trafficking in certain geographical areas of Georgia⁸² and the UK,⁸³ where the crime largely remains a hidden phenomenon, is also an issue which is ripe for consideration.

More generally, it is also important to note that, despite the best efforts of competent national authorities, a number of practical challenges nevertheless continue adversely affect the implementation of awareness raising programs in some European countries. For instance, the high costs associated with broadcasting anti-trafficking programs on television in Armenia,⁸⁴ as well as the perennial difficulties faced by competent authorities in Denmark in executing awareness programs targeting major source countries, such as Nigeria, have also had an adverse impact on the extent to which there is adequate awareness about the risks associated with human trafficking.⁸⁵ This situation is further compounded by the fact that, although there has been very little empirical evaluation of the impact of awareness-raising measures operationalized to date in a number of European countries, including Cyprus,⁸⁶ Poland,⁸⁷ Portugal,⁸⁸ the UK⁸⁹ and Latvia,⁹⁰ amongst others, the hegemonic assumption is countenanced that said awareness-raising programs have definitively resulted in positive attitudinal changes. This, as chapter 2 suggests, is cause for concern.

4.3. Victim Identification and Referral

The identification and referral of trafficked victims is indispensable to any effective anti-trafficking framework.⁹¹ The consequences associated with failing to correctly identify and refer victims of trafficking are numerous, but include, *inter alia*, an improper diagnosis of the actual nature and scale of human trafficking; the inability on the part of trafficked victims to benefit from the myriad rights provided for in relevant legislation; the inability of these victims to access justice, and, in particular, compensation; the treatment of these persons as criminals,

⁸² GRETA, *Report on Georgia* (n 24) [63]

⁸³ GRETA, *Report on the United Kingdom* (n 39) [140]

⁸⁴ GRETA, *Report on Armenia* (n 28) [94]

⁸⁵ GRETA, *Report on Denmark* (GRETA(2011)21, 2011) [99]

⁸⁶ GRETA, *Report on Cyprus* (n 17) [79]

⁸⁷ GRETA, *Report on Poland* (n43) [120]

⁸⁸ GRETA, *Report on Portugal* (n 27) [85]

⁸⁹ GRETA, *Report on the United Kingdom* (n 39) [160]

⁹⁰ GRETA, *Report on Latvia* (n 18) [93] - [94]

⁹¹ Office of the High Commissioner for Human Rights, 'Preliminary Report Consultation on the right to an effective remedy for trafficked persons' (United Nations, 2013) 6; EU Commission, *Guidelines for the identification of victims of trafficking in human beings, especially for Consular Services and Border Guards* (2013) 3

rather than victims; as well as re-trafficking.⁹² Against this backdrop, European anti-trafficking law places an obligation on European countries to establish appropriate mechanisms to correctly identify and refer victims for assistance and support commensurate with their needs.⁹³ More specifically, such assistance must be provided as soon as there are *reasonable grounds* for believing that such persons might have been trafficked, and should be afforded irrespective of victims' willingness to act as witnesses.⁹⁴ Moreover, the identification and referral of victims of trafficking must be undertaken by trained and qualified professionals, and, must in all circumstances, accord with the principles of a victim-centred approach.⁹⁵

Notwithstanding the importance of the obligation to correctly identify and refer trafficked victims,⁹⁶ a critical examination of existing state practice reveals some positive developments, which are, however, largely counterbalanced by inefficacious approaches to implementation in a number of European countries. On the one hand, several countries have set up National Referral Mechanisms (NRMs) which are generally comprised of 'first responders' and 'competent authorities' whose tasks primarily involve the detection of victims of trafficking, and the provision of appropriate protection and support commensurate with their needs.⁹⁷ These NRMs have brought about a number of improvements in terms of victim identification and referral in Europe.⁹⁸ Commendable practices include the identification of persons in relation to whom there is the *slightest indication* to suggest that they might have been trafficked in the Netherlands,⁹⁹ as well as the presumption of victimhood, unless the contrary is proved, in Norway.¹⁰⁰ Notwithstanding these positive developments, however, state practice across a

⁹² See generally, Elizabeth Hopper, 'Under-Identification of Human Trafficking Victims in the United States' (2004).5(2) *Journal of Social Work Research and Evaluation* 125; Davi Okech, Whitney Morreau and Kathleen Benson, 'Human trafficking: Improving victim identification and service provision' (2012) 55(4) *International Social Work* 488; Samuel Jones, 'Human trafficking victim identification: Should consent matter?' (2011) 45 *Indiana Law Review* 483

⁹³ Article 11(4) EU Anti-Trafficking Directive; Articles 8(2) and 22(1) Standing of Victims Directive; Article 7(1) CoE Anti-Trafficking Convention

⁹⁴ Recital 18 and Article 11(2) EU Anti-Trafficking Directive; Article 10(2) CoE Anti-Trafficking Convention

⁹⁵ Article 22(3) Standing of Victims Directive; Article 10(1) CoE Anti-Trafficking Convention

⁹⁶ OSCE, *Trafficking in Human Beings: Identification of Potential and Presumed Victims* Vol. 10 (SPMU Publication Series 2011) 21

⁹⁷ See e.g. – 'National Referral Mechanism' (*National Crime Agency*, 2014) <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed 24 December 2014

⁹⁸ See generally, OSCE, *National Referral Mechanism: Joining Efforts to Protect the Rights of Trafficked Persons - A Practical Handbook* (OSCE 2004)

⁹⁹ Conny Rijken, Jan van Dijk and Fanny Klerx-van Mierlo, *Trafficking Victims in The Netherlands: An exploratory study* (Tilburg University, 2013) 147; Nicole Jansen, *Breaking the cycle: a safe return as integral part of anti-trafficking approach* (Ministry of Security and Justice, 2014) 5

¹⁰⁰ GRETA, *Report on Norway* (n 66) [126]

number of other European countries suggests that the operationalisation of NRMs, where they exist, has been fraught with a number of operational challenges.¹⁰¹

Despite having been faced with increasing incidents of human trafficking in recent years, some European countries, including Italy,¹⁰² Latvia¹⁰³ and Malta,¹⁰⁴ do not have in place *formal* national guidelines concerning the modalities of victim identification and referral, which essentially means that this difficult and sensitive task is often executed in a haphazard fashion. In other countries, such as Albania,¹⁰⁵ Georgia¹⁰⁶ and Spain,¹⁰⁷ victim identification at the borders, as well as in rural areas also appears to be largely inadequate, an unfortunate state of affairs which has been attributed to the lack of funding and capacity to support the operation of robust NRMs in those vicinities. Added to this is the fact that in a number of countries, including Romania,¹⁰⁸ Hungary,¹⁰⁹ Ukraine¹¹⁰ and Malta,¹¹¹ pre-existing prejudice, stereotypes and a reported lack of sensitivity on the part of competent national authorities arguably impede the proper identification of many victims of trafficking, and, in particular, those victims who, because of hegemonic assumptions, are perceived to be prostitutes, street children or undocumented migrants. This suggests that, at present, a number of victims of trafficking, who might be irrationally perceived in a negative light by competent national authorities because of their status, might not be properly accounted for in the formal victim identification and referral process. Closely related to this unsettling reality is the fact that men who have traditionally been trafficked for labour exploitation, those trafficked internally, and children trafficked into forced begging are, in many instances, not properly identified in a number of countries, including Norway,¹¹² the UK,¹¹³ Albania,¹¹⁴ France¹¹⁵ and Moldova,¹¹⁶ Spain¹¹⁷ and Slovakia.¹¹⁸ The lack of

¹⁰¹ For full list of country reports on the challenges associated with victim identification, see EU Commission, 'Trafficking in Human Beings' (*European Migration Network*, 3 July 2014) <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/trafficking-human-beings/index_en.htm> accessed 12 April 2015

¹⁰² GRETA, *Report on Italy* (n 40) [123]

¹⁰³ GRETA, *Report on Latvia* (n 18) [124]; Human Rights Committee, 'Concluding observations on the third periodic report of Latvia', Adopted by the Committee at its 110th session (10-28 March 2014), CCPR/C/LVA/CO/3, 11 April 2014 [8]

¹⁰⁴ GRETA, *Report on Malta* (GRETA(2012)14, 2014) [103]

¹⁰⁵ GRETA, *Report on Albania* (n 16) [110]

¹⁰⁶ GRETA, *Report on Georgia* (n 24) [120]

¹⁰⁷ GRETA, *Report on Spain* (n 46) [163]

¹⁰⁸ GRETA, *Report on Romania* (n 78) [143]

¹⁰⁹ US Department of State, *Trafficking in Persons Report - Hungary* (2014) [201]

¹¹⁰ US Department of State, *Trafficking in Persons Report - Ukraine* (2014) [391]

¹¹¹ GRETA, *Report on Malta* (n 104) [70]

¹¹² GRETA, *Report on Norway* (n 66) [137]

¹¹³ GRETA, *Report on the United Kingdom* (n 39) [230]; Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and

consensus regarding the appropriate indicators to be used when identifying victims of trafficking, as well as the marked differences in approach in assessing the extent to which victims satisfy these indicators as between different state agencies, are also major factors that reportedly impede the operationalisation of a robust system of victim identification and referral in Serbia¹¹⁹ and Slovenia,¹²⁰ respectively.

On a practical level, it is also noteworthy that in a number of countries, including France,¹²¹ Italy,¹²² Latvia,¹²³ Spain,¹²⁴ Luxembourg,¹²⁵ Montenegro¹²⁶ and Portugal,¹²⁷ victim identification is reportedly carried out from a near-ubiquitously criminal justice perspective. The implications of this approach are manifold, but have primarily been manifested in the withdrawal of victim status if criminal cases fail to ensue; the failure of competent national authorities to provide appropriate support where victims decide not to cooperate in the institution of criminal proceedings; as well as the outright denial of support and assistance to victims whose profiles do not fit existing hegemonic assumptions.¹²⁸ It has also been reported that police officers in Luxembourg,¹²⁹ for example, do not systematically refer victims of trafficking to appropriate facilities designed for their protection, while in Cyprus the capacity of competent national authorities has not been sufficient enough to cover the full range of assistance required by diverse groups trafficked victims.¹³⁰ Added to this is the fact that, in a few countries, such as Italy,¹³¹ Luxembourg¹³² and Slovenia,¹³³ labour inspectors either lack the necessary capacity or

Northern Ireland', CEDAW/C/GBR/CO/7, Adopted by the Committee at its fifty-fifth session (8-26 July 2013) [38]

¹¹⁴ GRETA, *Report on Albania* (n 16) [111]

¹¹⁵ GRETA, *Report on France* (n 21) [128]

¹¹⁶ GRETA, *Report on Moldova* (n 51) [69]

¹¹⁷ GRETA, *Report on Spain* (n 46) [153]

¹¹⁸ GRETA, *Report on Slovakia* (n 44) [80]

¹¹⁹ GRETA, *Report on Serbia* (n 31) [71]

¹²⁰ GRETA, *Report on Slovenia* (n 77) [112]

¹²¹ GRETA, *Report on France* (n 21) [127] - [132]

¹²² GRETA, *Report on Italy* (n 40) [126]

¹²³ GRETA, *Report on Latvia* (n 18) [120]

¹²⁴ GRETA, *Report on Spain* (n 15) [159]

¹²⁵ GRETA, *Report on Luxembourg* (n 70) [85]

¹²⁶ GRETA, *Report on Montenegro* (GRETA(2012)9, 2012) [204]

¹²⁷ GRETA, *Report on Portugal* (n 27) [115]

¹²⁸ Venla Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2011) 154

¹²⁹ GRETA, *Report on Luxembourg* (n 70) [100]

¹³⁰ GRETA, *Report on Cyprus* (n 17) [146]

¹³¹ GRETA, *Report on Italy* (n 40) [129]

¹³² GRETA, *Report on Luxembourg* (n 70) [91]

¹³³ GRETA, *Report on Slovenia* (n 77) [108]

competence to effectively identify victims of trafficking or, indeed, make referrals. The same can be said in relation to NGO representatives, who despite possessing considerable expertise in the field, are often not afforded an adequate degree of involvement in the identification process in several countries, such as Bosnia and Herzegovina,¹³⁴ France,¹³⁵ Ireland,¹³⁶ Luxembourg,¹³⁷ Portugal¹³⁸ and the UK.¹³⁹ Even further, as the European Migration Network has recently suggested in its landmark report, a number of persons within the context of international protection and forced return procedures are not, at present, being correctly identified as victims of trafficking, especially in Germany, Estonia, Lithuania, Poland, Slovenia and Norway, despite indicators to this effect.¹⁴⁰ This situation has been attributed to a lack of established or uniform identification practices; a lack of proactive screening; as well as divergent interpretations of the indicators of human trafficking.¹⁴¹ Whatever the explanations, however, these practices have a number of adverse implications, which may include, *inter alia*, the forced return of victims of trafficking to situations of exploitation, the imposition of re-entry bans on victims which could prejudice their future opportunities for legitimate work; as well as the outright denial of the victim protection measures envisaged by European anti-trafficking law.¹⁴²

More generally, repetitive, and often unnecessary, interviews of victims of trafficking at the identification stage in Bosnia and Herzegovina¹⁴³ and Ukraine,¹⁴⁴ amongst others, have reportedly traumatised victims to such an extent that their proper identification has in some instances been impeded. The situation in Spain is no different, in that interviews with some victims have reportedly been closer to an interrogation, rather than a sensitive victim identification process.¹⁴⁵ The time-frame allotted to competent national authorities to make conclusive decisions regarding whether or not a person is, in fact, a victim of trafficking is also a major issue that impedes the efficacy of victim identification in some countries. For example, the short, and arguably unreasonable, timeframe of 72 hours allotted for victim identification in

¹³⁴ GRETA, *Report on Bosnia and Herzegovina* (n 29) [104]

¹³⁵ GRETA, *Report on France* (n 21) [129]

¹³⁶ GRETA, *Report on Ireland* (n 22) [161]

¹³⁷ GRETA, *Report on Luxembourg* (n 70) [89]

¹³⁸ GRETA, *Report on Portugal* (n 27) [117]

¹³⁹ GRETA, *Report on the United Kingdom* (n 39) [219]

¹⁴⁰ European Migration Network, *Identification of victims of trafficking in human beings in international protection and forced return procedures* (European Union, 2014)

¹⁴¹ *Ibid* 30

¹⁴² *Ibid* 14

¹⁴³ GRETA, *Report on Bosnia and Herzegovina* (n 29) [100]

¹⁴⁴ US Department of State, *Trafficking in Persons Report - Ukraine* (2014) 391

¹⁴⁵ GRETA, *Report on Spain* (n 46) [159]

Denmark¹⁴⁶ or, alternatively, the lengthy period of 6 months before a decision can be made as to whether a person is a victim of trafficking in Ireland,¹⁴⁷ raise serious questions as to whether victims in those countries are being afforded timely referral and protection, as envisaged by European anti-trafficking law. Moreover, the practice of some European countries to the determination of whether a person is a victim of trafficking is arguably at odds with the requirements of European anti-trafficking law. In Cyprus, for example, victims are only recognised as such if they have suffered discernible ‘damage’,¹⁴⁸ which is in contradistinction to European anti-trafficking law, which defines a victim of trafficking as one who has been subject to the relevant ‘action’, ‘means’ and ‘purpose’ (in the case of adults).¹⁴⁹

It can be argued that those countries which adopt a narrow approach to defining who is a ‘victim of trafficking’ risk compromising the proper identification of victims of forced labour, domestic servitude and forced begging, for example, who may not have suffered any discernible physical damage, but who may nevertheless have suffered mental trauma, as well as the loss of several years of remuneration. That said, the absence of a sufficiently pragmatic definition of a ‘victim of trafficking’ in Ireland;¹⁵⁰ the high burden of proof placed on victims to establish that they were trafficked in Spain;¹⁵¹ and, more controversially, the narrow judicial construction of who is a ‘real’ victim of trafficking in the UK,¹⁵² are also serious concerns which must be addressed.

The recently decided case of *R v SSHD*¹⁵³ is illustrative of the latter point. In that case, the claimant, a Chinese woman aged 20, was trafficked to the UK in 2007 by the ‘snakehead’ criminal organisation. Having arrived in the UK, she was sexually exploited for about six months by members of the organisation until a man (‘M’), who later became her boyfriend, paid an introductory fee to secure her release. About a year later, the claimant self-identified to the Poppy Project, indicating that she had been subject to trafficking. A decision letter subsequently issued found that she was not a victim of trafficking. She challenged this decision before the High Court of England and Wales, which ultimately held that she could not benefit

¹⁴⁶ GRETA, *Report on Denmark* (n 85) [121]

¹⁴⁷ GRETA, *Report on Ireland* (n 22) [162]

¹⁴⁸ Article 2 Law 87(I)/2007 of Cyprus

¹⁴⁹ GRETA, *Report on Cyprus* (n 17) [45]

¹⁵⁰ GRETA, *Report on Ireland* (n 22) [61]

¹⁵¹ GRETA, *Report on Spain* (n 15) [161]

¹⁵² See OSCE, ‘Report by the Special Representative on her visit to the UK, 7-10 March 2011’, SEC.GAL/200/11, 18 January 2012 [8]

¹⁵³ [2012] EWHC 1075

from the protection and assistance measures provided for by the CoE Anti-Trafficking Convention. This adverse decision appears to have been based on the fact that,

The Claimant had by December 2009 been free of the Snakeheads for over two years, there was no suggestion that they had objected to her going or tried to pursue her, she had an established and loving relationship with M, they had a child together and a happy family, there was no basis for the Poppy Project to be involved (however that should be interpreted), and she was likely to make a full recovery from her experiences according to all the expert evidence. It was in my judgment an almost inevitable conclusion that she no longer qualified for Convention assistance, whatever other immigration claims she might have.¹⁵⁴

While it is arguable that the decision ultimately reached in this case was the correct one, in that assistance and protection is not absolute or never-ending, but is limited to the need to assist victims in their physical, psychological and social recovery, the implications of the decision are nonetheless problematic. First, in distinguishing between a historic and a present victim of trafficking on the basis of the amount of time that has elapsed between the end of their exploitation and their case being reported to competent national authorities, the Court has inadvertently allowed for the creation of a largely false dichotomy, with the latter being deemed more deserving of protection and assistance than the former. This dichotomy is partly rooted in the questionable assumption that if a victim of trafficking has been free from exploitation for some time, s/he should, without state assistance, be able to sort out her/his own recovery process. Additionally, the dichotomy also implies that freedom from exploitation for some time invariably means that the victim has sufficiently recovered from the physical and psychological effects of their exploitation. However, it must always be borne in mind that the effects of exploitation are often long-term,¹⁵⁵ especially if victims are not afforded the necessary medical and psychological assistance commensurate with their needs in a timely fashion. For this reason, Courts are implored to do their utmost to treat each case on its merit so as to ensure that deserving victims are not unnecessarily treated as ‘historic’ victims, and, therefore, denied the support and assistance envisaged by European anti-trafficking law.¹⁵⁶ In this regard, the recent

¹⁵⁴ Ibid [39]

¹⁵⁵ Cathy Zimmerman and Others, ‘The health of trafficked women: a survey of women entering post-trafficking services in Europe’ (2008) 98(1) *American Journal of Public Health* 55.

¹⁵⁶ GRETA, *Report on the United Kingdom* (n) [84]. (‘GRETA is concerned about the interpretation of “victim” whereby the time elapsed since the ending of a situation of exploitation and a presumed diminished urgency of needs for social assistance or protection are used as key considerations in victim identification [...] In the opinion of GRETA, decisions on the different rights and entitlement according to the Convention must be taken on a case-by-case basis regardless of the time elapsed and the existence of urgent needs for assistance.’)

decision of *Atamewan v SSHD*¹⁵⁷ is particularly welcome, given that the court not only emphasised that there must be an appropriate level of flexibility when determining whether to provide assistance to victims who have been exploited in the past, but also the fact that it found that the UK's Guidance that made reference to 'historic victims' of trafficking was unlawful.

Atamewan concerned a Nigerian girl who had been brought to the UK under the premise of living with and working for her relative, as well as being enrolled in school. Upon arrival in the UK, she was, however, beaten and required to undertake housework for extended periods without pay. Once she had attained the age of 18, she escaped from her exploitative conditions, and then reported the matter to a women's organisation two years later. Having reviewed the claimant's case, competent national authorities, similar to the approach taken in *R v SSHD* as discussed above, arrived at the adverse decision that:

Although it is accepted that Ms Atamewan was brought to the UK and then exploited by her aunt for domestic servitude, it is considered that the exploitation ended in December 2007 when Ms Atamewan absented herself from her aunt's home. She has had minimal contact with her aunt since then, and her aunt has shown no interest in trying to trace Ms Atamewan. Ms Atamewan has moved on with her life since leaving her aunt, she has formed friends and had a relationship during the three years at liberty in the UK and has found casual work when needed to support herself. It is therefore considered that there is sufficient distance in time since the period of exploitation such that Ms Atamewan is no longer considered to be a victim of trafficking in need of protection under the Convention.¹⁵⁸

As a consequence of this decision, the claimant was required to return to Nigeria without having been afforded the necessary support and assistance envisaged by the CoE Anti-Trafficking Convention. In a subsequent claim before the High Court, however, their Lordships ruled that the UK's Guidance on 'historic' victims of trafficking was unlawful.¹⁵⁹ In so ruling, the Court rejected the decision arrived at in *R v SSHD* that a person cannot be a victim of trafficking if he or she does not need some or all of the assistance set out under the Convention.¹⁶⁰ While accepting that a victim of trafficking might not be entitled to assistance 'for life and long after the traumas of being a victim of trafficking had passed',¹⁶¹ the Court nonetheless considered that 'if the needs are great, the level of assistance must be greater.'¹⁶² On

¹⁵⁷ [2013] EWHC 2727

¹⁵⁸ Ibid [15]

¹⁵⁹ Ibid [85]

¹⁶⁰ Ibid [78]

¹⁶¹ Ibid [74]

¹⁶² Ibid [73]

the facts, therefore, notwithstanding the fact that the claimant had been free from exploitation for over two years, the Court refused to view her as a 'historic' victim, and accordingly mandated the SSHD to return her to the UK so as to take part in the investigations.¹⁶³ More profoundly, for the purposes of this discussion, it is important to note that the Court was prepared to be flexible in its approach to the treatment of victims who have been exploited in the past, thus avoiding the false dichotomy discussed above. In short, the Court, in response to a hypothetical question posed by the claimant's counsel, stated *obiter* that even if someone had been trafficked to the UK 30 years ago,

It may be that, after 30 years, not much (if any) further assistance was needed apart from assistance regarding investigation and possible prosecution of the offences to which he had been subject. Each case, would, of course, depend on the particular facts involved.¹⁶⁴

In short, in view of the general picture painted in this section, it can be argued that, although European anti-trafficking law provides a framework through which European countries are obliged to operationalize an effective system of victim identification and referral, the practice on the part of a number of these countries suggests the existence of a 'disconnect' in the fulfilment of this important obligation. This arguably has serious adverse implications, as it risks leaving a number of trafficked victims without the necessary tools to facilitate their speedy recovery, whilst also exposing them to secondary victimisation, primarily through expulsion, criminal or administrative punishment, as well as re-trafficking.

4.4. Court Proceedings

Court proceedings, though an indispensable part of any effective anti-trafficking machinery, have traditionally proven to be a deeply traumatic experience for victims of trafficking, not only because of their inherently adversarial nature, but also because victims are often called upon to repeat the specific and distributing details of their exploitation multiple times.¹⁶⁵ Against this backdrop, European anti-trafficking law establishes a robust criminal justice framework which has the objective of ensuring that victims can effectively institute criminal proceedings against their traffickers in a timely fashion, whilst simultaneously ensuring that these vulnerable persons are not subject to secondary victimisation. More specifically, this framework envisages that

¹⁶³ Ibid [103]

¹⁶⁴ Ibid [80]

¹⁶⁵ UNIFEM, *Trafficking in Women and Children in India* (Orient Blackswan 2005) 233

European countries will grant victims access to *free* legal counselling and representation¹⁶⁶ for the purposes of impugning the unlawful conduct of their traffickers, in addition to enabling them to present their views and concerns before the courts,¹⁶⁷ as well as claim compensation.¹⁶⁸ Importantly, any assistance and support afforded victims in the context of criminal proceedings¹⁶⁹ must be robust enough to ensure that these vulnerable individuals are protected from secondary victimisation.¹⁷⁰ The protective mechanisms to be taken in this regard must include, *inter alia*, the avoidance of unnecessary interviews with victims,¹⁷¹ and, in particular, questioning in respect of specific details about their private life;¹⁷² the avoidance of visual contact between victims and perpetrators to the greatest extent legally possible,¹⁷³ through, for example, the establishment and use of court facilities having separate waiting areas;¹⁷⁴ the avoidance of intimidation, especially with regard to child victims of trafficking;¹⁷⁵ as well as *in camera* hearings.¹⁷⁶ Wherever possible, European anti-trafficking law also envisages that audio-visual technology will be utilised in the context of criminal proceedings, including video and telephone conferencing.¹⁷⁷ In those circumstances where victims' property has been seized or where they incur expenses as a result of participating in criminal proceedings, such property must be returned to the victims¹⁷⁸ and any expenses reimbursed.¹⁷⁹ Moreover, where the prosecution decides not to institute proceedings against traffickers, European countries, in accordance with their national law, must afford trafficked victims the right to review the decision not to prosecute.¹⁸⁰

A critical review of existing state practice across Europe with regard to compliance with the obligation to conduct sufficiently robust criminal proceedings suggests the existence of an uneven pattern of implementation, and, thus, a 'disconnect' between the specific prescriptions contained in European anti-trafficking law and that which obtains in practice in a number of

¹⁶⁶ Recital 19 and Article 12(1) and (2) EU Anti-Trafficking Directive; Article 7(4) Residence Permit Directive; Article 13 Standing of Victims Directive; Article 15(2) CoE Anti-Trafficking Convention

¹⁶⁷ Article 12 (1)(e) CoE Anti-Trafficking Convention

¹⁶⁸ Recital 19 and Article 12(2) EU Anti-Trafficking Directive

¹⁶⁹ Article 11(1) EU Anti-Trafficking Directive

¹⁷⁰ Recital 20 EU Anti-Trafficking Directive

¹⁷¹ Article 12(4)(a) EU Anti-Trafficking Directive; Article 20(c) Standing of Victims Directive

¹⁷² Article 12(4)(d) EU Anti-Trafficking Directive; Article 30(a) CoE Anti-Trafficking Convention

¹⁷³ Articles 19(1) and Article 23(a) Standing of Victims Directive

¹⁷⁴ Article 19(2) Standing of Victims Directive

¹⁷⁵ Article 30(b) CoE Anti-Trafficking Convention

¹⁷⁶ Article 12(4)(c) EU Anti-Trafficking Directive; Article 23(d) Standing of Victims Directive

¹⁷⁷ Article 17(1)(b) Standing of Victims Directive

¹⁷⁸ *Ibid* Article 15

¹⁷⁹ *Ibid* Article 14

¹⁸⁰ *Ibid* Article 11(1) and (2)

European countries. On the one hand, it is certainly commendable that in Montenegro, for example, human trafficking cases are given priority in the context of criminal proceedings, which, in effect, means that these cases are processed and heard in the shortest possible timeframe.¹⁸¹ It is also quite commendable that Austria¹⁸² and Macedonia¹⁸³ have established specialised units in their respective prosecution departments and criminal courts to allow for the initiation and hearing of criminal cases involving trafficked victims. Additionally, it is also a positive development that NGOs are legally empowered to bring actions on behalf of trafficked victims against traffickers in the courts of Luxembourg.¹⁸⁴ On the other hand, however, it is rather regrettable that no specialised court rooms have been established for the purposes of conducting trials involving trafficked children outside Chisinau in Moldova,¹⁸⁵ and that audio-visual technology are not utilised in the context of criminal proceedings in Greece¹⁸⁶ and Romania.¹⁸⁷ Even further, it is also regrettable that no provision is made for anonymous statements to be taken from victims of trafficking in Luxembourg,¹⁸⁸ for example. That said, even where such a provision exists, reports are that anonymous statements are not routinely taken from victims of trafficking in a number of countries, including Serbia¹⁸⁹ and Bulgaria.¹⁹⁰ It is submitted that the failure to systematically implement the anonymity provision runs the risk of unnecessarily exposing trafficked victims to intimidation from traffickers, which may further traumatise these already vulnerable individuals and, ultimately, impede their recovery. This situation is further compounded by the fact that in countries such as Andorra, victims of crime and perpetrators reportedly use the same entrances and exits to court houses,¹⁹¹ while in Serbia, traffickers have reportedly been allowed to directly cross-examine trafficked victims, which has led to unnecessary confrontation and, quite possibly, secondary victimisation.¹⁹² The fact that

¹⁸¹ GRETA, *Report on Montenegro* (n 126) [38]

¹⁸² GRETA, *Report on Austria* (n 45) [153]

¹⁸³ GRETA, *Report on Macedonia* (n 32) [31]

¹⁸⁴ GRETA, *Report on Luxembourg* (n 70) [151]

¹⁸⁵ GRETA, *Report on Moldova* (n 51) [160]

¹⁸⁶ US Department of State, *Trafficking in Persons Report - Greece* (2014) 189

¹⁸⁷ GRETA, *Report on Romania* (n 78) [201]

¹⁸⁸ GRETA, *Report on Luxembourg* (n 70) [160]

¹⁸⁹ GRETA, *Report on Serbia* (n 31) [231]

¹⁹⁰ GRETA, *Report on Bulgaria* (n 20) [221]

¹⁹¹ GRETA, *Report on Andorra* (n 25) [110] (Note that since no case of human trafficking has been formally prosecuted in Andorran courts to date, this assessment relates to victims of crime generally).

¹⁹² GRETA, *Report on Serbia* (n 31) [231]

repetitious, and often unnecessary, interviews are typically conducted with trafficked victims in Bulgaria also runs the risk of traumatising these already vulnerable persons.¹⁹³

More generally, in Poland¹⁹⁴ and Albania,¹⁹⁵ inadequate funding to cover the expenses of *ex officio* lawyers has resulted in victims of trafficking receiving poor quality representation or, in a few cases, cash-strapped NGOs having to bear the costs associated with providing such an important service. Additionally, in Bulgaria,¹⁹⁶ Macedonia,¹⁹⁷ Latvia¹⁹⁸ and Norway,¹⁹⁹ limited access to legal aid has in the past prevented many victims of trafficking from claiming compensation against traffickers. Practical challenges, such as victims having to prove the amount of resources that they have both in their country of origin and the destination country, also impede effective access to legal aid in countries such as Italy.²⁰⁰ In so far as adjudication is concerned, it is widely felt that some judges face a number of difficulties when hearing complex and sensitive human trafficking cases.²⁰¹ For instance, judges in Armenia have reportedly faced several challenges when adjudicating on cases involving trafficked men, and, in particular, those who have been trafficked for labour exploitation, where the line between trafficking and labour contract violations is often blurred.²⁰² A number of judges have reportedly also faced difficulties in discerning the link between traffickers' assets and their use in trafficking offenses for the purposes of forfeiture proceedings in Portugal.²⁰³ The incorrect classification of human trafficking by some judges has also had the effect of traffickers being sentenced for less-serious offenses, which carry lower, and often non-dissuasive, penalties in countries such as France²⁰⁴ and Ireland.²⁰⁵ This state of affairs is further compounded by the fact that plea bargain procedures are applicable to human trafficking cases in countries such as Bosnia and Herzegovina, which runs the risk of affording judges a wide and often unchecked discretion to impose sanctions that do not commensurate with the seriousness of the trafficking-related

¹⁹³ GRETA, *Report on Bulgaria* (n 20) [221]

¹⁹⁴ GRETA, *Report on Poland* (n 43) [180]

¹⁹⁵ GRETA, *Report on Albania* (n 16) [136]

¹⁹⁶ GRETA, *Report on Bulgaria* (n 20) [185]

¹⁹⁷ GRETA, *Report on Macedonia* (n 32) [174]

¹⁹⁸ GRETA, *Report on Latvia*(GRETA(2012)15, 2012)[155]

¹⁹⁹ GRETA, *Report on Norway* (n 66) [254](Access to legal aid before victims decide to file a police report has reported been limited to 3 hours).

²⁰⁰ GRETA, *Report on Italy* (n 40) [167]

²⁰¹ See e.g. Committee against Torture, 'Concluding observations of the Committee against Torture on Greece, adopted at Forty-eighth session (7 May-1 June 2012), CAT/C/GRC/CO/5-6, 27 June 2012 [24]

²⁰² GRETA, *Report Armenia* (n 28) [163]

²⁰³ GRETA, *Report on Portugal* (n 27) [174]

²⁰⁴ GRETA, *Report on France* (n 21) [206]

²⁰⁵ GRETA, *Report on Ireland* (n 22) [245]

offense in question.²⁰⁶ The reportedly stereotypical attitudes of some Judges in Germany²⁰⁷ and Montenegro,²⁰⁸ which has been attributed to them countenancing hegemonic assumptions about who is a 'real' victim of trafficking, as described in chapter 2, as well as the lack of systematic training, also run the risk of subjecting trafficked victims to secondary victimisation in those countries. Similarly, the lack of awareness and sensitivity on the part of some judges as to victims' precarious position of vulnerability has resulted in many victims' testimonies being scantily regarded, numerous acquittals of traffickers, as well as victims being treated as 'prostitutes' in Croatia,²⁰⁹ Greece,²¹⁰ Cyprus,²¹¹ Ireland²¹² and Latvia.²¹³ Additionally, it is also important to note that a number of trafficked victims who have to date been identified in Poland have also been regarded as having been 'voluntarily exploited',²¹⁴ while Nigerian women, in particular, have reportedly not been treated on equal terms as other victims of trafficking in the context of criminal proceedings in Norway.²¹⁵ Moreover, the often lengthy timeframe that it takes to conclude criminal proceedings – up to 7 years in Poland,²¹⁶ Bulgaria²¹⁷ and Lithuania²¹⁸ – which is often fuelled by protracted adjournments, also impedes the efficacious conduct of criminal proceedings in these countries. The same is true in relation to criminal proceedings in Malta,²¹⁹ Slovenia,²²⁰ Cyprus,²²¹ Ireland²²² and Serbia.²²³

While the examples provided above are not an exhaustive account of what obtains in practice in Europe, they do, however, suggest that while some European countries have come a long way in terms of compliance with their obligation to ensure the effective conduct of criminal proceedings involving trafficked victims, a number of other countries are still lagging behind. In short, this 'disconnect' between the prescriptions of European anti-trafficking law with regard to

²⁰⁶ GRETA, *Report on Bosnia and Herzegovina* (n 29) [153]

²⁰⁷ US Department of State, *Trafficking in Persons Report - Germany* (2014) 185

²⁰⁸ GRETA, *Report on Montenegro* (n 126) [135]

²⁰⁹ GRETA, *Report on Croatia* (n 42) [136]

²¹⁰ US Department of State, *Trafficking in Persons Report - Greece* (2014) 188

²¹¹ GRETA, *Report on Cyprus* (n 17) [199]

²¹² GRETA, *Report on Ireland* (n 22) [245]

²¹³ GRETA, *Report on Latvia* (n 198) [182]

²¹⁴ GRETA, *Report on Poland* (n 43) [217]

²¹⁵ GRETA, *Report on Norway* (n 66) [259]

²¹⁶ GRETA, *Report on Poland* (n 43) [217]

²¹⁷ GRETA, *Report on Bulgaria* (n 20) [221]

²¹⁸ Committee against Torture, 'Concluding observations on the third periodic report of Lithuania', Adopted by the Committee at its fifty-second session (28 April–23 May 2014), CAT/C/LTU/CO/3, 17 June 2014 [14]

²¹⁹ GRETA, *Report on Malta* (n 104) [184]

²²⁰ GRETA, *Report on Slovenia* (n 77) [167]

²²¹ GRETA, *Report on Cyprus* (n 17) [197]

²²² GRETA, *Report on Ireland* (n 22) [45]

²²³ GRETA, *Report on Serbia* (n 31) [231]

the conduct of criminal proceedings and the practice of a number of European countries is of some concern, primarily because of the serious adverse implications, including the secondary victimisation, which inadequate court proceedings can have on trafficked victims.

4.5. Stakeholder Collaboration

Human trafficking, as a quickly evolving, multi-dimensional, and often transnational, phenomenon, cannot be effectively combated by one country, agency or actor alone.²²⁴ Rather, collaboration at the international, regional and domestic levels must be actively embarked upon in a systematic, as opposed to fragmented or spasmodic, way.²²⁵ Against this backdrop, European anti-trafficking law explicitly obliges European countries to collaborate with each other in an effort to facilitate and enhance action against trafficking in human beings.²²⁶ Collaboration, in this regard, is not restricted, however, to formal inter-state cooperation; in fact, European anti-trafficking law envisages that information, research, as well as best practices will be shared amongst the various agencies - both state and civil society²²⁷ - that constitute a country's anti-trafficking machinery.²²⁸ Collaboration, in the form of intelligence sharing, capacity building and joint investigations, is also envisaged as between the competent national authorities of European countries and third countries, as well as with various international and regional organisations, including European Union Agencies.²²⁹

In practice, while it appears that cooperation between *regional* anti-trafficking agencies operating in Europe and international organisations charged with an anti-trafficking mandate has been a marked success to date, the same arguably cannot be said for inter-state or intra-state collaboration. On the one hand, it is certainly commendable that, through the coordinating efforts and oversight of Interpol²³⁰ and the EU Fundamental Rights Agency (FRA),²³¹ Europol

²²⁴ Jennifer Sheldon-Sherman 'The Missing "P": Prosecution Prevention Protection and Partnership in the Trafficking Victims Protection Act' (2012) 117(2) Penn State Law Review 443, 475

²²⁵ Maudisa McSween, 'Investing in the Business against Human Trafficking: Embracing the Fourth P-Partnerships' (2011) 6 Intercultural Human Rights Law Review 283, 286; Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' (2002) 12(25) Forced Migration Review 8, 27

²²⁶ Recital 5 EU Anti-Trafficking Directive; Article 26(1) Standing of Victims Directive; Article 9 CoE Anti-Trafficking Convention

²²⁷ Recital 6 EU Anti-Trafficking Directive; Articles 12(5) and 35 CoE Anti-Trafficking Convention

²²⁸ Articles 5(1), 32 and 34 CoE Anti-Trafficking Convention

²²⁹ Recital 5 EU Anti-Trafficking Directive (This Recital envisages that EU member states will make use of EU agencies, such as EUROPOL and EUROJUST, to facilitate investigations and prosecutions of trafficking in persons).

²³⁰ - 'Partnerships' (*Interpol*, 2014) <<http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Partnerships>> accessed 21 December 2014

has facilitated high-level anti-trafficking investigations at the European level;²³² Frontex has coordinated Joint Operations in which the issue of human trafficking was a major priority;²³³ and EUROJUST has initiated criminal investigations into human trafficking cases and successfully facilitated the prosecution of traffickers as a result of joint judicial cooperation.²³⁴ It is also commendable that, at the CoE level, GRETA and the COP, in conjunction with the aforementioned EU Agencies,²³⁵ the OSCE, the UN Special Rapporteur on Human Trafficking, UNODC and the IOM, have successfully hosted a number of consultations, workshops and capacity building programs which have helped to raise the profile of human trafficking in Europe.²³⁶

On the other hand, however, the existing practice regarding inter-state cooperation on trafficking-related issues raises a number of concerns. For instance, notwithstanding suspicions of human trafficking, no efforts towards international cooperation have reportedly been embarked upon by Andorra to date,²³⁷ while competent national authorities in Albania and Kosovo have consistently refused to cooperate with each other,²³⁸ a troubling reality which runs the risk of leaving a number of potential victims, especially children, unidentified. That said, even in those countries where international cooperation is generally operationalized, several difficulties nevertheless arise in practice. For instance, due to fractured diplomatic relations, reports are that collaboration in the anti-trafficking field as between Armenia and Turkey has

²³¹ European Union Agency for Fundamental Rights, *Fundamental rights: challenges and achievements in 2011* (European Union, 2012) 110

²³² EUROPOL, *The EU Serious and Organised Crime Threat Assessment* (European Union, 2013) ('Operation Veerde', involving the Czech Republic and the UK, resulted in 11 arrests); See also, EUROPOL, *Europol Review – General Report on Europol Activities* (European Union, 2011) (Europol supported joint investigation teams (JITs), including 'Operation Gulf' which resulted in the rescuing of 28 trafficked children between the UK and Romania and some 126 arrests); EUROPOL, 'Joint Action to Tackle West African Human Trafficking Networks' (*Europol*, 26 October 2012) <<https://www.europol.europa.eu/node/1895>> accessed 24 December 2014 (Europol conducted a joint action initiative to tackle West African trafficking networks).

²³³ See e.g. Frontex, 'Joint Operation Agelaus' (*Frontex*, 2010) <<http://www.frontex.europa.eu/news/joint-operation-agelaus-children-in-irregular-migration-HgSDR5>> accessed 24 December 2014; Frontex, 'Joint Operation Minerva' (*Frontex*, 2011) <<http://migrantsatsea.wordpress.com/tag/joint-operation-minerva/>> accessed 24 December 2014; Frontex, 'Joint Operation Indalo' (*Frontex*, 2011) <<http://www.frontex.europa.eu/operations/archive-of-accomplished-operations/tV9Whw>> accessed 24 December 2014

²³⁴ European Union's Judicial Cooperation Unit, *Strategic Report Eurojust's action against trafficking in human beings Final report and action plan* (Eurojust, 2012) 33

²³⁵ Memorandum of Understanding between the Council of Europe and the European Union (10 May 2007).

²³⁶ GRETA, *First General Report on GRETA's activities covering the period from February 2009 to July 2011* (Council of Europe 2011) 13 - 15

²³⁷ GRETA, *Report on Andorra* (n 25) [45] (This could be partly explained by the fact that there have to date been no officially confirmed case of human trafficking in Andorra).

²³⁸ GRETA, *Report on Albania* (n 16) [148]

proven to be problematic in practice.²³⁹ Unfortunately, the same can be said with respect to relations between Norway and Eritrea.²⁴⁰ More specifically, reports are that competent authorities in the latter state have consistently rejected Norwegian requests to discuss pertinent issues related to human trafficking over the years.²⁴¹ Similarly, reports are that Greek officials have also consistently refused to cooperate with Moldovan authorities in the fight against human trafficking.²⁴² On a related issue, it is also disconcerting that cooperation between France and Nigeria,²⁴³ as well as between Poland, on the one hand, and Belarus, Russia and Moldova, on the other,²⁴⁴ remains problematic in practice.

More generally, international cooperation in relation to specific trafficking-related issues remains a perennial challenge in Europe. For example, Icelandic authorities have noted that cooperation with China and Romania on the issue of labour trafficking has proved to be quite challenging in practice,²⁴⁵ while Spain's cooperation with other countries is reportedly limited to the issue of the sexual exploitation of trafficked victims.²⁴⁶ Authorities in Armenia²⁴⁷ and Bosnia and Herzegovina²⁴⁸ have also expressed concern over the fact that obtaining requisite information from Russia and Azerbaijan, respectively, on various trafficking related issues has proven to be extremely difficult, while the relationship between Ireland and Latvia with regard to the issue of 'sham marriages' remains problematic.²⁴⁹ Danish authorities' lack of cooperation with authorities in third countries regarding the reintegration of trafficked victims,²⁵⁰ as well as Croatian authorities' failure to actively cooperate with receiving states in the repatriation of trafficked victims also remains a fundamental challenge.²⁵¹ Similarly, Slovenian authorities have also expressed concern over the numerous difficulties they continue to face in terms of ascertaining information from authorities in the Dominican Republic on traffickers' previous convictions and on victims' family history, circumstances of recruitment and economic and

²³⁹ GRETA, *Report on Armenia* (n 28) [82]

²⁴⁰ GRETA, *Report on Norway* (n 66) [96]

²⁴¹ *Ibid*

²⁴² US Department of State, *Trafficking in Persons Report - Greece* (2014) 188

²⁴³ GRETA, *Report on France* (n 21) [93]

²⁴⁴ GRETA, *Report on Poland* (n 43) [104]

²⁴⁵ GRETA, *Report on Iceland* (n 67) [87]

²⁴⁶ GRETA, *Report on Spain* (n 15) [72]

²⁴⁷ GRETA, *Report on Armenia* (n 28) [82]

²⁴⁸ GRETA, *Report on Bosnia and Herzegovina* (n 29) [73]

²⁴⁹ GRETA, *Report on Latvia* (n 18) [82]

²⁵⁰ GRETA, *Report on Denmark* (n 8.5) [89]

²⁵¹ GRETA, *Report on Croatia* (n 42) [114]

political conditions.²⁵² The fact that Poland and Denmark have both unsuccessfully participated in joint investigations teams to date further compounds this rather unsatisfactory state of affairs.²⁵³

The picture painted by the existing state practice with regard to collaboration at the domestic level is also cause for concern. For example, the level of cooperation between NGOs working in the anti-trafficking field in Abkhazia and South Ossetia and those operating in Georgia continues to be fraught with a number of practical difficulties,²⁵⁴ while the exchange of information between NGO representatives and competent national authorities in Bosnia and Herzegovina has proven to be largely unsatisfactory.²⁵⁵ The lack of consistency in terms of cooperation between NGOs and competent national authorities in Bulgaria,²⁵⁶ Moldova²⁵⁷ and France²⁵⁸ also runs the risk of adversely affecting long-term anti-trafficking efforts that require close cooperation, particularly with regard to the identification of child victims of trafficking. The same argument can be made in respect of Croatia, where the level of communication between NGOs and police officials in that country remains unsatisfactory, to the extent that the former are typically not informed of the outcome of trafficking cases that they refer to the latter.²⁵⁹ Similarly, in Malta²⁶⁰ and Portugal,²⁶¹ it is reportedly the case that the views of NGOs are not sufficiently taken into account by competent authorities, presumably due to a lack of basic trust, as well as the absence of a formal institutional structure that sufficiently delineates competence. The limited or altogether non-involvement of NGOs in the development of national anti-trafficking policy in the context of Montenegro,²⁶² Cyprus²⁶³ and the UK,²⁶⁴ as well as the lack of transparency and communication between trade unions and the police in Denmark,²⁶⁵ and as between medics and social workers in Montenegro,²⁶⁶ are also serious challenges that have adversely affected stakeholder cooperation in Europe to date.

²⁵² GRETA, *Report on Slovenia* (n 77) [72]

²⁵³ GRETA, *Report on Poland* (n 43) [105]; GRETA, *Report on Denmark* (n 85) [86]

²⁵⁴ GRETA, *Report on Georgia* (n 24) [63]

²⁵⁵ GRETA, *Report on Bosnia and Herzegovina* (n 29) [53]

²⁵⁶ GRETA, *Report on Bulgaria* (n 20) [84]

²⁵⁷ GRETA, *Report on Moldova* (n 51) [12]

²⁵⁸ GRETA, *Report on France* (n 21) [66]

²⁵⁹ GRETA, *Report on Croatia* (n 42) [47]

²⁶⁰ GRETA, *Report on Malta* (n 104) [31]

²⁶¹ GRETA, *Report on Portugal* (n 27) [57]

²⁶² GRETA, *Report on Montenegro* (n 126) [57]

²⁶³ GRETA, *Report on Cyprus* (n 17) [28]

²⁶⁴ GRETA, *Report on the United Kingdom* (n 39) [93]

²⁶⁵ GRETA, *Report on Denmark* (n 85) [64]

In view of the above, it is submitted that there is, indeed, a ‘disconnect’ between the prescriptions of European anti-trafficking law with regard to stakeholder collaboration and that which generally obtains in practice in a number of European countries. This arguably has a number of practical implications, both in terms of the prosecution of traffickers where collaboration is paramount, as well as in the identification, referral and protection of trafficked victims.

4.6. Training

Stakeholders in the anti-trafficking field are frequently called upon to perform the difficult tasks of investigating trafficking-related offenses, identifying and referring victims of trafficking, as well as adjudicating on a number of other sensitive issues which may involve competing rights and interests. Given the importance of these tasks, a failure on the part of stakeholders to properly execute their respective mandate(s) could have devastating repercussions on both the human rights and criminal justice fronts.²⁶⁷ Against this backdrop, European anti-trafficking law obliges European countries to systematically train key stakeholders working in the anti-trafficking field.²⁶⁸ Training must not only target law enforcement personnel, such as police officers, labour officers and immigration personnel, but also judicial officers, such as lawyers, prosecutors and judges, as well as healthcare, consular and civil society personnel.²⁶⁹ More specifically, this training should be robust enough to enable these stakeholders to treat victims in an impartial, respectful, professional and non-discriminatory manner.²⁷⁰ As the case of *Rantsev* affirms, this obligation is not merely hortatory; the training of those working in the anti-trafficking field *must* be conducted.²⁷¹

Although a number of European countries have to date enhanced their training of key stakeholders in the anti-trafficking field in a manner that has produced discernible results,²⁷² the

²⁶⁶ GRETA, *Report on Montenegro* (n 126) [147]

²⁶⁷ On the importance of training, See Deborah Wilson, William Walsh and Sherilyn Kleuber, ‘Trafficking in human beings: Training and services among US law enforcement agencies’ (2006) 7(2) *Police Practice and Research* 149

²⁶⁸ Article 5(2) CoE Anti-Trafficking Convention

²⁶⁹ Article 29(2) - (5) CoE Anti-Trafficking Convention; Recitals 15 and 25 and Articles 9(3) & 18(3) EU Anti-Trafficking

²⁷⁰ Article 25(1) Standing of Victims Directive; Article 29(2)-(3) CoE Anti-Trafficking Convention

²⁷¹ *Rantsev v Cyprus and Russia* [2010] ECHR 22 [296]

²⁷² EU Commission, ‘Mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings’ COM (2014) 635 final 10, 15, 24; GRETA, *Third General Report covering the period from 1 August 2012 to 31 July 2013* (Council of Europe, 2013) [7]

existing practice in other countries suggests that the training obligation is, in many respects, still not being fully complied with. On the one hand, it is certainly commendable that in the Netherlands, for example, specialised judges and prosecutors have been appointed and exposed to continuous training on various trafficking-related issues.²⁷³ On the other hand, however, it is perhaps regrettable that very little training has reportedly been afforded competent national authorities working in the anti-trafficking field in Andorra to date.²⁷⁴ It is also regrettable that in Iceland²⁷⁵ and Italy,²⁷⁶ for example, anti-trafficking training has not been provided on a systematic basis. The fact that training is typically funded by external donors in countries such as Macedonia²⁷⁷ and Bosnia and Herzegovina²⁷⁸ has also had an adverse impact on the extent to which training can be provided on a systematic basis in those countries. More generally, the frequent renewal of key members of staff in the anti-trafficking field in Croatia²⁷⁹ and Moldova,²⁸⁰ for example, also creates the continuous need for new training, which has proven to be both expensive and time-consuming.

The foregoing challenges are further compounded by the fact that in a few countries, such as Austria²⁸¹ and Romania,²⁸² training sessions on trafficking-related issues are optional, and therefore do not generally attract much interest from key stakeholders. That said, even where training is mandatory, as in Cyprus,²⁸³ the topics covered are typically limited in nature, which do not afford stakeholders a full grasp of some of the more controversial and sensitive issues that might arise from time to time in this field. On a related issue, the European Migration Network (EMN) has also recently noted that training within the context of some countries is not multidisciplinary in nature, which essentially means that the expertise of stakeholders in certain fields is not systematically enhanced.²⁸⁴ More specifically, training with regard to the dynamics of child trafficking remains weak in the Netherlands,²⁸⁵ while officers working at

²⁷³ GRETA, *Report on the Netherlands* (GRETA(2014)10, 2014)[67]

²⁷⁴ GRETA, *Report on Andorra* (n 25) [39]

²⁷⁵ GRETA, *Report on Iceland* (n 67) [66]

²⁷⁶ GRETA, *Report on Italy* (n 40) [77]

²⁷⁷ GRETA, *Report on Macedonia* (n 32) [83]

²⁷⁸ GRETA, *Report on Bosnia and Herzegovina* (n 29) [61]

²⁷⁹ GRETA, *Report on Croatia* (n 42) [53]

²⁸⁰ GRETA, *Report on Moldova* (n 51) [182]

²⁸¹ GRETA, *Report on Austria* (n 45) [152]

²⁸² GRETA, *Report on Romania* (n 78) [72]

²⁸³ GRETA, *Report on Cyprus* (n 17) [59]

²⁸⁴ European Migration Network, *Identification of victims of trafficking in human beings in international protection and forced return procedures* (European Union, 2014) 26

²⁸⁵ GRETA, *Report on the Netherlands* (n 273) [76]

immigration centres in Luxembourg²⁸⁶ and Spain,²⁸⁷ amongst others,²⁸⁸ have not always benefited from specialised training, especially with regard to the identification of trafficked victims. Labour inspectors in the context of Macedonia;²⁸⁹ street officers in Poland²⁹⁰ and Serbia;²⁹¹ neighbourhood officers in Turkey;²⁹² border officials in Norway²⁹³ and Spain;²⁹⁴ consular staff in Luxembourg;²⁹⁵ as well as health care workers in the UK,²⁹⁶ have reportedly not systematically benefited from training on a number of trafficking-related issues which are of direct relevance to their respective mandates. Finally, it is also felt that judges in a number of countries, including Ireland,²⁹⁷ Luxembourg,²⁹⁸ Norway,²⁹⁹ Spain,³⁰⁰ Serbia,³⁰¹ Poland,³⁰² Romania³⁰³ and Macedonia³⁰⁴ are not sufficiently trained on many trafficking-related issues, which runs the risk of exposing victims to secondary victimisation.

In view of the foregoing, it can be argued that, while considerable progress has been made in recent years with regard to the training of key personnel in the anti-trafficking field in a number of European countries, the existing practice of several other countries suggests that more needs to be done to adequately and consistently train stakeholders, particularly in terms of victim identification and referral.

²⁸⁶ GRETA, *Report on Luxembourg* (n 70) [56]

²⁸⁷ GRETA, *Report on Spain* (n 46) [90]

²⁸⁸ European Migration Network, *Identification of victims of trafficking in human beings in international protection and forced return procedures* (n 284) 16 (noting that training remains a challenge in Austria, Belgium and Sweden).

²⁸⁹ GRETA, *Report on Macedonia* (n 32) [83]

²⁹⁰ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of Poland', CEDAW/C/POL/CO/7-8, Adopted by the Committee at its fifty-ninth session, meeting from 20 October to 7 November 2014 [26]

²⁹¹ GRETA, *Report on Serbia* (n 31) [84]

²⁹² US Department of State, *Trafficking in Persons Report - Turkey* (2014) 384

²⁹³ GRETA, *Report on Norway* (n 66) [119]

²⁹⁴ GRETA, *Report on Spain* (n 15) [90]

²⁹⁵ GRETA, *Report on Luxembourg* (n 70) [58]

²⁹⁶ GRETA, *Report on the United Kingdom* (n 39) [126]

²⁹⁷ GRETA, *Report on Ireland* (n 22) [87]

²⁹⁸ GRETA, *Report on Luxembourg* (n 70) [52]

²⁹⁹ GRETA, *Report on Norway* (n 66) [241]

³⁰⁰ GRETA, *Report on Spain* (n 15) [90]

³⁰¹ GRETA, *Report on Serbia* (n 31) [84]

³⁰² GRETA, *Report on Poland* (n 43) [81]

³⁰³ GRETA, *Report on Romania* (n 78) [72]

³⁰⁴ GRETA, *Report on Macedonia* (n 32) [83]

CONCLUSION

This chapter provided a critical assessment of the existing law and practice on human trafficking in Europe through the lens of the 'INI' typology's 'institutional' paradigm. The application of Galligan's Socio-legal theory, in this context, reveals that a strong institutional framework is a pre-requisite to the effective implementation of anti-trafficking law in practice. Although the chapter makes it clear that the vast majority of European countries have, in recent years, strengthened their institutional anti-trafficking frameworks so as to better achieve the three-pronged objectives of prevention, prosecution and protection, pursuant to their European anti-trafficking obligations, it also suggests that many of the challenges identified above, particularly with regard to victim identification and referral and stakeholder collaboration, are symptomatic of a wider European problem when it comes to 'law in action'. That said, it must be borne in mind that the findings presented also suggest that, because of social and economic factors, including economic disparities as between Western and Eastern Europe, many of the institutional challenges examined in this chapter are more pronounced in the Eastern European context. This is particularly the case in respect of awareness raising, court proceedings, as well as the training of key personnel in the anti-trafficking field. To this end, a strong argument can be made that, in some respects, there is a 'disconnect' between the prescriptions of European anti-trafficking law and the practice of some European countries at the institutional level. The implications of this 'disconnect', as intimated in the foregoing sections, are numerous. In view of this, it can be argued that reform is, indeed, required, particularly in so far as state practice is concerned. As will be demonstrated in the next chapter, however, reform of state practice is not only required at the *institutional* level, but also at the *individual* level.

CHAPTER 5

INDIVIDUAL ASPECTS OF EUROPEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

This chapter critically assesses the existing law and practice on human trafficking in Europe against the backdrop of the *individual* benchmarks outlined by the ‘INI’ typology. In this context, it seeks to determine the extent to which the myriad rights of trafficked victims, as provided for under European anti-trafficking law, are being protected, respected and fulfilled in practice. More specifically, the overriding objective of this chapter is to evaluate whether a ‘disconnect’ exists between what is stipulated as a matter of law, and that which obtains in practice. The conclusion ultimately reached by this chapter is that while, in general, European anti-trafficking law provides a robust framework through which the rights of trafficked victims can be adequately protected, respected and fulfilled, existing state practice in a number of European countries suggests that there is still, in many respects, a ‘disconnect’ between European anti-trafficking law and practice, which has a number of adverse implications.

5.1. Primacy of Victims’ Rights

Ensuring that victims of trafficking are viewed by competent national authorities as particularly vulnerable individuals whose needs must be met to the greatest extent possible is perhaps one of the most important functions of European anti-trafficking law.¹ Unfortunately, though, what is today described as a ‘victim-centred’ approach to human trafficking was not always countenanced at the European level prior to 2001.² In fact, it can be argued that the majority of anti-trafficking instruments which were adopted in both the 1990s and early 2000s at the European level appeared to take a distinctly criminal justice approach,³ giving primacy to the

¹ Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 112

² Venla Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2011) 292

³ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Bloomsbury Publishing 2007) 99

need to prosecute traffickers, often times at the expense of victim protection.⁴ More recent legislative instruments at the European level seem to have, however, brought about a drastic change not only in the way in which victims' rights are viewed, but also in the way in which such rights are protected. Among the principal provisions which seek to achieve these objectives are those which oblige states, from the very outset, to provide protective measures commensurate with the different needs of female and male victims;⁵ those which recognize the special position of pregnant, physically and psychologically unwell and disabled victims;⁶ as well as those which recognize the highly adverse impact that exploitation has on child-victims of trafficking, and thus call for the adoption of appropriate measures to ensure their protection in accordance with their best interests.⁷ In short, it can be argued that, in contradistinction to what obtained in Europe less than two decades ago, current European anti-trafficking law appears to have adequate mechanisms in place to effectively take account of the myriad rights and interests of trafficked victims. The mechanisms envisaged to achieve this objective must, in principle, be implemented in a sensitive, professional, informed, consensual, tailored and non-discriminatory manner.⁸

That said, among the major aspects of European anti-trafficking law and practice which suggest that the rights of trafficked victims are arguably not being afforded the level of primacy envisaged are the 'non-punishment' and the 'witness protection' requirements. Given the uneven state practice regarding the implementation of these two important provisions, the next two sub-sections will address these issues in turn.

A. Non-Punishment of Trafficked Victims

One of the most important, yet overly controversial,⁹ provisions of European anti-trafficking law is that of the 'non-punishment' provision. In general, such a provision is couched in the following terms:

⁴ Steven Peers and Nicholas Rogers, *EU Immigration And Asylum Law: Text And Commentary* (Martinus Nijhoff Publishers 2006) 817

⁵ Recital 3 EU Anti-Trafficking Directive; Article 5(3) and 17 CoE Anti-Trafficking Convention

⁶ Article 11(7) EU Anti-Trafficking Directive

⁷ Article 28(3) CoE Anti-Trafficking Convention

⁷ Article 11(7) EU Anti-Trafficking Directive; Article 10 Standing of Victims Directive

⁸ Article 12(7) CoE Anti-Trafficking Convention; Article 1 Standing of Victims Directive

⁹ Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 578 (noting the concerns about the 'cautious approach' countenanced by European anti-trafficking law regarding the non-punishment obligation).

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to [trafficking-related offenses].¹⁰

On a textual construction of this provision, four main points can be gleaned. First, this provision does not provide complete immunity for trafficked victims who engage in conduct prohibited by member states' laws;¹¹ rather, it only applies where the victim in question has been *compelled*¹² to engage in unlawful activities in the course, and as a result, of the trafficking ordeal. The second point is that such a provision envisages some variation in member states' implementation of the non-punishment obligation, evidenced by the phrase 'in accordance with the basic principles of its legal systems'.¹³ Thirdly, the provision also envisages that trafficked victims, to the extent that they have been compelled, will not be prosecuted for a non-exhaustive list of unlawful activities,¹⁴ including, but not limited to soliciting, illegal border crossing, the cultivation of cannabis, and the possession of forged identity documents, amongst others. And, fourth, where the circumstances are such that the victim has been compelled to commit illegal activities, the provision envisages that such a person will not only be precluded from prosecution within the context of criminal proceedings, but also from administrative penalties,¹⁵ such as detention in irregular migrant facilities. The overarching objective of this

¹⁰ Article 8 EU Anti-Trafficking Directive; see also Article 26 CoE Anti-Trafficking Convention which is couched in similar terms: 'Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.'

¹¹ Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press) 288

¹² Ibid 284. Note that the notion of 'compulsion' is linked to the 'means' element found in the definition of human trafficking under the Trafficking Protocol and European anti-trafficking law: threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage. It does not, however, require physical force or constraint. Cf. In the case of children, consent to exploitation is not possible; as such, when assessing compulsion reference must be had to factors such as children's age, maturity and understanding, and not necessarily the 'means' element detailed above. See Michelle Brewer, *The Prosecution of Child Victims of Trafficking* (Garden Court Chambers, 2013) 4 - 5

¹³ Council of Europe Committee of Ministers, 'Explanatory Report to the Council of Europe Convention on action against trafficking in human beings' CM(2005)32 Addendum 2 final (3 May 2005) [274] (explaining that the non-punishment obligation can be complied with in a variety of ways; for example, some member states may choose to provide for a substantive criminal or procedural criminal law provision, while others may take any other measure which they may deem serves the purpose of allowing for the possibility of not punishing victims when they are compelled to commit offenses).

¹⁴ OSCE, *Policy and Legislative Recommendations towards the Effective Implementation of the non-punishment provision with regard to victims of trafficking* (OSCE, 2013) [57] ('As there is no exhaustive list of offences that might be committed by victims of trafficking in the course of, or as a consequence of, being trafficked, and since new forms of exploitation may, and do, emerge, States should consider adopting an open-ended list of offences typically related to trafficking in human beings, with regard to the commission of which victims of trafficking shall be immune from punishment.')

¹⁵ Ibid [14]

provision, in keeping with the distinctly human-rights orientation of European anti-trafficking law, is to protect vulnerable victims of trafficking who, whilst on the face of it, may have committed an offense, have nevertheless done so without the exercise of any real autonomy. In other words, because of the degree of control exercised by traffickers over these individuals, European anti-trafficking law regards it as being unjust, as well as an avenue of re-victimisation, for competent national authorities to hold these persons criminally responsible for offenses which, had they been free of exploitation, would not have been committed.¹⁶

Notwithstanding the significance of the non-punishment provision, however, there appears to be uneven implementation in a number of European countries. On the one hand, in a few countries, such as Belgium and the Netherlands, amongst others, there are increasingly positive results in the implementation of the non-punishment obligation, evidenced by the few cases decided to date in those countries. For example, in a Belgian case decided by the Criminal Court of Turnhout in 2012,¹⁷ 20 trafficked victims were allegedly recruited from Romania to work in Belgium under the guise of finding better jobs. Once they had arrived in Belgium, they were, however, forced to steal clothes from shops in order to repay their travel and living expenses. One of the victims was also forced into prostitution. After receiving several reports of thefts, Belgian police began an investigation into the matter, which revealed that a criminal organization comprising of some 15 perpetrators were forcing the victims to commit the illegal activities in question. In view of this, all 20 victims were regarded as having been forced into criminality, and were accordingly not prosecuted for the thefts and prostitution which they were compelled to commit. A similar conclusion was reached in a Dutch case decided in 2010.¹⁸ In that case, an Albanian minor was sold by her parents to a trafficker. Upon arrival in the Netherlands, she was held in slave-like conditions, and was reportedly exploited by her trafficker, both within his household, and on the streets, where she was forced to steal. In an effort to negate the credibility of the victim, the trafficker argued at his trial that the victim had written a 'love letter' which, among other things, indicated that she had committed the thefts voluntarily. The Judge, after having considered all the circumstances of the case, however, held

¹⁶ Recital [14] EU Anti-Trafficking Directive

¹⁷ See Centre for Equal Opportunities and Opposition to Racism, Presentation of Alliance Expert Coordination Team Meeting (December 2012) (includes a discussion of the judgment from the Criminal Court of Turnhout (Belgium))(17 October 2012).

¹⁸ Dutch National Rapporteur on Trafficking in Human Beings, 'Trafficking in human beings, Seventh Report of the Dutch National Rapporteur' (2010) 248

that the victim had written the letter under coercion, and, that, given that she was forced to steal, she could not be prosecuted for theft.

While these two examples are not by any means an exhaustive account of the increasing level of awareness on the part of prosecutors and, indeed, judicial authorities across Europe with regard to the implementation of the non-punishment obligation, they do, however, serve as examples which other countries may very well be advised to emulate.¹⁹

That said, at least one leading European anti-trafficking scholar – Ryszard Piotrowicz – remains convinced that, ‘a significant number of countries fail to apply [the non-punishment provision], either because of a lack of awareness of it, or a failure to appreciate the rationale for the principle, or because of a failure to identify people as victims of trafficking in the first place.’²⁰ In Norway, for example, fines are reportedly imposed on women found to be engaged in prostitution as well as on those who refuse to give their names and addresses to police officers, notwithstanding clear indications that these women have been compelled by their traffickers to so act.²¹ In those circumstances where the requisite fines are not paid, it appears that imprisonment ensues.²² In Turkey²³ and Bulgaria,²⁴ there have also been reports of victims being sentenced for illegal border crossing which were a direct result of being under the control of their traffickers, while in Denmark, the possession of fraudulent identity documents have reportedly resulted in foreign victims of trafficking being sentenced for up to two months, deported and, in some cases, even banned from re-entering the Schengen area for up to 5 years.²⁵ The situation in many other European countries is hardly different.²⁶ For example, in

¹⁹ For further details on Belgium’s implementation of the non-punishment obligation, see Patricia Le Cocq, ‘The non-punishment principle as an essential element of a human rights-based approach to action against trafficking in human beings’ (Council of Europe-OSCE workshop, Strasbourg, 9-10 October 2014)

²⁰ Ryszard Piotrowicz, ‘Human Trafficking and the Non-Punishment Principle’ (OSCE and CoE Not for Sale – Joining Forces against Trafficking in Human Beings Conference, Vienna, 17 February 2014)

²¹ GRETA, *Report on Norway* (GRETA(2013)5, 2013) [240]

²² Ibid. See also, Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic reports of Lithuania, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013)’, CRC/C/LTU/CO/3-4, 30 October 2013 [48]

²³ Human Rights Committee, ‘Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (15 October - 2 November 2012)’, CCPR/C/TUR/CO/1, 13 November 2012 [15]

²⁴ GRETA, *Report on Bulgaria* (GRETA(2011)19, 2011) [207]

²⁵ GRETA, *Report on Denmark* (GRETA(2011)21, 2011) [200]

²⁶ See e.g. FIZ, ‘Trafficking in girls’ (2012) 12 Newsletter 3. Citing an incident in Switzerland where, a young victim was held in detention, and then deported from that country after she was found to have had a forged passport in her possession. The evidence appeared to, however, suggest that not only was she trafficked into prostitution by a pimp, but also that she was forced to possess and use the falsified passport; See also OSCE, ‘Report by the Special Representative on her visit to the Republic of Azerbaijan, 23-26 September 2012’, 11 July 2014 [36]; Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined second and third

France, child victims of trafficking who have been forced to pick-pocket or solicit have reportedly been imprisoned,²⁷ while a number of victims who have been forced to engage in purse-snatching and drug smuggling in Italy have also been prosecuted.²⁸ Trafficked children have also been penalised in Bosnia and Herzegovina for offenses against the ‘public order’, though there were indications that they were compelled to act illegally.²⁹ Victims who have allegedly been trafficked for the illegal production of cigarettes in Poland,³⁰ as well as those trafficked for the cultivation of cannabis in the UK have also reportedly been prosecuted, despite there being indicators to the effect that such victims were compelled to commit such offenses as a direct result of the trafficking experience.³¹ The far-reaching implications of this disconcerting state of affairs were recently explained by the OSCE’s Co-ordinator for Combating Trafficking in Human Beings:

The punishment of victims of trafficking for crimes directly related to their trafficking is a violation of their fundamental dignity. It constitutes a serious denial of reality and of justice. Such punishment blames victims for the crimes of their traffickers, for crimes that, but for their status as trafficked persons, they would not have perpetrated. The criminalization of trafficked victims may be tantamount to persecution of victims by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, which should be investigated, it fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment. Instead of being treated as victims, they are treated as criminals. This practice furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading trafficked victims from giving evidence against their traffickers and by enabling traffickers to exert even further control over their victims by threatening exposure to punishment by the State [...] Traffickers will favour the punishment of victims as it simply plays into their hands: it ensures that their victims are the ones to bear the criminal penalties while the real offenders can operate with impunity.³²

periodic reports of Albania’, E/C.12/ALB/CO/2-3, Adopted by the Committee at its fifty-first session (4-29 November 2013), 18 December 2013 [22]

²⁷ GRETA, *Report on France* (GRETA(2012)16, 2013) [128]

²⁸ GRETA, *Report on Italy* (GRETA(2014)18, 2014) [189]

²⁹ OSCE, ‘Report by the Special Representative on her visit to Bosnia and Herzegovina, 12-14 June 2012’, SEC.GAL/142/13, 31 July 2013 [15]

³⁰ GRETA, *Report on Poland* (GRETA(2013)6, 2013)[207]

³¹ GRETA, *Report on the United Kingdom* (GRETA(2012)6, 2012)[228]

³² OSCE, *Policy and Legislative Recommendations towards the Effective Implementation of the Non-punishment Provision with regard to Victims of Trafficking* (n 14) [4]

The Special Case of England and Wales

In view of the fact that Courts in England and Wales have, for over seven years, been adjudicating on the difficult question of the non-punishment of trafficked victims,³³ it is necessary, within the context of this chapter, to provide a detailed analysis of the efficacy of the approach countenanced by these Courts to date. At the outset, however, a few preliminary points are worth noting. The first is that, prior to the coming into effect of section 45 of the Modern Slavery Act, which creates a statutory defence, the UK implemented the non-punishment obligation through three different methodologies. The first was through the conventional criminal defences of ‘duress’ or, alternatively, ‘necessity.’ The duress defence would have precluded a trafficked victim from being prosecuted where the unlawful offense at issue had been committed as a direct (not indirect) result of a threat of death or serious injury aimed at her or someone sufficiently close to her,³⁴ while the defence of ‘necessity’ would have arisen in those circumstances where the commission of the unlawful offense was necessary or was reasonably believed to have been necessary so as to avoid or prevent death or serious injury where, objectively viewed, ‘the commission of the [offense] was reasonable and proportionate, having regard to the evil to be avoided or prevented and the [offense] would not have been committed without that necessity.’³⁵ In view of the fact that the evidence required to satisfy these evidential requirements must be cogent, as well as the fact that trafficked victims hardly ever succeeded in invoking these defences,³⁶ the Crown Prosecution Service (CPS) had taken the initiative to issue special Guidance to prosecutors, which provided that the prosecution could choose, where the evidence suggested that a credible victim of trafficking had been compelled to commit an unlawful offense, to not prosecute such a person for any

³³ See generally David Ormerod and Others, *Blackstone's Criminal Practice 2012* (Oxford University Press 2011) 1028 - 29. Note that *R v O* [2008] EWCA Crim. 2835 was the first case decided by the Court of Appeal dealing with the non-punishment obligation, albeit that the UK had not at the time ratified the CoE Anti-Trafficking Convention as yet. Here, a girl in her mid-teens had entered the UK lawfully in an apparent attempt to escape from her father's threat to kill her for refusing to submit to a forced marriage to a much older man who already had five wives. She was subsequently forced into prostitution, but managed to escape, and was provided with false identity documents. She was, however, subsequently arrested in Dover when attempting to leave the UK. Without any pre-sentence report, the Crown Court imposed a sentence of imprisonment without having examined a report from the Poppy Project which stated that she had been trafficked. The Court of Appeal considered that the ‘shameful concatenation of circumstances’ was so extreme that the conviction had to be quashed on the basis that a fair trial had not taken place.

³⁴ Note that the defence of ‘duress’ is inapplicable in cases alleging where murder or attempted murder is at issue. See *R v Z* [2005] 2 AC 467

³⁵ See *LM, MB, DG, Betti Tabot and Yutunde Tijani v The Queen* [2010] EWCA Crim 2327, [8]

³⁶ See *R v N*; *R v LE* [2012] EWCA Crim 189, [45] Noting that the defence of duress is unlikely to succeed where a trafficked victim has had an opportunity to escape.

unlawful activities committed if such a decision was in the public interest.³⁷ Notwithstanding the existence of this Guidance, however, prosecutors in England and Wales frequently sought prosecutions against trafficked victims for offenses which they had unlawfully committed.³⁸ Against this backdrop, on several occasions, British Courts have had to exercise their jurisdiction to ‘stay’ prosecutions on the basis of an ‘abuse of process.’³⁹ The exercise of this jurisdiction, in effect, meant that the Courts would have quashed a conviction against a trafficked victim where the evidence suggested that the prosecutor failed to observe a legal process to which that victim was entitled; that legal process being, the prosecutors’ obligation to at least *consider* whether the circumstances of the case suggest that they should not prosecute the victim on the ground that she was compelled to commit an unlawful activity.

Notwithstanding the increasing frequency with which the jurisdiction to ‘stay’ has been invoked in British Courts faced with the issue of the punishment of trafficked victims in recent years, it can be argued that, in general, the cases that have been decided thus far suggest that the Courts are inclined to *narrowly* construe the circumstances which indicate that a victim was *compelled* to commit unlawful activities as a result of having been trafficked,⁴⁰ and will only intervene to find an abuse of process in the most flagrant of cases where new evidence indicates that, had the prosecution been aware of such evidence, the victim would not have been prosecuted. For instance, in the case of *Tijani*,⁴¹ the appellant was convicted and sentenced to nine months’ imprisonment on account that she produced a fraudulent identity document when applying for a job at a care home. Although the Court accepted that she had been a victim of trafficking in the *past*,⁴² to the extent that she was forced into prostitution, it, however, narrowly construed the non-punishment provision, holding that the necessary nexus between compulsion by the trafficker and the offense in question had not been satisfied, since several months had elapsed

³⁷ – ‘Human Trafficking, Smuggling and Slavery’ (Crown Prosecution Service, 2014) <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/> accessed 9 December 2014. On the interpretation of the CPS Guidance, see LM & Ors [2010] EWCA Crim 2327

³⁸ Peter Carter and Parosha Chandran, ‘Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System’ in Parosha Chandran (ed), *Human Trafficking Handbook - Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 407

³⁹ For commentary, see John Spencer, ‘International law, people trafficking and the power to stay criminal proceedings for abuse of process’ (2014) 73(1) Cambridge Law Journal 11, 11-14

⁴⁰ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (n 14) [67] ‘[The cases] illustrate a tendency to narrow the interpretation of the non-punishment obligation to sentencing considerations, rather than to protection against the conviction of a trafficked person for offences which are caused or directly linked to their having been trafficked.’

⁴¹ *Tijani* (n 35)

⁴² *Ibid* [47]

between the trafficking incident and the offenses at issue. While, on the facts of this case, it can be argued that this was perhaps the correct approach, the decision arrived at does, however, beg the question as to whether the subjective perception of compulsion on the part of a victim is even remotely a relevant consideration in the Court's assessment of whether the offense was actually committed as a result of having been trafficked. This factor might be especially relevant in those cases involving victims trafficked for the removal of organs, for example, who, as a result of the grave physical consequences of their exploitation, may subjectively believe that they are still under compulsion when attempting to access medical services using falsified identity documents given to them by their traffickers, notwithstanding the fact that some time might have elapsed between the actual end of their exploitation and the commission of the unlawful offense. The question which arises in this regard is - should the fact that the exploitation has ended a few months before the commission of an unlawful offense completely extinguish the requirement of compulsion, notwithstanding the fact that a victim might still subjectively perceive herself as being under compulsion? Would it make a difference that the victim genuinely believed herself to be under a voodoo spell, as is often the case?⁴³ Would the outcome in such a case be different where the victim's family has been threatened in the country of origin, and the victim uses falsified identity documents to return home to allay these threats? Given the sensitive nature of these questions, as well as the overriding public policy considerations that arise in this context,⁴⁴ British courts should be open to the possibility of being a little more flexible in their approach to construing the notion of compulsion, especially in relation to *past* or *historic* victims of trafficking.

That said, there is some indication that British courts are perhaps now willing, in view of the UK's European anti-trafficking obligations, to countenance the prospect of overturning convictions obtained in contravention of the non-punishment obligation, where the facts of the case in question demonstrate a clear nexus between the trafficking ordeal and the offenses at issue. In *LM, MB, DG*,⁴⁵ for example, the three appellants in question were initially regarded as

⁴³ Kathryn Cullen-DuPont, *Human Trafficking* (Infobase Publishing 2009) 80

⁴⁴ See Pam Bowen, 'Trafficking-related Criminal Legislation in the UK, Special Measures for Victims and Sentencing Guidelines' in Parosha Chandran (ed), *Human Trafficking Handbook - Recognising Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 401 (nothing that the policy considerations against complete immunity for victims of trafficking include the fact that such immunity will act as a pull factor to traffickers to exploit and victim more vulnerable victims since they would know that victims would not be prosecuted for these offenses. Complete immunity might also open the flood gates to a litany of claims by arrested persons that they were victims of trafficking).

⁴⁵ *LM, MB, DG* (n 35)

being in breach of the Sexual Offenses Act by allegedly controlling the prostitution of two Eastern European women. Later, however, the prosecution accepted that they had engaged in such unlawful activity under compulsion by their traffickers, and entered into a plea agreement with them to the effect that they would have been treated as victims, rather than perpetrators. When the hearing was held, however, the prosecutors nevertheless went ahead and sought prosecutions against the victims, notwithstanding the non-punishment obligation. On appeal, the Court of Appeal quashed the convictions on the basis that, had the prosecution considered the non-punishment obligation at the relevant time, it would have arrived at the conclusion that the victims in question had engaged in the unlawful activity of controlling prostitution as a direct result of having been compelled to do so by their traffickers. In other words, in ignoring the non-punishment obligation when it had become clear that the victims in question were compelled to commit the unlawful activity, the prosecution had failed to correctly discharge its duty.⁴⁶

The type of evidence which will engage the Court's jurisdiction to 'stay' a prosecution with regard to an alleged abuse of process was recently considered in *L and Others v R*,⁴⁷ a case which jointly dealt with the non-punishment obligation in the context of three children and one adult who were trafficked for the production of cannabis and prostitution, respectively. The Court began its assessment by reiterating that the non-punishment obligation does not protect trafficked victims from penalties imposed where the offense at issue is wholly unconnected to the trafficking ordeal.⁴⁸ That said, the Court, however, pointed out that, in general, trafficking cases involving the non-punishment of victims must be treated with greatest sensitivity.⁴⁹ Without being too prescriptive, the Court noted that if the facts of a particular case show that the victim was under levels of compulsion which meant that in reality their culpability was extinguished, then it will exercise its jurisdiction to 'stay' a prosecution.⁵⁰ In other cases, however, such as where the victim only provides a 'colourful excuse for criminality', that is, where the offenses at issue are unconnected to the trafficking situation, an abuse of process claim, it held, will fail.⁵¹ Applying these general principles to the facts of the instant case, the Court found that the decision to sentence the first appellant, *THN*, after he was brought in a

⁴⁶ Ibid [34]

⁴⁷ [2013] EWCA Crim 991, [2014] 1 All ER 113, [2013]

⁴⁸ Ibid [14]

⁴⁹ Ibid [13]

⁵⁰ Ibid [33]

⁵¹ Ibid

freezer container from Vietnam to the UK, and then compelled to cultivate cannabis, could no longer stand, given that ‘his criminal activities were integral to the circumstances in which he was a victim.’⁵² In other words, the Court considered that if the evidence available to it had been available to the lower court at the time when the matter was first heard, a decision to prosecute would have amounted to an abuse of process. The same ruling ensued in *R v T*, which concerned a 17 year old who was sentenced to two years at a Young Offenders’ Institution for cultivating cannabis. The Court considered that at the time when this sentence was imposed, no proper consideration was given to the question of whether *T* was a victim of trafficking, and that ‘his presence in the cannabis factory formed part and parcel of the process in which he was victimised.’⁵³ In *R v HVN*, a child, aged 17, was sentenced to 8 months of detention and training on each count of cultivating cannabis. Although he was compelled to engage in this unlawful activity, the UK Border Agency’s (UKBA) assessment that he was a ‘credible’ victim of trafficking was not communicated to the lower court in time, which ultimately resulted in him being convicted and sentenced. On appeal, the Court quashed the conviction on the basis that had the new evidence been available to the lower court, *HVN* would not have been prosecuted, and that if he was, this would have amounted to an abuse of process.⁵⁴ A similar ruling was arrived at in *R v L*, a case in which a native of Uganda who was trafficked into prostitution in the North of England and London, respectively, was nevertheless sentenced to 6 months imprisonment for the possession of a false passport. On appeal, the Court of Appeal considered that:

Given the appellant’s prolonged exposure to involuntary prostitution and enforced control, the offence she actually committed appears to us to have arisen as a result of her being a victim of trafficking who was provided with a forged passport for her to use as if it were genuine, and the use of it represented a step in a process by which she would escape. On the basis of the facts which are now known, if this appellant had been prosecuted, an abuse of process argument would have been advanced with a realistic prospect of success.⁵⁵

In view of the foregoing, it can be argued that, although it is certainly a positive development that UK Courts, cognizant of the country’s European Anti-Trafficking commitments, have increasingly been prepared to exercise their jurisdiction to render the prosecution of trafficked victims an ‘abuse of process’ where it is found that such persons have been compelled to

⁵² Ibid [45]

⁵³ Ibid [55]

⁵⁴ Ibid [67]

⁵⁵ Ibid [74]

commit unlawful activities as a result of the trafficking ordeal, such an exercise of jurisdiction often comes a little too late, when most of the damage has already been done.⁵⁶ For example, in *R v HTB*,⁵⁷ a young Vietnamese girl was trafficked to the UK and exploited for cannabis cultivation. She was prosecuted, convicted of drug offences and sentenced to 20 months' imprisonment. When the matter was heard in the lower court, the Judge found that she had been aware that she was coming to the UK illegally, and that upon arrival in the UK, it must have been clear to her that she was cultivating an illegal crop. In view of the sentencing guidelines in operation at the time, the Judge imposed what he considered to be the shortest sentence in all the circumstances. On appeal, however, the Court of Appeal decided that the appellant was a child at the relevant time when she was compelled to commit the unlawful offense, and, accordingly, quashed the custodial sentence and replaced it with a non-custodial sentence. Unfortunately, however, by the time her appeal was heard, she was already six months into the original sentence, which meant that she would have already been re-victimised.

Apart from *R v HTB*, however, the victims in the cases discussed above who were eventually released from their sentences upon the quashing of their respective convictions had effectively been denied the myriad support and assistance measures provided for by European anti-trafficking law, simply because of their initial treatment by competent national authorities as criminals, rather than victims. Moreover, it can also be argued that where a finding of 'abuse of process' is only made after several months following the conviction of victims for unlawful activities,⁵⁸ and the victim has therefore had to spend the intervening period in detention

⁵⁶ In the immigration context, see *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC) [170]. Here, the appellant, a Thai victim of trafficking, who was forced into prostitution for eight months in the UK, was nevertheless prosecuted and sentenced to nine months imprisonment for using a false passport when attempting to return to Thailand after escaping from her trafficker. When the matter was heard, on appeal, by the Upper Tribunal of the Immigration and Asylum Chamber, two Immigration Judges considered that, 'although there is a non-punishment provision included in the Convention, the appellant was prosecuted for using a false passport and sentenced to nine months in prison. We accept, however, that this was not a breach of the Convention by the respondent as he was not aware at the time of the prosecution that the appellant was a victim of trafficking as she did not disclose this fact until after her sentence was completed.' Note, however, the reality is that at the time, the CPS Guidelines on human trafficking had in fact stated that the failure of a trafficking victim to disclose information should not count against her as it can be explained by many reasons.

⁵⁷ EWCA Crim 211 (2012)

⁵⁸ Note the troubling sentiments of the Court of Appeal in *R v N*; *R v LE* (n 36) [86.e] '[...] an abuse of process argument in the context of the Convention which is advanced long after conviction is most unlikely to succeed on the basis that subsequent events show that if the decision to prosecute were to be taken at this later stage, the result might be different from the decision actually taken in the light of contemporary standards and guidance as they existed when it was taken.' The practical effect of these sentiments is that once several months have passed since the conviction of a trafficked victim who has been prosecuted for an unlawful activity which she was compelled to commit, it will be very unlikely that the Court's jurisdiction to 'stay' the prosecution on a basis of an 'abuse of process' could be invoked. This appears to be in direct contravention to European anti-trafficking law.

centres, such as prisons with seasoned criminals, secondary victimisation might very well be an inevitable consequence. This second layer of victimisation not only exposes victims to the prospect of being re-trafficked, as reportedly transpired in the case of *THN*,⁵⁹ but also militates against any reasonable prospect of them adequately recovering from the trafficking ordeal. Added to this is the fact that when victims are convicted for unlawful activities which they have been compelled to commit – whether for a week or a day – they are then placed in the rather precarious position of possibly being exposed to stigma and discrimination upon their return to smaller, close-knit communities, where news of their conviction might in all likelihood not be well received.

The foregoing discussion paints a rather disturbing picture of the extent to which European countries have been successful in implementing the non-punishment obligation.⁶⁰ More specifically, the practice of a number of European countries on this sensitive issue suggests that there is a ‘disconnect’ between what exists as a matter of European anti-trafficking law, and what transpires in practice. In many respects, this ‘disconnect’ has serious adverse implications, particularly in so far as the primacy of victims’ rights is concerned. Indeed, in those countries where a narrow construction of the non-punishment provision is currently countenanced, such as the UK, there is a minimalist approach in operation which, as case law illustrates, is not beneficial for many trafficked victims. The negative human rights implications of such an approach involve not only secondary victimization, but also reduced trust in the criminal justice system. This might perhaps explain why the appellant in *R v N*⁶¹ has, at the time of writing,

⁵⁹ L and Others and R (n 47) [43]

⁶⁰ See generally, Bijan Hoshim ‘The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law’ (2013) 1(2) Groningen Journal of International Law 5

⁶¹ *R v N* (n 36) In this case, the appellant, a 17 year-old Vietnamese boy, was arrested, convicted and sentenced to an 18 months detention and training order for engaging in the illegal production of cannabis. Following his conviction, however, fresh evidence was provided by competent national authorities which indicated that he had been a victim of trafficking, notwithstanding the prosecution’s earlier assessment that he was smuggled to the UK. After having served his sentence, the matter was nevertheless brought on appeal. The Court of Appeal refused to find an abuse of process, on the ground that the appellant had been smuggled to the UK; had been in communication with his cousin during this time; was found in possession of cash; and could have, during a three-day period away from the house, taken the opportunity to escape. The problem with this ruling, however, is that the Court appeared to exclusively focus on the circumstances of his recruitment, and therefore failed to recognise that, in keeping with the definition of child trafficking, ‘harbouring’ and ‘transportation’ also constitute prohibited ‘acts.’ While it accepted that he had been exploited, the Court, however, failed to interpret ‘compulsion’ in a manner that secures the best interest of the child. It seemingly required cogent evidence of threat, coercion, use or force, etc, which are not necessary in so far as the ‘means’ element is concerned when defining child trafficking. But, even if ‘compulsion’ ought to be narrowly construed, the Court nevertheless failed to take account of the fact that the victim was threatened by his exploiter to the effect that if he had not returned to the house, he would be killed.

decided to lodge an application before the ECtHR for consideration.⁶² It might also explain why, despite opposition from the Lord Chief Justice of England and Wales,⁶³ GRETA⁶⁴ has continued to express extreme dissatisfaction regarding the manner in which the non-punishment obligation has been implemented across Europe.

B. Witness Protection

European anti-trafficking law envisages that European countries will adopt a comprehensive witness protection scheme aimed at protecting victims, witnesses, as well as their family members from retaliation or intimidation from traffickers and their associates.⁶⁵ This scheme must, at the very minimum, include physical protection, relocation and, in appropriate cases, identity changes.⁶⁶ While this obligation has been largely complied with in some European countries, existing state practice in most countries suggests that more needs to be done to protect victims of trafficking.⁶⁷ For instance, in countries such as Albania,⁶⁸ Austria,⁶⁹ Hungary⁷⁰ and Malta,⁷¹ weak witness protection schemes run the risk of unnecessarily exposing victims to reprisals from traffickers, which might account for the fact that very few victims utilize such schemes in practice. In other countries, such as France,⁷² Italy⁷³ and Romania,⁷⁴ although witness

⁶² Ibid [13] ‘The language of Article 26 is directed at the sentencing decision rather than the decision to prosecute.’ This appears to be a narrow, inflexible, and arguably incorrect, construction of Article 26 CoE Anti-Trafficking Convention, and will likely be challenged in proceedings before the ECtHR. See OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (n 14) 27

⁶³ Ibid [86.b] ‘We underline that in future the only publication likely to be relevant to an inquiry into an alleged abuse of process in the context of Convention obligations is the CPS Guidance in force at the time when the relevant decisions were made. [...] Unless it is to be argued that the CPS Guidance itself is inadequate and open to question because it has failed to keep itself regularly updated in the light of developing knowledge, for the purposes of the court considering an abuse of process for which the prosecutorial authority is responsible, it is the CPS Guidance which should be the starting point, and in the overwhelming majority of cases, the finishing point for any argument of alleged non-compliance with Article 26.’

⁶⁴ GRETA, *Second General Report on GRETA’s activities covering the period from 1 August 2011 to 31 July 2012* (GRETA(2012)13)[59] (referring to ‘a patchy pattern as regards the implementation of Article 26 of the Convention.’)

⁶⁵ Recital [19] and Article 12 EU Anti-Trafficking Directive; Article 12(2) and 28 CoE Anti-Trafficking Convention; Article 18 Standing of Victims Directive

⁶⁶ Ibid

⁶⁷ See generally Elaine Pearson, *Human Traffic, Human Rights: Redefining Victim Protection* (Anti-Slavery International, 2002) 74

⁶⁸ GRETA, *Report on Albania* (GRETA(2011)22, 2011)[176]; CRC, ‘Concluding observations the combined second to fourth periodic reports of Albania, adopted by the Committee at its sixty-first session (17 September-5 October 2012)’, CRC/C/ALB/CO/2-4, 7 December 2012 [82(c)]

⁶⁹ GRETA, *Report on Austria* (GRETA(2011)10, 2011) [123]

⁷⁰ US Department of State, *Trafficking in Persons Report - Hungary* (2014) 201

⁷¹ GRETA, *Report on Malta* (GRETA(2012)14, 2014) [191]

⁷² GRETA, *Report on France* (n 27) [230]

⁷³ GRETA, *Report on Italy* (n 28) [201]

protection schemes do exist, it appears that these have not been very effective in preventing traffickers from threatening and, in some cases, even intimidating victims to such an extent that they are left with no choice but to withdraw from court proceedings. More specifically, there have been reports of serious threats having been hurled at victims by traffickers when entering and leaving courtrooms, which have reportedly led to many victims deciding to abandon court proceedings, especially where those threats are in relation to family members living in third states in relation to which France,⁷⁵ for example, has no jurisdiction. In countries such as Montenegro⁷⁶ and Bosnia and Herzegovina,⁷⁷ unsatisfactory witness protection schemes also expose victims to re-victimisation, which is not helped by the lack of technical expertise and equipment to adequately protect victims from intimidation in the case of the latter. Iceland's relatively small size has meant that, on at least one occasion, a trafficked victim has had to be relocated to another Nordic country, in view of serious threats from traffickers.⁷⁸ Additionally, in Ukraine,⁷⁹ reports are that many of the victims who enrol in witness protection schemes are not treated by competent national authorities in a sensitive manner, while in Cyprus,⁸⁰ the potential restraint on victims' agency has prevented many victims from fully participating in that country's witness protection scheme. Of some concern, too, is the fact that hostels in Ireland, wherein which victims are supposed to be housed, are easily discoverable; this is a situation which GRETA has expressed some concern about.⁸¹

In light of the foregoing, it appears that, although the European anti-trafficking law provides an adequate framework for witness protection,⁸² existing state practice on the part of a number of European countries suggests that there is a 'disconnect' between what obtains at the legislative level and that which obtains at the operational level.⁸³

⁷⁴ GRETA, *Report on Romania* (GRETA(2012)2, 2012) [198]

⁷⁵ GRETA, *Report on France* (n 27) [230]

⁷⁶ GRETA, *Report on Montenegro* (GRETA(2012)9, 2012) [192]

⁷⁷ GRETA, *Report on Bosnia and Herzegovina* (GRETA(2013)7, 2013) [163]

⁷⁸ GRETA, *Report on Iceland* (GRETA(2014)17) [183]

⁷⁹ US Department of State, *Trafficking in Persons Report - Ukraine* (2014) 391

⁸⁰ GRETA, *Report on Cyprus* (GRETA(2011)8, 2011) [205]

⁸¹ GRETA, *Report on Ireland* (GRETA(2013)15, 2013) [176]

⁸² See also, The Police Cooperation Convention for South-East Europe (providing for witness protection as between Albania, Bosnia and Herzegovina, Hungary, the Republic of Moldova, Romania, Serbia and "the former Yugoslav Republic of Macedonia"); The Agreement on the co-operation in the area of witness protection (2012) (providing for witness protection as between Austria, Croatia, the Czech Republic, Estonia, Hungary, Poland, Romania and Slovenia); as well as Europol's Witness Protection Network.

⁸³ Arcadio Díaz Tejera, 'Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe' (Parliamentary Assembly of the Council of Europe, 2014) [47] - [51] (Several issues were identified by Rapporteur Díaz Tejera. These include the difficult of balancing the rights of the defence with that of

5.2. The Provision of Basic Supplies

It is perhaps trite that as a first step towards facilitating victims' recovery, these vulnerable persons must be afforded appropriate basic supplies commensurate with their individual needs. In the specific context of European anti-trafficking law, this obligation is couched in the following general terms:

Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.⁸⁴

[...] assistance and support measures [...] shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of [...] material assistance.⁸⁵

Although this provision does not specifically explain the scope of the obligation to provide 'material assistance', it is perhaps implicit that such assistance should include, at a minimum, the provision of food, clothing as well as other basic supplies.⁸⁶ While these services may, at first glance, appear to be so basic that explicit legislative stipulation is arguably not necessary, existing state practice suggests that at the European level, there are a few European countries which do not *fully* comply with this important obligation. Perhaps the most obvious instance of non-compliance arises in those circumstances, as described in chapter four, where victims are not correctly identified, and, as a corollary, are therefore denied the provision of the basic supplies which European anti-trafficking law envisages.⁸⁷ Another of the instances in which

the witness in situations where anonymity had been granted (the Czech Republic and France); the absence of a robust system to not re-victimise certain witnesses (Austria); the lack of clarity in the law regarding agreements concluded with witnesses (the Netherlands); the psychological and socio-economic difficulties encountered by witnesses, such as separation from their families and unemployment (Croatia, Italy, the Netherlands, Norway and Slovenia); a lack of motivation coupled with a lack of trust in the authorities and their confidentiality measures (Serbia and the Slovak Republic); problems of institution building (Montenegro and Slovenia); a lack of funding and/or human resources (Croatia, Poland and Serbia); and the increasing prominence of social media results in greater difficulties for the witness protection programmes when creating new identities for individuals (the Netherlands and Slovenia)).

⁸⁴ Article 11 (2) EU Anti-Trafficking Directive

⁸⁵ Article 11 (5) EU Anti-Trafficking Directive; See also Article 12 CoE Anti-Trafficking Convention

⁸⁶ Council of Europe Committee of Ministers, 'Explanatory Report to the Council of Europe Convention on action against trafficking in human beings' (n 13) [156]. Note that 'material assistance' is to be distinguished from 'financial assistance' on the basis that the former is not limited to the provision of money; it may include the provision of food and clothing.

⁸⁷ UN Office of the High Commissioner, *Human Rights and Human Trafficking: Fact Sheet No. 36* (United Nations, 2014) 12 ('If a trafficked person is not identified at all or is incorrectly identified as a criminal or an irregular or smuggled migrant, then this will directly affect that person's ability to access the rights to which she or he is entitled [...] In short, failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory.')

there might be non-compliance with the obligation to provide basic supplies arises in those circumstances where, in keeping with the hegemonic assumptions discussed in chapter 2, victims who do not appear to be passive are not treated as ‘real’ victims, and are, accordingly, denied access to basic services.⁸⁸ Other possible denials of victims’ right to access basic supplies arises in those circumstances where shelters in which victims are accommodated simply do not have the necessary capacity to provide such supplies, which has the indirect result of precluding these victims from accessing the full range of basic services envisaged by European anti-trafficking law.⁸⁹ In addition, there have also been cases in which the budgetary allocation by the state to designated shelters has been fixed in advance, which has meant that the amount of money envisaged to cover the provision of basic services has not always been adequate, as in the case of Latvia.⁹⁰ In addition, in countries such as Portugal⁹¹ and Bulgaria,⁹² the lack of adequate state funding also has the indirect effect of denying some victims a consistent provision of basic services. Additionally, in Moldova,⁹³ the quality of basic supplies has been seriously questioned by GRETA, while in Ireland,⁹⁴ there are reports that some victims of trafficking are not afforded choice foods commensurate with their specific dietary requirements. To the extent that some European countries do not fully comply with the obligation to provide basic supplies to victims of trafficking, it can be argued that there is a ‘disconnect’ between law and practice.

5.3. The Provision of Medical and Psychological Assistance

The exploitation of trafficked victims often results in them developing a number of medical and psychological problems, both of a transient and permanent nature.⁹⁵ These problems are numerous, but include, *inter alia*, HIV/AIDS and other forms of sexually-transmitted diseases,⁹⁶

⁸⁸ May-Len Skilbrei, ‘Chapter 10 Moving Beyond Assumptions? The Framing of Anti-Trafficking Efforts in Norway’ (2012) *Transnational Migration, Gender* 211, 213 (explaining that ‘the emphasis on the lack of agency of the victims [...] can be harmful in its ability to [...] protect and assist victims.’)

⁸⁹ GRETA, *Report on France* (n 27) [145]

⁹⁰ GRETA, *Report on Latvia* (GRETA(2012)15, 2012)[131]

⁹¹ GRETA, *Report on Portugal* (GRETA(2012)17, 2012)[131]

⁹² GRETA, *Report on Bulgaria* (n 24) [167]

⁹³ GRETA, *Report on Moldova* (GRETA(2011)25, 2011) [120]

⁹⁴ GRETA, *Report on Ireland* (n 81) [176]

⁹⁵ Mary Burke, *Human Trafficking: Interdisciplinary Perspectives* (Routledge 2013) 244

⁹⁶ Diana Mason, Judith Leavitt and Mary Chaffee, *Policy and Politics in Nursing and Healthcare* (Elsevier Health Sciences 2013) 736

tuberculosis,⁹⁷ and post-traumatic stress disorder.⁹⁸ In recognition of the deleterious effect which exploitation has on victims of trafficking, European anti-trafficking law makes provision for measures to be taken on an informed and consensual basis to attend to the medical and psychological needs of victims.⁹⁹

While, in general, this obligation is complied with by the majority of European countries, it can nevertheless be argued that a minimalist approach to such an obligation is currently countenanced by some countries. For example, the provision of medical services is only offered on an *emergency*, as opposed to routine, basis to victims in Austria,¹⁰⁰ while in other countries, such as Bulgaria, unless NGOs make the requisite payments for healthcare on behalf of victims, these persons are unable to access medical services free of charge.¹⁰¹ Additionally, in France¹⁰² and Cyprus,¹⁰³ victims of trafficking have reportedly faced a number of practical challenges when attempting to access specialised medical services, particularly in those cases where they do not have valid residence permits. In Malta, several victims of trafficking, notwithstanding the trauma of the trafficking ordeal, have been required to provide evidence to the effect that they have special medical needs or lack sufficient resources to cover their own medical bills before they are allowed to access medical services.¹⁰⁴ Additionally, reports are that, in Serbia¹⁰⁵ and Norway, victims with acute medical problems have nevertheless had very limited access to specialist medical practitioners, such as gynaecologists and dentists.¹⁰⁶

More generally, there appears to be a general lack of awareness among health professionals of their obligation to provide medical services to trafficked victims in Serbia¹⁰⁷ and Greece,¹⁰⁸ while in Romania, the lack of training of healthcare professionals, the constant turn-over of previously trained workers, as well as low incentives in terms of salary, sometimes compromise the quality

⁹⁷ Alexis Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Greenwood Publishing Group 2009) 84

⁹⁸ Scott Firsing, *Disturbing Times: The State of the Planet and Its Possible Future* (South Publishers 2008) 61

⁹⁹ Article 11(5) EU Anti-Trafficking Directive; Article 12 (1)(a) CoE Anti-Trafficking Convention; Articles 7 and 9(2) Residence Permit Directive; Article 9(1)(c) and 20(d) Standing of Victims Directive

¹⁰⁰ GRETA, *Report on Austria* (n 69) [100]

¹⁰¹ GRETA, *Report on Bulgaria* (n 24) [164]

¹⁰² GRETA, *Report on France* (n 27) [145], [146]

¹⁰³ GRETA, *Report on Cyprus* (n 80) [141], [143]

¹⁰⁴ GRETA, *Report on Malta* (n 71) [143]

¹⁰⁵ Committee on Economic, Social and Cultural Rights, 'Concluding observations on the second periodic report of Serbia', Adopted by the Committee at its fifty-second session (28 April-23 May 2014), E/C.12/SRB/CO/2, 10 July 2014 [25]

¹⁰⁶ GRETA, *Report on Norway* (n 21) [194]

¹⁰⁷ GRETA, *Report on Serbia* (GRETA(2013)19, 2013) [171]

¹⁰⁸ US Department of State, *Trafficking in Persons Report - Greece* (2014) 188

of medical services afforded victims.¹⁰⁹ Additionally, in the UK¹¹⁰ and Spain,¹¹¹ some victims have reportedly experienced long delays in terms of accessing physicians, which raises questions as whether the needs of those who require immediate medical attention are being met in a timely fashion.

In so far as the provision of psychological assistance is concerned, there have been reports that in Bulgaria, for example, such assistance is limited to victims of internal trafficking, arguably at the exclusion of foreign victims.¹¹² Additionally, there have also been concerns about whether victims from the European Economic Area (EEA) who do not comply with the ‘habitual residency’ condition are being afforded effective access to psychological assistance in Ireland, for example.¹¹³ While counselling is generally provided to victims of trafficking in Norway¹¹⁴ and Romania,¹¹⁵ amongst others, some concerns nevertheless remain over whether these are tailored to meet the specific needs of child victims, for example. Moreover, concerns have also been expressed regarding the extent to which male victims who have been trafficked into labour exploitation are routinely provided with psychological assistance commensurate with their individual needs.¹¹⁶

In view of the foregoing, it is arguable that, while, in general, European anti-trafficking law provides a robust framework for the provision of medical and psychological assistance, existing state practice in a number of European countries suggests two things: the first is that a minimalist approach is currently countenanced in respect of the provision of medical services to the extent that only *emergency* medical services are provided in the vast majority of cases; and, second, some countries place additional, and often unnecessary, restrictions on victims’ access to both medical and psychological assistance, which largely reflect their ‘hegemonic assumptions’ about who is and who isn’t a ‘real’ victim. This has serious implications, particularly regarding the recovery of trafficked victims.

¹⁰⁹ GRETA, *Report on Romania* (n 74) [145]

¹¹⁰ GRETA, *Report on the United Kingdom* (n 31) [256]

¹¹¹ GRETA, *Report on* (GRETA(2013)16, 2013)[259]

¹¹² GRETA, *Report on Bulgaria* (n 24) [180]

¹¹³ GRETA, *Report on Ireland* (n 81) [178]

¹¹⁴ GRETA, *Report on Norway* (n 21) [171]

¹¹⁵ GRETA, *Report on Romania* (n 74) [145]

¹¹⁶ GRETA, *Report on Sweden* (GRETA(2014)11, 2014) [150]

5.4. Special Measures to Protect Child Victims

In recognition of the fact that children are one of the most vulnerable groups of persons to trafficking and re-victimisation post-exploitation,¹¹⁷ European anti-trafficking law provides a number of measures that are aimed at protecting and supporting these vulnerable persons, in accordance with their best interests. More specifically, the types of assistance envisaged by European anti-trafficking law not only include the provision of material assistance,¹¹⁸ but also access to education,¹¹⁹ and protection from secondary victimisation in the context of criminal proceedings.¹²⁰ In relation to the latter, European anti-trafficking law envisages the use of appropriate technologies to facilitate child victims' participation in criminal proceedings;¹²¹ the use of specially designed premises aimed at protecting child victims from unnecessary encounters with traffickers;¹²² limited number of interviews to be conducted by trained professionals;¹²³ as well as the appointment of legal guardians to represent children where the actions of parents raise conflicts of interests¹²⁴ or where they are unaccompanied or separated from their parents.¹²⁵ Furthermore, European anti-trafficking law envisages that European countries will pay special attention to the needs of unaccompanied child victims, and where appropriate, provide requisite assistance to family members of these persons.¹²⁶ More profoundly, as the case of *R v O*¹²⁷ reiterates, European anti-trafficking law also places an obligation on states to ensure that where the age of a young victim is uncertain, that that person will be presumed to be a child, and thus provided with assistance commensurate with her needs.¹²⁸

Notwithstanding these strong prescriptions, however, existing state practice in a number of European countries suggests that, in many respects, the obligation to protect and assist child victims of trafficking is not being fully complied with in practice. Several examples are

¹¹⁷ David Hodge and Cynthia Lietz, 'The International Sexual Trafficking of Women and Children A Review of the Literature' (2007) 22(2) *Affilia: Journal of Women and Social Work* 163

¹¹⁸ Article 11 EU Anti-Trafficking Directive; See also Article 12 CoE Anti-Trafficking Convention

¹¹⁹ Article 14 (1) EU Anti-Trafficking Directive; Article 12(1)(f) CoE Anti-Trafficking Convention

¹²⁰ Article 15(2) and (3) EU Anti-Trafficking Directive;

¹²¹ Article 15(4) EU Anti-Trafficking Directive; 24(1)(a) Standing of Victims Directive

¹²² Article 15(3)(b) EU Anti-Trafficking Directive

¹²³ Article 15(3)(a), (d) and (e) EU Anti-Trafficking Directive

¹²⁴ Article 14(1) and 15(1) EU Anti-Trafficking Directive; Article 24(1)(b) Standing of Victims Directive

¹²⁵ Article 16(3) and (4) EU Anti-Trafficking Directive; 10(4)(a) CoE Anti-Trafficking Convention; Article 24(1)(b) Standing of Victims Directive

¹²⁶ Article 14(3) EU Anti-Trafficking Directive

¹²⁷ *R v O* [2008] EWCA Crim. 2835 [13]

¹²⁸ Article 13(2) EU Anti-Trafficking Directive; Article 10(3) CoE Anti-Trafficking Convention; Article 24(2) Standing of Victims Directive

instructive on this point. In Austria,¹²⁹ Italy,¹³⁰ Poland,¹³¹ Slovakia¹³² and the UK,¹³³ for example, there have been numerous reports of child victims of trafficking, especially those who are unaccompanied, absconding from care facilities as a result of being inadequately supervised by national authorities.¹³⁴ This troubling state of affairs would suggest that there is a strong possibility that at least some of these children are being re-trafficked. In other countries, such as France,¹³⁵ Norway¹³⁶ and Georgia,¹³⁷ amongst others, there have also been reports that child victims are sometimes accommodated in non-specialised shelters; this runs the risk of exposing these vulnerable persons to secondary victimisation, especially when they are housed with adults. Additionally, the appointment of legal guardians to assist child victims remains a challenge in a number of countries, including Italy,¹³⁸ Slovenia¹³⁹ and Serbia,¹⁴⁰ where, because of a lack of training, guardians have been generally unable to develop the level of trust required to fully support child victims of trafficking. In Armenia, there have also been cases in which parents, notwithstanding evidence suggesting their involvement in the trafficking of their children, have nevertheless been permitted to represent their children in the context of court proceedings, in lieu of state appointed guardians.¹⁴¹

More generally, there have also been reports that in a number of countries, the proper identification and referral of child victims of trafficking remains a fundamental challenge in practice.¹⁴² In the UK¹⁴³ and Italy,¹⁴⁴ for example, competent national authorities have typically conducted x-rays on children so as to determine their age(s). Notwithstanding this, however, x-ray results have in some instances been inaccurate, which have had the indirect effect of

¹²⁹ GRETA, *Report on Austria* (n 69) [88]

¹³⁰ GRETA, *Report on Italy* (n 28) [64], [133]

¹³¹ GRETA, *Report on Poland* (n 30) [147]

¹³² GRETA, *Report on Slovakia* (GRETA(2011)9, 2011) [81]

¹³³ GRETA, *Report on the United Kingdom* (n 31) [105]

¹³⁴ Eve Byrne, *Trafficked children who go missing from care Briefing for joint inquiry by APPG for Runaway and Missing Children and Adults, and APPG for Looked After Children and Care Leavers* (Barnados, 2012) 1; Lucie Shuker, *Evaluation of Barnardo's Safe Accommodation Project for Sexually Exploited and Trafficked Young People* (University of Bedfordshire, 2013) 23

¹³⁵ GRETA, *Report on France* (n 27) [150] - [151]

¹³⁶ GRETA, *Report on Norway* (n 21) [173]

¹³⁷ GRETA, *Report on Georgia* (GRETA(2011)24, 2011) [148]

¹³⁸ GRETA, *Report on Italy* (n 28) [143]

¹³⁹ GRETA, *Report on Slovenia* (GRETA(2013)20, 2013) [123]

¹⁴⁰ GRETA, *Report on Serbia* (n 107) [158]

¹⁴¹ GRETA, *Report on San Armenia* (GRETA(2012)8, 2012) [166]

¹⁴² See e.g. OSCE, 'Report by the Special Representative on her visit to Ireland from 30 January to 02 February 2012', SEC.GAL/246/12, 21 February 2013 [9]

¹⁴³ GRETA, *Report on the United Kingdom* (n 31) [244]

¹⁴⁴ GRETA, *Report on Italy* (n 28) [133]

denying victims who are under the age of 18 requisite assistance and support commensurate with their individual needs.¹⁴⁵ In other countries, such as Poland,¹⁴⁶ Austria,¹⁴⁷ Spain,¹⁴⁸ and the UK,¹⁴⁹ a lack of awareness and training on the part of some professionals as to the specific dynamics of child trafficking (e.g. that there is no requirement for the ‘means’ element in the definition of trafficking to be satisfied), often results in many of these victims being penalised for offenses such as theft, drug trafficking and prostitution. Quite worrying also is the fact that a large number of children all across Europe, particularly those of Roma, Egyptian and Kosovo decent, remain extremely vulnerable to trafficking and are, in many instances, trafficked. This is reportedly due to the fact that countries such as Albania,¹⁵⁰ Bulgaria,¹⁵¹ France,¹⁵² Montenegro¹⁵³ and Norway,¹⁵⁴ amongst others, have not done enough in recent years to eliminate discrimination and prejudice that perennially affect these vulnerable groups. The consequence of this failure on the part of these countries lies in the fact that many of these children are not adequately identified as victims of trafficking or sufficiently supported post-identification.¹⁵⁵ That said, even in those circumstances where these persons are correctly identified, access to appropriate care, housing and psychological assistance, in general, remains problematic.¹⁵⁶ Systemic problems in registering Roma children at birth, as well as in enrolling them in schools in Macedonia¹⁵⁷ and Bulgaria,¹⁵⁸ for example, also run the risk of exposing a number of these children to trafficking.

In sum, the implementation deficit described above suggests that, in many respects, reform of the law and practice on the protection and assistance of child victims is both necessary and appropriate.

¹⁴⁵ Ibid

¹⁴⁶ GRETA, *Report on Poland* (n 30) [66]

¹⁴⁷ GRETA, *Report on Austria* (n 69) [88]

¹⁴⁸ GRETA, *Report on Spain* (n 111) [183]

¹⁴⁹ GRETA, *Report on the United Kingdom* (n 31) [104]. On the challenges of identifying trafficked children in the UK, see Emma Kelly, ‘Safeguarding Trafficked Children’ in Hilary Owen and Liz Hughes (eds), *Good Practice in Safeguarding Children: Working Effectively in Child Protection* (Jessica Kingsley Publishers 2009)186

¹⁵⁰ GRETA, *Report on Albania* (n 68) [93]

¹⁵¹ GRETA, *Report on Bulgaria* (n 24) [71]

¹⁵² GRETA, *Report on France* (n 27) [184]

¹⁵³ GRETA, *Report on Montenegro* (n 76) [60]

¹⁵⁴ GRETA, *Report on Norway* (n 21) [63]

¹⁵⁵ Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic report of Austria, adopted by the Committee at its sixty-first session (17 September - 5 October 2012)’, CRC/C/AUT/CO/3-4, 3 December 2012 [60]

¹⁵⁶ Ibid

¹⁵⁷ GRETA, *Report on Macedonia* (GRETA (2014)12, 2014) [118]

¹⁵⁸ GRETA, *Report on Bulgaria* (n 24) [71]

5.5. Accommodation

In keeping with the ‘victim-centred’ approach to human trafficking described in section 5.1., European anti-trafficking law places an obligation on European countries to provide ‘appropriate and safe accommodation’ to victims of trafficking.¹⁵⁹ For accommodation to be ‘appropriate’, it must necessarily take account of any sex-specific needs of individual adult victims as well as child victims of trafficking, such needs varying greatly depending on their pre-existing vulnerabilities, the type and duration of exploitation they have had to endure, as well as the nature of rehabilitation that is specifically required.¹⁶⁰ Appropriate accommodation also implies that victims must be cared for by trained professionals;¹⁶¹ their freedom of movement must not be unnecessarily curtailed;¹⁶² and their privacy must, to the greatest extent possible, be respected while in accommodation.¹⁶³ Such treatment should not merely be afforded for a fixed period of time, but for as long as it takes for victims to adequately recover from the trauma of exploitation.¹⁶⁴ ‘Safe’ accommodation, on the other hand, implies that shelters must be designed and guarded in such a way as to protect trafficked victims from harassment by traffickers and their associates.¹⁶⁵

While state practice in this area suggests that some European countries are committed to the task of providing appropriate and safe accommodation to all victims of trafficking,¹⁶⁶ there are, however, still a number of gaps in implementation. The most serious challenges appear to be a lack of capacity; the inaccessibility of some shelters by particular categories of trafficked victims, such as men and boys;¹⁶⁷ as well as the substandard treatment sometimes experienced by some

¹⁵⁹ Article 11(5) EU Anti-Trafficking Directive; Article 12(1)(a) CoE Anti-Trafficking Convention; 9(3)(a) Standing of Victims Directive

¹⁶⁰ Lucy Mair and Camille Warren, *Securing Housing After Trafficking* (AIRE Centre, 2013) 18

¹⁶¹ Lucie Shuker, *Safe accommodation for sexually exploited and trafficked young people* (University of Bedfordshire, 2011) 2

¹⁶² GRETA, *Second General Report on GRETA's activities covering the period from 1 August 2011 to 31 July 2012* (GRETA(2012)13) 57

¹⁶³ *Ibid*

¹⁶⁴ Recital [18] EU Anti-Trafficking Directive. See also, IOM, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (International Organization for Migration, 2007) 101

¹⁶⁵ Council of Europe, ‘Explanatory Report to CoE Anti-Trafficking Convention’ (n 13) [154]

¹⁶⁶ E.g. GRETA reports that, in the Netherlands, for example, there are designated shelters for male victims of trafficking. See GRETA, *Report on the Netherlands* (GRETA(2014)10, 2014)[7], [161]. Additionally, in Iceland, five pregnant Nigerian women who were trafficked to that country were reportedly allowed to stay in shelters for an extended period. See GRETA, *Report on Iceland* (n 78) [133]. Difficulties in terms of male victims accessing accommodation exists in Sweden, for example. See GRETA, *Report on Sweden* (GRETA(2014)11, 2014) [150].

¹⁶⁷ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘Concluding observations on the second periodic report of Azerbaijan’, adopted by the Committee at its eighteenth session (15-26 April 2013), CMW/C/AZE/CO/2, 27 May 2013 [44]

victims of trafficking. On the issue of capacity, it has been reported that, in the Netherlands,¹⁶⁸ for example, due to consistently high numbers of victims requesting accommodation, as well as the lengthy duration of their stay in shelters, very few unoccupied beds are generally available for newly admitted victims of trafficking. In Poland¹⁶⁹ and Bosnia and Herzegovina,¹⁷⁰ similar problems arise in view of the fact that existing shelters are generally under-funded and understaffed. Additionally, in some countries, such as Romania and Bulgaria, it appears that the duration of accommodation in shelters is wholly inadequate. More specifically, the European Commission has expressed serious concern about the fact that the duration of accommodation in these countries is fixed to 10 days, which is less than the 30-day recovery and reflection period to which trafficked victims are entitled.¹⁷¹ In the UK (more specifically, Scotland), while accommodation is generally available in Glasgow, reports are that there are very few options for accommodation in other areas.¹⁷² In Romania, reports suggest that some counties do not accommodate victims who did not reside in those specific counties prior to having been trafficked,¹⁷³ while in France, there are indications that some shelters do not accept victims who cannot prove that they have adequate resources to support themselves for the duration of time for which accommodation is required.¹⁷⁴ Additionally, in Norway, reports suggest that victims have sometimes been required to pay accommodation fees out of their subsistence allowance,¹⁷⁵ while in the Netherlands victims have in the past been refused admission to shelters on the ground that they are of foreign origin, or from complex social and economic backgrounds, or unable to speak English or Dutch.¹⁷⁶ As a matter of policy, some victims have also been required to vacate designated accommodation immediately after investigations or criminal proceedings have been completed.¹⁷⁷

More generally, there have been several reports that countries such as Germany,¹⁷⁸ Luxembourg,¹⁷⁹ Armenia,¹⁸⁰ Austria,¹⁸¹ Bulgaria,¹⁸² Denmark,¹⁸³ Iceland,¹⁸⁴ and, to a lesser extent,

¹⁶⁸ GRETA, *Report on the Netherlands* (n 166) [157]

¹⁶⁹ GRETA, *Report on Poland* (n 30) [163]

¹⁷⁰ GRETA, *Report on the Bosnia and Herzegovina* (n 77) [112]

¹⁷¹ European Commission, 'On the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities' SWD(2014) 318 final 6

¹⁷² GRETA, *Report on the United Kingdom* (n 31) [270]

¹⁷³ GRETA, *Report on Romania* (n 74) [138]

¹⁷⁴ GRETA, *Report on France* (n 27) [142]

¹⁷⁵ GRETA, *Report on Norway* (n 21) [153]

¹⁷⁶ GRETA, *Report on the Netherlands* (n 166) [157]

¹⁷⁷ *Ibid*

¹⁷⁸ US Department of State, *Trafficking in Persons Report - Germany* (2014) 185

Italy,¹⁸⁵ do not in general provide designated accommodation to male victims of trafficking. It can be argued that the general reluctance on the part of a number of European countries to provide accommodation to male victims of trafficking reflects the hegemonic assumption that male victims are not ‘real’ victims, and, accordingly, do not need accommodation, as expressly stated by several stakeholders in Latvia.¹⁸⁶ This approach not only means that male victims of trafficking are treated in a discriminatory manner, but also that these victims are particularly at risk for becoming secondarily victimised. In short, such hegemonic assumptions about who is a ‘real’ victim, and who is therefore deserving of accommodation, further prevent male victims from self-identifying, and may deter many from instituting criminal proceedings against their traffickers.

Beyond the issue of capacity, the suboptimal treatment to which victims of trafficking housed in state shelters in some countries are sometimes subject also raises serious concerns. For instance, there are reports that in Montenegro, bars are sometimes placed at the windows of shelters wherein victims are housed, which are akin to detention-like facilities.¹⁸⁷ A number of victims have also been housed in detention-like facilities in England and Wales,¹⁸⁸ and direct provision centres in Ireland,¹⁸⁹ subsequent to having been denied a recovery and reflection period. Poorly equipped caregivers in Belarus,¹⁹⁰ as well as unnecessary restrictions on victims’ freedom of movement in Turkey,¹⁹¹ also raise concerns about whether the ‘safe and secure’ accommodation obligation is being fully complied with in practice. Additionally, the sharing of accommodation in state shelters as between trafficked victims and traffickers in Ireland¹⁹² and Portugal,¹⁹³ for example, also suggests that re-victimisation in the form of intimidation or re-trafficking is a real possibility for victims identified in those countries. In fact, in Portugal, there

¹⁷⁹ GRETA, *Report on Luxembourg* (GRETA(2013)18, 2013) [105]

¹⁸⁰ GRETA, *Report on Armenia* (n 141) [128]

¹⁸¹ GRETA, *Report on Austria* (n 69) [94]

¹⁸² GRETA, *Report on Bulgaria* (n 24) [165]

¹⁸³ GRETA, *Report on Denmark* (n 25) [137]

¹⁸⁴ GRETA, *Report on Iceland* (n 78) [136]

¹⁸⁵ GRETA, *Report on Italy* (n 28) [147]

¹⁸⁶ GRETA, *Report on Latvia* (n 90) [136]

¹⁸⁷ GRETA, *Report on Montenegro* (n 76) [142]

¹⁸⁸ British Parliament, *The Trade in Human Beings: Human Trafficking in the UK, Sixth Report of Session 2008-09, Vol 2: Oral and Written Evidence* (Home Affairs Committee of the House of Commons, 2009) 187

¹⁸⁹ Human Rights Committee, ‘Concluding observations on the fourth periodic report of Ireland’, Adopted by the Committee at its 111th session (7-25 July 2014), CCPR/C/IRL/CO/4, 19 August 2014 [20]

¹⁹⁰ US Department of State, *Trafficking in Persons Report – Belarus* (2014) 94

¹⁹¹ US Department of State, *Trafficking in Persons Report – Turkey* (2014) 384

¹⁹² GRETA, *Report on Ireland* (n 81) [175]

¹⁹³ GRETA, *Report on Portugal* (n 91) [127]

has been at least one report of traffickers being allowed to remove a child victim from a shelter after claiming to be family members.¹⁹⁴ More generally, the lack of privacy and confidentiality in the context of some shelters operating in Ireland¹⁹⁵ and Montenegro,¹⁹⁶ as well as the general lack of rehabilitative activities for victims housed in some shelters in Malta¹⁹⁷ are also major challenges that arise from time to time. Ensuring the security of shelters wherein trafficked victims are accommodated also remains a serious concern for authorities in the Netherlands¹⁹⁸ and Portugal.¹⁹⁹

In view of the above, it can be argued that, in many respects, the European anti-trafficking obligation to provide appropriate and safe accommodation to victims of trafficking is, at present, being complied with in a piece-meal fashion. More specifically, the state practices described above suggest that there is, indeed, a ‘disconnect’ between European anti-trafficking law and that which transpires in practice in a number of European countries.

5.6. Privacy and Confidentiality

As intimated in the foregoing sections, trafficked victims are extremely vulnerable individuals whose physical and psychological well-being can be further compromised should they be exposed to adverse circumstances in the aftermath of having been identified.²⁰⁰ In an effort to ensure that these circumstances do not arise, European anti-trafficking law provides that victims of trafficking must be afforded privacy and confidentiality to the greatest extent possible.²⁰¹ More specifically, European countries are under an obligation to ensure that the identities of trafficked victims in the context of both identification and criminal justice proceedings are not revealed to the public, including to the press, and that any data about victims is adequately stored and used in conformity with basic principles of European law.²⁰² The objective underlying these legislative stipulations is to protect victims and, by extension, their family

¹⁹⁴ Ibid [128]

¹⁹⁵ GRETA, *Report on Ireland* (n 81) [175]

¹⁹⁶ GRETA, *Report on Montenegro* (n 76) [142]

¹⁹⁷ GRETA, *Report on Malta* (n 71) [123]

¹⁹⁸ GRETA, *Report on the Netherlands* (n 166) [237]

¹⁹⁹ GRETA, *Report on Portugal* (n 91) [128]

²⁰⁰ Jodie Beeson, ‘Psychology of Human Trafficking’ in Michael Palmiotto (ed), *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press 2014) Chp 4

²⁰¹ Article 11 CoE Anti-Trafficking Convention; Article 21 Standing of Victims Directive. cf. The right to privacy is not an absolute right, given that it has to be balanced against the Article 10 ECHR right to freedom of expression.

²⁰² See e.g. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)

members from unnecessary exposure and intimidation that might otherwise prevent them from successfully recovering from the trafficking ordeal or from instituting criminal proceedings against traffickers.²⁰³

While state practice on the issue of privacy and confidentiality is, in large part, quite promising, there are nevertheless serious gaps in implementation which require amelioration.²⁰⁴ During an onsite visit to Croatia, for example, GRETA's representatives reported that they witnessed first-hand an instance where the privacy of victims who were housed in a state shelter was seriously compromised by care workers.²⁰⁵ The mixing of men, women and child victims of trafficking, without adequate supervision and without clear demarcations in so far as their interactions are concerned, in shelters in Montenegro is also of some concern as it risks exposing these vulnerable individuals to re-victimisation.²⁰⁶ There are also concerns regarding the extent to which the data of some trafficked victims is adequately stored in Portugal²⁰⁷ and Armenia,²⁰⁸ where shortcomings in communication between state officials and NGO representatives risk unwittingly exposing victims' personal information, such as their sexual histories and HIV/AIDS status. There have also been reports of victims' names being published by the press in Armenia,²⁰⁹ Bosnia and Herzegovina,²¹⁰ Spain,²¹¹ and Moldova,²¹² while ensuring anonymity in the context of trials involving trafficked victims remains a perennial challenge in the UK,²¹³ especially in cases adjudicated upon by Employment Tribunals.

In short, while it appears that, for the most part, the vast majority of European countries comply with the obligation to respect the privacy of trafficked victims, as well as ensure the confidentiality of details related to these persons, the examples identified above suggest that, in a few countries, there is a 'disconnect' between what obtains as a matter of law, and that which obtains in practice.

²⁰³ UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (United Nations, 2009) 52

²⁰⁴ Office of the High Commissioner for Human Rights, 'Who are the Victims of Human Trafficking?' (*United Nations*, 5 November 2009) <<http://www.ohchr.org/EN/NewsEvents/Pages/VictimsOfHumanTrafficking.aspx>> accessed 11 December 2014 (noting that in some countries, 'screening procedures sometimes woefully fail to respect the rights of the victims to privacy and confidentiality.')

²⁰⁵ GRETA, *Report on Croatia* (GRETA(2011)20, 2011) [95]

²⁰⁶ GRETA, *Report on Montenegro* (n 76) [142]

²⁰⁷ GRETA, *Report on Portugal* (n 91) [112]

²⁰⁸ GRETA, *Report on Armenia* (n 141) [71]

²⁰⁹ *Ibid*

²¹⁰ GRETA, *Report on Bosnia and Herzegovina* (n 77) [163]

²¹¹ GRETA, *Report on Spain* (n 111) [274]

²¹² OSCE, 'Report by the Special Representative on her visit to the Republic of Moldova, 31 October - 3 November 2011, SEC.GAL/147/12,' 19 July 2012 [14]

²¹³ GRETA, *Report on the United Kingdom* (n 31) [366]

5.7. Information, Documentation and Interpretation/Translation

Without the timely and accurate provision of information, trafficked victims cannot fully understand their rights or make informed choices regarding the options available to enable their recovery, protection, or participation in criminal proceedings.²¹⁴ Against this backdrop, European anti-trafficking law provides that trafficked victims should be provided with information on a number of issues, including, but not limited to, the recovery and reflection period; the possibilities for compensation; the types of support services available; the nature and risks associated with participating in criminal proceedings;²¹⁵ and the possibilities and risks associated with restorative justice programs.²¹⁶

The importance of the obligation to provide timely and accurate information to victims of trafficking was recently explored in a French case decided in mid-2012.²¹⁷ In that case, the appellant was arrested by police for illegally entering and residing in France. She was made subject to a deportation order the same day of her arrest, without any consideration of the fact that she might have been trafficked. She challenged this order before the Administrative Court of Appeal, but her application was rejected. On the basis of a subsequent appeal, however, the Conseil d'État found that, contrary to the provisions of the French Code of Entry and Stay of Foreigners and Asylum Seekers, the appellant was not provided with services appropriate to her needs, despite the fact that the authorities had reasonable grounds to believe that she was a victim of trafficking for forced labour. More importantly, the Court found that in failing to *inform* the victim in question as to her right to a 30-day recovery and reflection period, the police were in breach of their obligation under the requisite statute. In consequence of this, the Court annulled the decree that was issued to have the appellant deported, and ordered the payment of EUR 3000 to her, in recognition of the breach of her right to receive adequate information as a victim of trafficking.

While this decision is of some significance as it indicates the primacy to be afforded the obligation to provide information, existing state practice in several European countries belies

²¹⁴ Article 11(5) and (6) EU Anti-Trafficking Directive; Article 5 Residence Permit Directive; Articles 3 (2), 4 and 9 Standing of Victims Directive

²¹⁵ *Ibid*

²¹⁶ Article 12(1)(b) Standing of Victims Directive

²¹⁷ Conseil d'Etat, application No. 339209, judgment of 15 June 2012 <<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026025637>> accessed 11 December 2015

the importance of this decision. For example, in Poland²¹⁸ and Austria,²¹⁹ reports are that victims of trafficking are not routinely informed of the existence of the recovery and reflection period, while in the UK,²²⁰ competent national authorities do not always provide adequate information to domestic workers, in particular, as to the possibilities available within the context of the national referral mechanism. Additionally, in Malta, reports suggest that victims of trafficking do not generally receive specific information as to what options are available to them in respect of claims for compensation.²²¹

In so far as the obligation to provide trafficked victims with necessary documentation is concerned, it is important to note that European anti-trafficking law envisages that passports and identity cards, travel documents and residence permits should be issued in a timely manner so as to enable victims not only to access basic services, but also to return to their places of origin, if they so desire.²²² Notwithstanding this express stipulation, however, state practice in a number of countries reveals that there is a gap between what European law provides and what sometimes obtains in practice. For instance, in France, the replacement of identity documents confiscated by traffickers takes a disproportionately long period of time to be issued, during which time victims are sometimes denied access to several benefits envisaged by French anti-trafficking law.²²³ Additionally, in Norway²²⁴ and Spain,²²⁵ there have been reports that *temporary* identity documents have had to be provided to some victims of trafficking, not because of an unwillingness on the part of competent national authorities to provide permanent documents, but because cooperation with certain consular offices, such as the Nigerian consulate, is both difficult and time-consuming. Moreover, in Romania, there have been reports of several victims of trafficking encountering difficulties when attempting to access support services, such as educational facilities, because their identity documents have either not been issued in a timely manner or not been issued at all.²²⁶

With regard to the obligation to provide interpretation/translation to trafficked victims, it is important to note that European anti-trafficking law provides that victims of trafficking must be

²¹⁸ GRETA, *Report on Poland* (n 30) [169]

²¹⁹ GRETA, *Report on Austria* (n 69) [108]

²²⁰ GRETA, *Report on the United Kingdom* (n 31) [199]

²²¹ GRETA, *Report on Malta* (n 71) [153]

²²² Article 16(4) CoE Anti-Trafficking Convention

²²³ GRETA, *Report on France* (n 27) [145]

²²⁴ GRETA, *Report on Norway* (n 21) [204]

²²⁵ GRETA, *Report on Spain* (n 111) [185]

²²⁶ GRETA, *Report on Romania* (n 74) [143]

afforded both the opportunity to be understood, as well as the opportunity to understand, the options available to them.²²⁷ While, in general, interpretation/translation services are available in the vast majority of European countries, some practical difficulties nevertheless arise in a few countries, which require attention. For example, the European Commission recently expressed concern about the fact that the relevant legislation in Bulgaria appears to only guarantee interpretation/translation in the context of criminal proceedings,²²⁸ which begs the question as to whether victims are truly aware of the options available outside of that context. On a more practical level, competent authorities in Malta continue to face difficulties in finding interpreters who are versed in the full-range of languages spoken by foreign victims of trafficking,²²⁹ while in Norway, the costs associated with interpretation/translation have proven to be extremely high and, in some instances, prohibitive.²³⁰ Additionally, the UK faces a number of practical challenges in respect of the provision of interpretation/translation to victims of trafficking. The first of these challenges relates to the quality of such services, particularly in areas outside of the major cities.²³¹ The second relates to the fact that some first Responders are limited in their capacity to provide interpretation/translation, primarily because state funding for such services is inadequate at present.²³² Finally, it also appears from a review of a number of cases decided by British courts to date that the obligation to provide interpretation/translation is not always afforded the level of primacy it deserves. For example, in *R v HVN*,²³³ the Court of Appeal recalled that when the appellant - a child victim of trafficking who was prosecuted for controlling cannabis - first appeared via video link at Nottingham Crown Court, no interpreter was present, which resulted in the case being adjourned. As a result of this adjournment, the victim in question could not benefit from the protection measures which the Court of Appeal later found that he was entitled to as a victim of trafficking. In the case of *R v O*,²³⁴ the Court of Appeal found that the lack of interpretation/translation did not ‘of itself undermine the fairness of the proceedings or the safety of the conviction’²³⁵ of a trafficked victim, despite its earlier statement that, ‘it is plain that there were some difficulties in understanding the appellant’ and

²²⁷ Article 11(1) EU Anti-Trafficking Directive; Article 7(3) Residence Permit Directive; Articles 5(3) and 7(1),(3) and (7) Standing of Victims Directive; Article 12(1)(c) CoE Anti-Trafficking Convention

²²⁸ European Commission, ‘Report on the Application of the Residence Permit Directive’ (n 255) 7

²²⁹ GRETA, *Report on Malta* (n 71) [113]

²³⁰ GRETA, *Report on Norway* (n 21) [92]

²³¹ GRETA, *Report on the United Kingdom* (n 31) [184]

²³² *Ibid*

²³³ *R v HVN* (n 47)

²³⁴ *R v O* (n 127)

²³⁵ *Ibid* [12]

that ‘she [was] clearly not literate in English or it seems at all.’²³⁶ This ruling appears to have been based on several (questionable) assumptions; for example, letters from the appellant’s then solicitor which stated that, having met with the appellant, he ‘was satisfied that she understood and spoke sufficient English without the necessity of finding an Edo interpreter’;²³⁷ as well as a statement from the counsel for the appellant to the effect that at no time did the appellant appear to have difficulty understanding what was being said to her, though her ‘strong accent’ meant ‘taking her account in stages.’²³⁸ While it is arguable that the decision ultimately reached by the Court of Appeal was correct, the fact that it was prepared to adopt a minimalist approach to the obligation to provide interpretation/translation is troubling, and sets a worrying precedent for other courts which may in future encounter victims who have ‘strong accent[s]’.²³⁹

In view of the foregoing, it can be argued that while, in general, European anti-trafficking law on the questions of information, documentation and interpretation/translation is being complied with in the majority of European countries, concerns nevertheless arise in respect of a few countries which either adopt a minimalist approach to the provision of these services or have altogether denied victims’ access to such services.

5.8. Regularisation of Immigration Status

Cognizant of the precarious position which many victims of trafficking often find themselves in, particularly those who do not have the citizenship of the destination country, European anti-trafficking law specifically provides for an obligatory *recovery and reflection* period, as well as for the granting of discretionary *residence permits*. The recovery and reflection period, the duration of which is unspecified in the Residence Permit Directive²⁴⁰ but specified to be at least 30 days in the CoE Anti-Trafficking Convention,²⁴¹ ought to be issued by competent national authorities once there are *reasonable grounds* for believing that a person has been trafficked.²⁴² Such a period of recovery and reflection has the objectives of affording victims the opportunity to escape the influence of their traffickers, whilst temporarily benefiting from appropriate

²³⁶ Ibid [11]

²³⁷ Ibid

²³⁸ Ibid

²³⁹ Cf. Article 7(7) Standing of Victims Directive (‘Victims may challenge a decision not to provide interpretation or translation. The procedural rules for such a challenge shall be determined by national law.’)

²⁴⁰ Article 6(1) Residence Permit Directive (‘The duration and starting point of the period referred to in the first subparagraph shall be determined according to national law.’)

²⁴¹ Article 13(1) CoE Anti-Trafficking Convention

²⁴² Ibid

assistance and support measures commensurate with their needs.²⁴³ It also has the objective of affording victims the opportunity to make an informed decision as to whether they wish to cooperate with competent national authorities in the institution of criminal proceedings.²⁴⁴ By contrast, residence permits afford victims of trafficking the opportunity to remain in the destination country for an extended period of time following the expiration of the recovery and reflection period, either for the purposes of cooperating with competent national authorities in the institution of criminal proceedings against traffickers²⁴⁵ or on the basis of their personal situation,²⁴⁶ which may include their age, disability or medical status, amongst others. Such residence permits ought to, in principle, be renewable, provided that the foregoing conditions continue to exist.²⁴⁷ Moreover, the issuance of residence permits must be without prejudice to victims' right to seek refugee status/asylum.²⁴⁸ In accordance with EU anti-trafficking law, the *recovery and reflection period* can, however, be terminated if the victim in question actively, voluntarily and on his/her own initiative renews contacts with his/her traffickers,²⁴⁹ or where public policy or national security interests justify such termination.²⁵⁰ On the other hand, the *residence permit* can be terminated if the authorities have decided to bring an end to the criminal proceeding wherein which the victim was a participant;²⁵¹ where the victim ceases to cooperate with competent national authorities;²⁵² where the victim voluntarily renews contact with his/her traffickers;²⁵³ or where public policy or national security interests warrant its termination.²⁵⁴

While it is certainly a positive development that a number of European countries have extended the recovery and reflection period beyond the minimum 30-day period,²⁵⁵ in recognition of the fact that this minimum period does not always afford victims the best

²⁴³ Ibid; Article 6(1) Residence Permit Directive;

²⁴⁴ Suzanne Egan, 'Protecting the victims of trafficking: problems and prospects' (2008) 1 European Human Rights Law Review 106, 111

²⁴⁵ Article 14(1) (b) CoE Anti-Trafficking Convention

²⁴⁶ Ibid Article 14(1) (a)

²⁴⁷ Article 13(1) Residence Permit Directive; 14(3) CoE Anti-Trafficking Convention

²⁴⁸ Article 14(5) CoE Anti-Trafficking Convention

²⁴⁹ Article 6(4) Residence Permit Directive

²⁵⁰ Ibid

²⁵¹ Ibid Article 14(e)

²⁵² Ibid Article 14(d)

²⁵³ Ibid Article 14(a)

²⁵⁴ Ibid Article 14(c)

²⁵⁵ European Commission, 'Report on the Application of the Residence Permit Directive' {SWD(2014) 318 final} 5 (Belgium allows for a 45-day recovery and reflection period; Hungary and Malta allow for a 60-day recovery and reflection period; and Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia and Denmark allow for three months recovery and reflection)

possible opportunity to recover sufficiently from the trafficking ordeal, a recent report by the EU Commission suggests that a number of countries have been satisfied with adopting a minimalist approach to the operationalisation of this obligation, effectively fixing, irrespective of the individual circumstances of the case, the duration of the recovery and reflection to the minimum of 30 days.²⁵⁶ Furthermore, it is also important to note that in some countries, including Andorra²⁵⁷ and San Marino,²⁵⁸ national laws either do not explicitly provide for a recovery and reflection period or the issuance of residence permits. Additionally, in Georgia,²⁵⁹ Bulgaria,²⁶⁰ Ireland²⁶¹ and Italy,²⁶² reports suggest that even where national law provides for a recovery and reflection period, competent national authorities do not consistently provide support services to victims during this time. In Norway,²⁶³ the situation is slightly different, to the extent that, while support services are generally afforded victims of trafficking during the reflection and recovery period, information on the availability of the 30-day period is not provided on a consistent basis, which effectively limits the number of persons who can reasonably benefit from this service.

More generally, in a number of countries, including Denmark,²⁶⁴ Romania,²⁶⁵ Slovenia²⁶⁶ and France,²⁶⁷ competent national authorities have reportedly been motivated by the wrong objective in affording victims the recovery and reflection period. While European anti-trafficking law prescribes the objectives of the recovery and reflection period to be (i) affording victims the opportunity to escape the influence of traffickers; (ii) allowing victims to recover from the trafficking ordeal; and (iii) affording victims the opportunity to make an informed decision as to whether they wish to participate in criminal proceedings, a number of European countries typically afford victims the 30-day period to prepare them for their impending departure or to pressure them into agreeing to participate in criminal proceedings.²⁶⁸ The challenge with this approach lies in the fact that it does not adequately take account of the severity of the trauma

²⁵⁶ Ibid (For example, Bulgaria, Cyprus, Czech Republic, Estonia, Spain, Finland, France, Hungary, Lithuania, Latvia, Portugal, Greece and Sweden)

²⁵⁷ GRETA, *Report on Andorra* (GRETA(2014)16, 2014) [79]

²⁵⁸ GRETA, *Report on San Marino* (GRETA(2014)19, 2014) [92]

²⁵⁹ GRETA, *Report on Georgia* (n 137) [178]

²⁶⁰ GRETA, *Report on Bulgaria* (n 24) [179]

²⁶¹ GRETA, *Report on Ireland* (n 81) [197]

²⁶² GRETA, *Report on Italy* (n 28) [147]

²⁶³ GRETA, *Report on Norway* (n 21) [191]

²⁶⁴ GRETA, *Report on Denmark* (n 25) [154]

²⁶⁵ GRETA, *Report on Romania* (n 74) [156]

²⁶⁶ GRETA, *Report on Slovenia* (n 139) [128]

²⁶⁷ GRETA, *Report on France* (n 27) [161]

²⁶⁸ See e.g. GRETA, *Report on Denmark* (n 25) [154]

typically experienced by trafficked victims or, indeed, the increased risk of re-victimisation which might ensue if states hastily seek to remove victims or demand that they cooperate in the institution of criminal proceedings before the time is appropriate for them to so do. Unfortunately, this minimalist approach not only manifests itself in the countries identified above, but also in Poland, where it has been reported that the full cooperation of victims is actually required in practice before the recovery and reflection period is granted.²⁶⁹ Additionally, in Ukraine,²⁷⁰ reports are that victims who fail to cooperate with the authorities during the recovery and reflection period are deported, seemingly in violation of the requirements of European anti-trafficking law.²⁷¹

One of the more controversial issues to have arisen in recent years is whether victims' renewal of contact with traffickers is a legitimate ground for states' termination of the recovery and reflection period.²⁷² The answer to this question is not at all straightforward, but it would seem that the application of this specific ground for terminating the recovery and reflection period might be compatible with the EU Residence Permit Directive,²⁷³ while at the same time incompatible with the CoE Anti-Trafficking Convention.²⁷⁴ Although GRETA has condemned the imposition of this ground, highlighting the difficulty of proving that a victim has 'voluntarily' renewed contacts with traffickers,²⁷⁵ it appears that EU member states are justified in invoking this ground on the basis that the CoE Convention itself includes a provision to the effect that the 'withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.'²⁷⁶ It might also be justified on the basis of the 'disconnection clause'²⁷⁷ included in said Convention which, although rejected by Russia,²⁷⁸ provides that:

²⁶⁹ GRETA, *Report on Poland* (n 30) [169]

²⁷⁰ US Department of State, *Trafficking in Persons Report - Ukraine* (2014) 391

²⁷¹ See Article 13(1) CoE Anti-Trafficking Convention ('During [the recovery and reflection] period it shall not be possible to enforce any expulsion order against him or her.')

²⁷² Note that several countries have included this ground of termination, including France, Finland, Luxembourg, the Netherlands, Malta and Slovenia.

²⁷³ Article 6(4) Residence Permit Directive

²⁷⁴ GRETA, *Report on Malta* (n 71) [135] ('GRETA recalls that the reasons listed in Article 13(3) of the Convention as justifying the non-observation of the recovery and reflection period by Parties do not include the re-establishment of contact with the trafficker.')

²⁷⁵ Article R316-1 Code governing the entry and stay of foreigners and right of asylum; GRETA, *Report on France* (n 27) [158]

²⁷⁶ Article 14 (3) CoE Anti-Trafficking Convention

²⁷⁷ Kamala Dawar, 'Disconnection Clauses: An Inevitable Symptom of Regionalism?' (2010) Society of International Economic Law Working Paper No. 2010/11 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632433> accessed 12 December 2014 (explaining that 'disconnection clauses' are legal provisions inserted into multilateral conventions to ensure that certain parties to

Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.²⁷⁹

In accordance with this provision, EU member states which are party to the CoE Anti-Trafficking Convention, but *not* non-EU member states which are party to the Convention, in so far as their *mutual relations* are concerned, are required to apply EU rules on human trafficking as provided for by the Residence Permit Directive, including the condition of terminating the recovery and reflection period on the ground of victims' voluntary renewal of contacts with their traffickers. The fundamental question which arises in this context, however, is the extent to which it can be said that the imposition of this condition prejudices the 'object and purpose of the [...] Convention'.²⁸⁰ If one were to examine Article 1(b) of the CoE Anti-Trafficking Convention, it is clear that one of the overarching objectives of said instrument is 'to protect the human rights of the victims of trafficking'.²⁸¹ If one were then to examine the effect of the ground for terminating victims' recovery and reflection period, that is, where they have voluntarily renewed contacts with their traffickers, it can be argued that, instead of contributing to the achievement of the foregoing objective, this ground has an adverse impact on the human rights of victims, as it opens up yet another avenue through which states can deny victims' access to the recovery and reflection period. This is especially the case in those circumstances where it is difficult to determine the extent to which victims have 'voluntarily' renewed contacts with their traffickers.²⁸² More specifically, it must be borne in mind that victims might suffer from the 'Stockholm Syndrome',²⁸³ and, accordingly, might become overly dependent on, and even supportive of, their traffickers. More generally, although the public policy ground for terminating the recovery and reflection period is compatible with European

the convention are not required to apply the rules of the convention because other relevant rules have already been agreed to among themselves).

²⁷⁸ Ibid 6 - 7

²⁷⁹ Article 40(3) CoE Anti-Trafficking Convention

²⁸⁰ Arthur Watts, Arnold Pronto and Michael Wood, *The International Law Commission 1999-2009: Volume IV: Treaties, Final Draft Articles, and Other Materials* (Oxford University Press 2010) 736 (arguing that 'the criterion concerning conformity with the object and purpose will provide the relevant standard for assessing the practice of the treaty parties.')

²⁸¹ Article 1(b) CoE Anti-Trafficking Convention

²⁸² GRETA, *Report on Luxembourg* (n 179) [111]

²⁸³ Oguzhan Omer Demir, *Characteristics of the Victims, the Traffickers and the Methods of Trafficking of Women for Sexual Exploitation in Turkey* (ProQuest 2008) 208

law, the fact that it is broadly construed by French authorities,²⁸⁴ for example, in favour of the state, suggests that a minimalist approach is presently in operation.

That said, with regard to the related obligation to provide victims of trafficking with residence permits, an uneven state of implementation appears to exist across several European countries. For example, in Armenia,²⁸⁵ the grounds for granting residence permits, as provided for under the CoE Anti-Trafficking Convention, are not recognized in domestic law, while in Bulgaria and the Czech Republic, the EU Commission has reported that the issuance of residence permits is sometimes subject to additional conditions beyond those recognized by EU law, such as the payment of fees, proof of accommodation or the presentation of entry visas as part of supporting documentation.²⁸⁶ The high costs typically associated with applying for residence permits, as well as the lengthy delays between the filing of applications and receiving such permits, are also practical impediments in France,²⁸⁷ Spain²⁸⁸ and the UK.²⁸⁹ Additionally, reports suggest that there is at times confusion on the part of Portuguese authorities regarding the appropriate distinction to be drawn between the recovery and reflection period and residence permits.²⁹⁰ Moreover, it has been reported that the six-month minimum duration for residence permits is not always complied with in practice in a number of countries, including Bulgaria, Estonia and Hungary,²⁹¹ while in Montenegro,²⁹² a disproportionately low number of victims have been granted such residence permits in practice. Additionally, there also appears to be inconsistent practices in Russia²⁹³ with regard to the issuance of residence permits, evidenced by the fact that some victims who should ordinarily benefit from such permits are nevertheless held in detention centres. In Slovakia, access to various services, such as accommodation and medical assistance, amongst others, during the period for which residence permits are issued, also remains a challenge.²⁹⁴ More generally, in so far as the withdrawal of residence permits is concerned, the EU Commission has also recently found that additional grounds, such as ‘public health considerations’, which go beyond the requirements of the Residence Permit

²⁸⁴ For full list of cases in French, see ‘Simple Search in Administrative Law’ (*Legifrance.gouv.fr*, 2014) <<http://www.legifrance.gouv.fr/rechJuriAdmin.do?reprise=true&page=1>> accessed 12 December 2014

²⁸⁵ GRETA, *Report on Armenia* (n 141) [135]

²⁸⁶ European Commission, ‘Report on the Application of the Residence Permit Directive’ (n 255) 8

²⁸⁷ GRETA, *Report on France* (n 27) [171]

²⁸⁸ GRETA, *Report on Spain* (n 111) [211]

²⁸⁹ GRETA, *Report on the United Kingdom* (n 31) [287]

²⁹⁰ GRETA, *Report on Portugal* (n 91) [136]

²⁹¹ European Commission, ‘Report on the Application of the Residence Permit Directive’ (n 255) 8

²⁹² *Ibid* 4

²⁹³ US Department of State, *Trafficking in Persons Report - Russia* (2014) 326

²⁹⁴ GRETA, *Report on Slovakia* (n 132) [107]

Directive, are provided for in some countries, such as Bulgaria, Finland, Hungary, Italy and Poland.²⁹⁵

In light of the foregoing, it can be argued that the obligation to provide victims of trafficking with a recovery and reflection period and, indeed, residence permits is, for the most part, applied in a piecemeal fashion across a number of European countries, which raises some fundamental questions as to whether victims of trafficking are currently being afforded the best possible chance of recovering from the exploitation which they have had to endure.

5.9. Repatriation

Victims of trafficking sometimes experience isolation, discontent, and immense frustration after having been identified and referred to appropriate service providers, especially in foreign countries to which they have been trafficked.²⁹⁶ This situation is typically made worse where the circumstances are such that they do not speak the language(s) of destination countries or where they have no material resources of their own or no familial support.²⁹⁷ Cognizant of this reality, European anti-trafficking law places an obligation on European countries of *origin* to facilitate and accept, without delay, the return of their nationals who have been trafficked abroad.²⁹⁸ In addition, it places an obligation on *destination* countries to return foreign victims of trafficking to their countries of origin in appropriate cases, having due regard to their rights, safety and dignity, as well as the status of on-going criminal proceedings.²⁹⁹

A review of the existing state practice regarding compliance with this important obligation reveals a number of positive developments in several European countries. For example, a number of countries, including Bulgaria,³⁰⁰ Spain, Poland, Italy, Latvia, Norway, amongst others, have operationalized formal Assisted Voluntary Return (AVR) programs³⁰¹ These programs, which are generally given effect to through bilateral agreements and partnership arrangements

²⁹⁵ European Commission, 'Report on the Application of the Residence Permit Directive' (n 255) 9

²⁹⁶ Denise Brennan, 'Competing claims of victimhood? Foreign and domestic victims of trafficking in the United States' (2008) 5(4) Sexuality Research & Social Policy 45, 55

²⁹⁷ Elizabeth Hopper and José Hidalgo, 'Invisible chains: Psychological coercion of human trafficking victims' (2006) 1 Intercultural Human Rights. Law Review 185, 195

²⁹⁸ Article 16(1) CoE Anti-Trafficking Convention

²⁹⁹ Ibid Article 16(2) (This can be following a victim's request to be returned home or upon expiration of the recovery and reflection period or residence permit).

³⁰⁰ Mariana Ilcheva, *Assisting and Reintegrating Child Victims of Trafficking in Bulgaria: Legal, Institutional and Policy Framework* (CSD Publishing 2012) 57

³⁰¹ IOM, *Migrant Assistance: Assisted Voluntary Return & Reintegration Counter Trafficking & Assistance to Vulnerable Migrants* (International Organization for Migration, 2012) 15 - 17

with the IOM, allow for the safe return of foreign victims of trafficking to their countries of origin in a dignified manner, through measures such as the provision of material assistance and basic supplies aimed at assisting in the reintegration of victims in their countries of origin.³⁰² Such programs not only reassure victims that they are valued, but also empower them to make more informed choices in future, as well as give them the tools necessary to maintain as normal a life as possible, thereby reducing the risk of re-trafficking.

Another positive development in this field relates to the offering of complementary protection to an increasing number of trafficked victims based on the Refugee Convention. By way of example, in the case of *AZ (Trafficked Women) Thailand CG*,³⁰³ the Upper Tribunal of the Immigration and Asylum Chamber was prepared to find that a Thai victim of trafficking could benefit from refugee protection, in accordance with Article 1(A)(2) of the Refugee Convention. Briefly, the facts of the case were that the victim in question was brought to the UK, and subsequently trafficked into sexual exploitation for 8 months, by a man with whom she had begun a relationship in Thailand. The tribunal heard evidence that she was threatened that her child, whom she had left in Thailand, would be killed if she did not comply with the demands of the trafficker in question, as well as other gruesome accounts of her being injected with drugs; forced to perform perverse sexual fantasies; and held in a dark room wherein she was left hungry when she attempted to escape. When she eventually managed to escape, and attempted to return to Thailand, she was arrested at a British airport and later sentenced to 9 months imprisonment for attempting to use a false passport. On appeal to the Upper Tribunal, however, the Judges found that, for the purposes of refugee protection, she had a ‘well-founded fear of persecution’,³⁰⁴ on the basis of having fallen into a ‘particular social group.’³⁰⁵ More specifically, the Tribunal considered that she fell into a ‘particular social group’ because she shared the immutable characteristic of having been a victim of trafficking for the purpose of sexual exploitation.³⁰⁶ It also found that she had a ‘well-founded fear of prosecution’ on a number of accounts: there was a strong possibility that she might have been re-trafficked if she had returned to Thailand, given that she was poorly educated and did not have strong familial support in that country; the possible complicity of immigration officials in Thailand; as well as the possible difficulties that she might face when attempting to reintegrate into her

³⁰² Ibid 10

³⁰³ (2010) UKUT 118 (IAC)

³⁰⁴ Ibid [116]

³⁰⁵ Ibid [140]

³⁰⁶ Ibid

community.³⁰⁷ Notwithstanding this positive ruling, however, the Tribunal was careful to note that it is not in every case that a trafficked victim's claim for refugee status, and therefore protection against repatriation, would be countenanced; several stringent conditions, particularly in respect of the well-founded fear of persecution requirement, must necessarily be satisfied.³⁰⁸ A similar sentiment is reportedly shared in Spain³⁰⁹ and Russia,³¹⁰ where these conditions are strictly applied in practice, to the extent that it is rare that trafficked victims will be granted refugee status, in lieu of being repatriated to their countries of origin.

More generally, a review of existing state practice reveals numerous instances where the European obligation of safe and dignified repatriation is not fully complied with by certain European countries. In Cyprus,³¹¹ Armenia³¹² and Andorra,³¹³ for example, no adequate repatriation framework is reportedly in place to facilitate the safe return of victims of trafficking to their countries of origin, while in Austria,³¹⁴ France,³¹⁵ Moldova,³¹⁶ Norway³¹⁷ and Slovakia,³¹⁸ although such a framework does exist, it has been reported that a number of victims, particularly those with irregular migrant status, have either been placed in detention centres, which invariably increases the risk of them being deported, or actually deported without regard to established repatriation procedures.³¹⁹ Additionally, in Bulgaria,³²⁰ Bosnia and Herzegovina,³²¹ Denmark,³²² Latvia,³²³ Russia³²⁴ and the UK,³²⁵ expedited repatriation procedures which do not

³⁰⁷ Ibid [148]

³⁰⁸ See e.g. AM and BM (Trafficked Women) Albania CG [2010] UKUT 80 (IAC). The Tribunal highlighted a list of non-exhaustive conditions. For example, whether the trafficker has reason to further pursue the victim; whether the victim will face severe ostracism, punishment (such as forced marriage) or discrimination if returned home; whether the victim has had a child as a result of trafficking, who will be deemed to be illegitimate and therefore unwelcome in the country of origin; whether the state is unwilling or unable to protect the victim against the prosecution feared; whether internal relocation is possible; and whether the victim is at a real (and not merely fanciful) risk of suicide, amongst others.

³⁰⁹ GRETA, *Report on Spain* (n 111) [214]

³¹⁰ US Department of State, *Trafficking in Persons Report - Russia* (2014) 324

³¹¹ GRETA, *Report on Cyprus* (n 80) [164]

³¹² GRETA, *Report on Armenia* (n 141) [144]

³¹³ GRETA, *Report on Andorra* (n 257) [89]

³¹⁴ GRETA, *Report on Austria* (n 69) [108]

³¹⁵ GRETA, *Report on France* (n 27) [130], [197]

³¹⁶ GRETA, *Report on Moldova* (n 93) [137]

³¹⁷ GRETA, *Report on Norway* (n 21) [137]

³¹⁸ GRETA, *Report on Slovakia* (n 132) [84]

³¹⁹ See also, OSCE, 'Report by the Special Representative on her visit to Romania, 9-12 September 2013', SEC.GAL/134/14, 15 August 2014 [19]

³²⁰ GRETA, *Report on Bulgaria* (n 24) [72]

³²¹ GRETA, *Report on Bosnia and Herzegovina* (n 77) [103]

³²² GRETA, *Report on Denmark* (n 25) [128]

³²³ GRETA, *Report on Latvia* (n 90) [162]

³²⁴ US Department of State, *Trafficking in Persons Report - Russia* (2014) 325

³²⁵ GRETA, *Report on the United Kingdom* (n 31) [311]

take proper account of victims' rights and interests run the risk of returning victims to situations of exploitation, which in turn increases the risk of them being re-trafficked. Moreover, there have been reports that, contrary to European anti-trafficking law, some countries, such as Romania³²⁶ and Croatia,³²⁷ do not consistently cooperate with other countries to facilitate the return of their nationals who have been trafficked abroad. On a related issue, Moldovan authorities have reported that, in some instances, they face tremendous difficulties in terms of getting destination countries, such as Russia and the United Arab Emirates, to cooperate with them in the repatriation of their nationals who have been trafficked abroad.³²⁸ In other instances, such as reported by GRETA in the context of the UK, even where cooperation is fruitful as between the UK and most source countries, it appears that there is typically inadequate assessment by UK authorities of the risks associated with returning victims to their countries of origin.³²⁹ This is further complicated by the practice often countenanced by UK authorities of returning victims through the 'cheapest' method; that is, long bus rides.³³⁰

In light of the foregoing, it can be argued that while, in some respects, European anti-trafficking law as well as the concomitant practice of some member states with regard to repatriation have produced some positive results, other countries appear to countenance a minimalist approach, which runs the risk of exposing victims to re-victimisation.

5.10. Reintegration

Victims of trafficking often find it extremely difficult to live as normal a life as possible after the trafficking ordeal has ended.³³¹ In fact, many victims, upon their return to their countries of origin, have been reported to have become destitute and, in some cases, have even been re-trafficked.³³² In view of this, European anti-trafficking law places an obligation on those State Parties which are *destination* countries to adopt the necessary rules to afford victims of trafficking who have become *lawful residents* (i.e. those with resident permits) access to the

³²⁶ GRETA, *Report on Romania* (n 74) [170]

³²⁷ GRETA, *Report on Croatia* (n 205) [114]

³²⁸ GRETA, *Report on Moldova* (n 93) [77]

³²⁹ GRETA, *Report on the United Kingdom* (n 31) [311]

³³⁰ *Ibid* [309]

³³¹ Mark Lusk and Faith Lucas, 'The challenge of human trafficking and contemporary slavery' (2009) 25(1) *Journal of Comparative Social Welfare* 49, 55

³³² Cherish Adams, 'Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims' (2011) 43 *George Washington International Law Review* 201

labour market, vocational training and education.³³³ Similarly, those State Parties which are source countries are under an obligation, following the receipt of nationals who have previously been trafficked abroad, to make their *best effort* to secure the reintegration of these individuals by affording them access to the labour market, the education system and vocational training.³³⁴

Existing state practice regarding the obligation to secure the reintegration of trafficked victims appears to suggest that, in many respects, this obligation is largely viewed as a hortatory, rather than mandatory, commitment by quite a number of European countries.³³⁵ More specifically, the European Commission has recently reported that access to the labour market for many victims of trafficking remains a fundamental challenge in a number of European countries, and, in particular, Slovakia and Lithuania, where access is on unequal terms vis-a-vis nationals or, alternatively, victims are only allowed to access salaried activities.³³⁶ Additionally, social reintegration remains problematic for many victims of trafficking in Albania,³³⁷ while in Bosnia and Herzegovina,³³⁸ Georgia³³⁹ and Serbia,³⁴⁰ no long-term rehabilitation programs are in place to assist in the recovery of trafficked victims. Additionally, in Denmark,³⁴¹ although reintegration programs do exist, the efficacy of these programs is reportedly largely unknown, since no follow-up contacts are made by competent authorities with victims to ascertain whether any progress has been made once victims have returned to their communities of origin. In other countries, such as Macedonia³⁴² and Georgia,³⁴³ competent authorities' lack of awareness as to the possibilities for reintegration, as well as understaffed facilities, largely comprising of unspecialised workers, collectively render reintegration a tremendously difficult process. In Ireland, reintegration efforts are reportedly compromised at times by competent national authorities constantly relocating victims to areas where no support structures are in place.³⁴⁴ Moreover, in the UK (more specifically, Scotland), eligibility for participation in reintegration

³³³ Articles 11 and 12 EU Anti-Trafficking Directive; Article 12(4) CoE Anti-Trafficking Convention

³³⁴ Ibid Article 16(5) CoE Anti-Trafficking Convention

³³⁵ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined second and third periodic reports of Serbia', CEDAW/C/SRB/CO/2-3, Adopted by the Committee at its fifty-fifth session (8-26 July 2013) [24(b)]

³³⁶ European Commission, 'Report on the Application of the Residence Permit Directive' (n 255) 9

³³⁷ GRETA, *Report on Albania* (n 68) [88]

³³⁸ GRETA, *Report on Bosnia and Herzegovina* (n 77) [112]

³³⁹ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fourth and fifth periodic reports of Georgia, CEDAW/C/GEO/CO/4-5,' Adopted by the Committee at its fifty-eighth session (30 June-18 July 2014), Reissued for technical reasons on 18 September 2014 [22(c)]

³⁴⁰ GRETA, *Report on Serbia* (n 107) [176]

³⁴¹ GRETA, *Report on Denmark* (n 25) [146]

³⁴² GRETA, *Report on Macedonia* (n 157) [182]

³⁴³ GRETA, *Report on Georgia* (n 137) [162]

³⁴⁴ GRETA, *Report on Ireland* (n 81) [176]

schemes has, in large part, depended on the vicinity in which the victim is exploited,³⁴⁵ while in Norway, the lack of classes in Norwegian renders the reintegration of trafficked victims problematic.³⁴⁶ Several practical problems in terms of child victims' access to schools on equal terms to other children also arise in Romania.³⁴⁷ This challenge is particularly acute in the case of children of Roma descent.³⁴⁸

In view of the foregoing, it appears that although European anti-trafficking law places an explicit obligation on states to ensure victims' access to reintegration programs, existing state practice on the part of a number of European countries suggests that a minimalist approach is presently in operation. This might be attributable to the relatively loose manner in which the obligation is couched in European anti-trafficking law (the requirement to make '*best efforts*'),³⁴⁹ but also to the fact that widespread economic difficulties in some countries,³⁵⁰ for example, do not provide the best preconditions for the full implementation of such potentially expensive and long-term programs.

CONCLUSION

This chapter provided a critical assessment of the existing law and practice on human trafficking in Europe, against the backdrop of the 'INI' typology's *individual* benchmarks. The findings provided by this chapter suggests that, while European anti-trafficking law provides a relatively robust framework for the protection and assistance of trafficked victims, a number of European countries implement the respective obligations discussed in the foregoing sections in a rather piecemeal fashion. This approach to implementation, which has been described by Galligan's Socio-legal theory as 'minimalist', has a number of adverse implications, ranging from inadequate recovery to re-victimisation. As will be demonstrated in the next 3 chapters, however, the challenges identified in this (as well as chapters 3 and 4) are not unique to Europe; gaps between law and practice also exist in the Commonwealth Caribbean.

³⁴⁵ GRETA, *Report on the United Kingdom* (n 31) [188]

³⁴⁶ GRETA, *Report on Norway* (n 21) [192]

³⁴⁷ GRETA, *Report on Romania* (n 74) [146]

³⁴⁸ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined second and third periodic reports of Montenegro', Adopted by the Committee at its eighty-fourth session (3-21 February 2014), CERD/C/MNE/CO/2-3, 13 March 2014 [14]

³⁴⁹ Article 16(5) CoE Anti-Trafficking Convention

³⁵⁰ UNODC, *Fact-Sheet on the Impact of the Economic Crisis on Trafficking in Persons and Smuggling of Migrants* (United Nations Office for Drugs and Crime, 2009) 1

CHAPTER 6

NORMATIVE ASPECTS OF COMMONWEALTH CARIBBEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

The Commonwealth Caribbean is an archipelago of twelve *independent* English-speaking islands¹ and mainland territories, spanning the entire Caribbean Basin area.² These states extend from Belize, located in Central America, all of the way along the Caribbean island chain to Guyana, on the South American continent.³ Apart from a shared history marked by slavery and colonialism, these states, in large part, also share a rich cosmopolitan culture, a common official language, and legal systems which are, for the most part, based on the English common law.⁴ More specifically, apart from being democratic societies founded on the rule of law,⁵ the Commonwealth Caribbean states examined by this thesis - Guyana, Jamaica, St. Vincent and the Grenadines (SVG) and Trinidad and Tobago (T&T) - are also member states of the Caribbean Community (CARICOM),⁶ an inter-governmental organisation that aims to, *inter alia*, foster economic development among its constituent members,⁷ as well as facilitate unimpeded freedom of movement.⁸

¹ Note that, for the purposes of this thesis, non-independent English-speaking Caribbean countries (e.g. Anguilla, British Virgin Islands, Cayman Islands, Montserrat and the US Virgin Islands) are not included in this definition of the 'Commonwealth Caribbean'.

² Ransford Palmer, *U.S.-Caribbean Relations: Their Impact on Peoples and Culture* (Greenwood Publishing Group 1998) 9

³ David Berry, *Caribbean Integration Law* (Oxford University Press 2014) 8

⁴ Rose-Marie Antoine, *Commonwealth Caribbean Law and Legal Systems* (Routledge 2008) 77 (note that Guyana, while in the main a common law jurisdiction, also inherited elements of the Roman-Dutch legal tradition. As such, it is sometimes referred to as a 'hybrid legal system').

⁵ Eddy Ventose, *Commonwealth Caribbean Administrative Law* (Routledge, 2012) 300

⁶ IBP USA, *Caribbean Community and Common Market Business Law Handbook* (International Business Publications, 2007) 7. Note that, while CARICOM bears superficial similarity to the EU (e.g. on the questions of freedom of movement and trade/economic development), it is an intergovernmental, as opposed to supranational organisation.

⁷ Kenneth Hall and Myrtle Chuck-A-Song, *CARICOM Single Market and Economy: Genesis and Prognosis* (Ian Randle Publishers, 2007) 155

⁸ *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ)

The four Commonwealth Caribbean states are classified as either high or middle-income territories,⁹ whose economies are largely fuelled by agriculture and tourism,¹⁰ as well as the extraction, production and distribution of various types of natural resources.¹¹ In general, these states are considered to be socio-politically stable societies,¹² with a relatively good human rights record.¹³ Notwithstanding the fact that these states have made tremendous strides in all sectors since becoming independent in the 1960s and 70s, recent statistical data suggests that, with the onset of globalisation and its attendant economic instability,¹⁴ criminal activities, including drugs¹⁵ and arms trafficking, homicides, kidnappings¹⁶ and, more recently, human trafficking,¹⁷ are increasingly becoming common place.¹⁸

Although research on human trafficking in the Commonwealth Caribbean is presently at an embryonic stage,¹⁹ given that the region is 'the most under-researched [...] region in the world with regard to trafficking in persons',²⁰ existing data suggests that, with the exception of SVG,²¹

⁹ See World Bank, 'Country and Lending Groups' (World Bank, 2015) <http://data.worldbank.org/about/country-and-lending-groups#Upper_middle_income> accessed 19 July 2015. Note that middle-income economies are those with a Gross National Income (GNI) per capita of more than US \$1,045 but less than \$12,736; high-income economies are those with a GNI per capita of US \$12,736 or more. Lower-middle-income and upper-middle-income economies are separated at a GNI per capita of US \$4,125. According to the World Bank, Trinidad and Tobago is an upper income country; St. Vincent and the Grenadines and Jamaica are upper-middle income countries; and Guyana is a lower-middle income country. See also, Tracy Skelton, *Introduction to the Pan-Caribbean* (Routledge 2014) 45

¹⁰ Benjamin Timms and Stern Neill, 'Cracks in the Pavement: Conventional Constraints and Contemporary Solutions for Linking Agriculture and Tourism in the Caribbean' in Rebecca Torres and Janet Momsen (eds), *Tourism and Agriculture: New Geographies of Consumption, Production and Rural Restructuring* (Taylor & Francis 2011) 105

¹¹ Alva Wilgus, *The Caribbean: Natural Resources* (Literary Licensing 2012)

¹² Derek O'Brien, *Constitutional Law Systems of the Commonwealth Caribbean* (Hart 2014) 4

¹³ Office of the High Commissioner for Human Rights, 'North America and The Caribbean' (UN OHCHR, 2012) 188

¹⁴ Yvonne Tsikata, Emmanuel Moreira and Pamela Hamilton, *Accelerating Trade and Integration in the Caribbean: Policy Options for Sustained Growth, Job Creation, and Poverty Reduction* (World Bank Publications 2009) xi

¹⁵ Ivelaw Griffith, *Drugs and Security in the Caribbean: Sovereignty Under Siege* (Penn State Press, 2010) 129

¹⁶ Stephanie Palmié and Francisco Scarano, *The Caribbean: A History of the Region and Its Peoples* (University of Chicago Press 2013) 576

¹⁷ Alexis Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Greenwood Publishing Group 2009) 94

¹⁸ Ivelaw Griffith, *Caribbean Security in the Age of Terror: Challenge and Change* (Ian Randle Publishers 2004) 34

¹⁹ Elzbieta Gozdiak, *Data and Research on Human Trafficking: Bibliography of Research-Based Literature* (DIANE Publishing 2011) 43

²⁰ Laura Langberg, 'Anti-trafficking Initiatives in Asia, Latin America, the Caribbean' (Workshop, Inter-American Development Bank, Washington, D.C., 2003) 5

²¹ Government of the United States of America, *Trafficking in Persons Report* (US Department of State, 2014) 332 (while there have been investigations into suspected cases of human trafficking, there have been no official prosecutions in this regard to date in SVG).

trafficking-related incidents have been officially recorded in Guyana, Jamaica and T&T.²² Notwithstanding this, however, the relative effectiveness of the various legislative instruments which have been enacted to date by the states concerned to counter these trafficking-related incidents is still largely unknown.²³ It is against this backdrop that this chapter, as well as chapters 7 and 8, has been conceptualised. The specific objective of this chapter, in keeping with the overarching aim of the thesis, is to critically assess, from a comparative socio-legal perspective, the existing law and practice on human trafficking in the four countries under investigation, so as to determine the extent to which there exists a ‘disconnect’ between anti-trafficking law and practice that necessitates reform, if at all.

A. BRIEF SITUATIONAL OVERVIEW

Although the full extent of human trafficking in the four Commonwealth Caribbean states examined by this thesis is currently unknown,²⁴ a number of trafficking-related incidents have nonetheless either been investigated or prosecuted in the states concerned. More specifically, interviews revealed that, since 2004, between 8 and 12 trafficking-related incidents have on an annual basis been either reported to, or investigated by, competent national authorities in Guyana.²⁵ To date, these incidents have resulted in three convictions,²⁶ albeit that these convictions were, at the time of writing, being appealed.²⁷ Interviews also revealed that, since

²² IOM, *Exploratory Assessment of Trafficking in Persons in the Caribbean Region: The Bahamas, Barbados, Guyana, Jamaica, The Netherlands Antilles, St. Lucia, Suriname and Trinidad and Tobago* (2nd edn, International Organisation for Migration, 2011) 31

²³ David Guinn, 'Politicized Knowledge: Knowledge Gaps and Priorities for Further Research in Latin American and Caribbean Trafficking' in IOM, *Human Trafficking: New Directions for Research* (International Organisation for Migration, 2009) 182

²⁴ Interview with G-3, State Official (Georgetown, Guyana, 11 February 2014); See, however, 'US TIP Report on Guyana 'self-contradictory- Minister Manickchand' (Ministry of Labour Human Services and Social Security, Government of Guyana, 2013) <http://www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=340:us-tip-report-on-guyana-self-contradictory-minister-manickchand&catid=2:news&Itemid=80%A6> accessed 11 April 2013 (noting that since 2004, there have been less than 20 persons have been charged and prosecuted).

²⁵ Interview with T-6, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

²⁶ Bryan Hunt, 'Remarks by Chargé d'Affaires at the Opening Ceremony Trafficking in Persons Training Workshop Ministry of Human Services and UN Development Program' (International Convention Centre, 4 September 2013) (for example, an Essequibo disco owner was sentenced to four years' imprisonment after he was found guilty of trafficking a minor, whilst a couple was sentenced to the maximum of five years each on summary conviction for trafficking in August of 2013).

²⁷ 'US stand by TIP Report despite Govt objections - Envoy' *TrakkerNews* (Georgetown, 30 June 2014) <<http://www.caribbeantrakker.com/2014/06/us-stand-by-tip-report-despite-govt-objections-envoy/#.U7MdjPldUUQ>> accessed 11 July 2014

2007, there have been some forty-one²⁸ and forty-two²⁹ trafficking-related incidents investigated in Jamaica and T&T, respectively. Although there have been no officially confirmed cases of human trafficking in SVG to date,³⁰ interviews, however, pointed to at least four *suspected* cases of human trafficking.³¹

More generally, various sources revealed that, over the last decade, each of the Commonwealth Caribbean states examined by this thesis, like their European counterparts, have investigated incidents involving both *internal* and *transnational* trafficking in persons.³² While internal trafficking appears to be the primary form of trafficking that occurs in Guyana,³³ transnational trafficking is reportedly the main form of trafficking with which Trinidad and Tobago is confronted.³⁴ The other two states, Jamaica and SVG, are reportedly confronted, in more or less equal proportion, with the threat of both internal *and* transnational trafficking in persons.³⁵

In so far as the profile of victims is concerned, various sources revealed that, in much the same manner as that which obtains in Europe, the vast majority of trafficked victims identified to date in the Commonwealth Caribbean are women and girls. The main forms of exploitation to which these persons are exposed are sexual exploitation³⁶ and, to a lesser extent, domestic servitude. Notwithstanding this, however, some reports indicate that an increasing number of

²⁸ Bryan Miller, 'Police Rescue 41 Human Trafficking Victims' (Jamaica Information Service, 2 February 2014) <<http://jis.gov.jm/police-rescue-41-human-trafficking-victims/>> accessed 3 March 2014; – 'Jamaica adopting zero tolerance to human trafficking' *Antigua Observer Newspaper* (St. Johns, 3 February 2014) <<http://www.antiguaobserver.com/jamaica-rights-jamaica-adopting-zero-tolerance-to-human-trafficking/>> accessed 4 March 2014; – 'J.C.F. Making Headway In Fight Against Human Trafficking' (Jamaica Information Service, 6 February 2014) <http://jis.gov.jm/radio_programs/j-c-f-making-headway-fight-human-trafficking/> accessed 4 March 2014; – 'Dozens of trafficking victims rescued' *Jamaica Gleaner* (Kingston, 1 February 2014) <<http://jamaica-gleaner.com/gleaner/20140201/lead/lead3.html>> accessed 4 March 2014.

²⁹ Interview with T-6 (n 25)

³⁰ – 'Diplomat wants US to back evidence on human trafficking allegation' *Antigua Observer Newspaper* (St. Johns, 15 July 2010) <www.antiguaobserver.com/st-vincent-politics-diplomat-wants-us-to-back-evidence-on-human-trafficking-allegation/> accessed 11 June 2013

³¹ Interview with S-5, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014)

³² Kamala Kempadoo, 'The war on human trafficking in the Caribbean' (2007) 49(2) *Race & Class* 79

³³ 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

³⁴ Interview with T-6 (n 25)

³⁵ – 'Prime Minister rejects trafficking in persons classification' | *Antigua Observer Newspaper* 5th August 2014 <<http://www.antiguaobserver.com/prime-minister-rejects-trafficking-in-persons-classification/>> 5/8/2014

³⁶ – 'TIP sensitisation campaign taken to Region 9' (Government Information Agency, 2012) <http://www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=569:-tip-sensitisation-campaign-taken-to-region-9&catid=2:news&Itemid=45> accessed 11 April 2013

men and boys are also at risk of,³⁷ and are, in many instances, trafficked³⁸ for the purpose of forced labour.³⁹

Finally, several sources revealed that the primary group of persons implicated to date in human trafficking in the Commonwealth Caribbean have been men, though a growing number of female traffickers are also becoming complicit in human trafficking, whether as criminal masterminds, 'protectors' or interpreters.⁴⁰ A similar trend exists in Europe, as described in chapter 3.

B. LEGAL FRAMEWORK

The Commonwealth Caribbean states examined by this thesis are, in the main, common law jurisdictions,⁴¹ whose legal systems are closely modelled after the English Legal System.⁴² Guyana is the only anomaly in this regard, as it is considered to have a 'hybrid' legal system⁴³ that is partly modelled after the British common law, as well as Roman-Dutch law. That said, unlike the British system of parliamentary supremacy, all four of the states under investigation operate under the rubric of constitutional supremacy,⁴⁴ with their respective Constitutions⁴⁵ being at the helm of their legal orders.⁴⁶ The respective states' judiciaries are comprised of a three-tier system of superior courts; the first being the High Court, the second being the Court of Appeal, and the highest being the Judicial Committee of the Privy Council (JCPC),⁴⁷ in the

³⁷ Anastasia Cunningham, 'More males falling victim to human trafficking Jamaica' *Gleaner Jamaica* (Kingston, 7 February 2012) <www.gleaner.com/gleaner/20120207/lead/lead4.html> accessed 8 December 2013; A Smith-Edwards, 'More Human Trafficking Victims Being Rescued' (Jamaica Information Service, 7 February 2012) <<http://jis.gov.jm/more-human-trafficking-victims-being-rescued/>> accessed 26 March 2014.

³⁸ Interview with T-6 (n 25)

³⁹ Interview with G-4, State Official (Georgetown, Guyana, 12 February 2014)

⁴⁰ Ibid

⁴¹ Shahid Shahidullah, *Comparative Criminal Justice Systems: Global and Local Perspectives* (Jones & Bartlett Publishers 2012) 13

⁴² Ralph Carnegie, 'The West Minister Model? A Commonwealth Caribbean Perspective' (1996) 6 *The Caribbean Law Review* 1

⁴³ Dorcas White, 'Some problems of a hybrid legal system: A case study of St. Lucia' 30 (4) *International and Comparative Law Quarterly* 862

⁴⁴ Rose-Marie Antoine, *Commonwealth Caribbean Law and Legal Systems* (Routledge 2008) 55

⁴⁵ Constitution of the Co-operative Republic of Guyana Act 1980, Act No. 2 OF 1980; The Jamaica (Constitution) Order in Council, 1962; The Saint Vincent Constitution Order 1979, Statutory Instruments 1979 No. 916; The Trinidad and Tobago (Constitution) Order in Council, 1961; amended by the Constitution of Trinidad and Tobago, Act 4 of 1976

⁴⁶ Derek O'Brien (n 12) 179

⁴⁷ – 'Trinidad and Tobago Government, 'Legal System and Economy' (Fitzwilliam Stone Furness-Smith & Morgan, 2013) <<http://www.fitzwilliamstone.com/fs/trinidad-and-tobago-in-government-legal-system-and-economy/>> accessed 16 May 2014

case of Jamaica, SVG and T&T, and the appellate jurisdiction of the Caribbean Court of Justice (CCJ), in the case of Guyana.⁴⁸

For the purposes of this thesis, the most relevant pieces of domestic legislation on human trafficking in the Commonwealth Caribbean states under investigation are the Combating of Trafficking in Persons Act of Guyana;⁴⁹ the Trafficking in Persons (Prevention, Suppression and Punishment) Act of Jamaica;⁵⁰ the Prevention of Trafficking in Persons Act of SVG;⁵¹ and the Trafficking in Persons Act of T&T.⁵² These statutory instruments, which are largely modelled after the Trafficking Protocol and the Caribbean Counter Trafficking Model Legislation,⁵³ have as their overarching objectives the prevention of trafficking-related incidents, the prosecution of traffickers, and the protection of trafficked victims.⁵⁴ As discussed in chapter 3, these are the same objectives that are pursued by European anti-trafficking law.

More generally, although the four Commonwealth Caribbean states examined by this thesis are dualist states,⁵⁵ several treaties are nevertheless applicable at the municipal level, pursuant to their respective ratifications and incorporation.⁵⁶ The foremost of these instruments is the Trafficking Protocol, which all four of the states have either acceded to or ratified to date.⁵⁷ The

⁴⁸ – 'Travesty in the Guyana Judiciary: The case of the Chief Magistrate V. the Judicial service Commission' (Legal Affairs Committee Caribbean Guyana Institute for Democracy, 2007)

⁴⁹ Act 2 of 2005

⁵⁰ 2007 (as amended by the Trafficking in Persons (Prevention, Suppression and Punishment) (Amendment) Act was enacted in 2013)

⁵¹ Act No. 27 of 2011

⁵² Act No. 14 of 2011

⁵³ John Sandy, 'Trafficking in Persons Bill' (Government of Trinidad and Tobago, 2011) <www.nationalsecurity.gov.tt/MediaCenter/Speeches/Speeches2011/TRAFFICKINGINPERSONSBILL/tabid/291/Default.aspx> accessed 11 May 2013

⁵⁴ See preamble TIP Act (Guyana); Section 3 (a) – (d) TIP Act (Jamaica); section 3 TIP Act (SVG); section 4 (a) – (d) TIP Act (T&T)

⁵⁵ Winston Anderson, 'Treaty Implementation in Caribbean Law and Practice' (1988) 8 Caribbean Law Review 185. Note that international treaties do not become automatically binding at the municipal level in the Commonwealth Caribbean, unless they have been ratified/acceded to, and subsequently incorporated. Note, however, that where ambiguities exist on particular issues, courts will attempt to interpret domestic law in conformity with international law. This is because there is a presumption that a state does not intend to derogate from its international obligations.

⁵⁶ Organisation of American States, 'Trinidad and Tobago Evaluation of Progress in Drug Control' (Inter-American Drug Abuse Control Commission, Multilateral Evaluation Mechanism, 2009)

⁵⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000) (Guyana acceded to this protocol on 14 September 2004; Jamaica ratified this protocol on 29 September 2003; SVG ratified this protocol on 29 October 2010; and T&T ratified this protocol on 6 November 2007).

same can be said of the parent Convention, the United Nations Convention against Transnational Organized Crime.⁵⁸

Apart from the foregoing instruments, the four Commonwealth Caribbean states examined by this thesis are also bound by their international obligations arising under CEDAW,⁵⁹ the CRC,⁶⁰ ILO Convention 182,⁶¹ and the Refugee Convention.⁶² The ICCPR,⁶³ ICESCR,⁶⁴ and CAT⁶⁵ also provide the international legal framework that informs these states' domestic anti-trafficking machinery.

C. NORMATIVE ASSESSMENT

This section attempts to provide a critical assessment of the existing law and practice on human trafficking in the Commonwealth Caribbean against the backdrop of the benchmarks outlined under the *normative* paradigm of the *INI* typology. More specifically, it will not only evaluate the extent to which there is a 'disconnect' between anti-trafficking law and practice, but also the extent to which the approach countenanced in the Commonwealth Caribbean shares similarities and/or differences with that which obtains in Europe. The central conclusion reached by this chapter is that while the anti-trafficking laws in the respective Commonwealth states examined by this thesis largely comply with the normative requirements provided for by the Trafficking Protocol, like Europe, a number of challenges arise in practice which necessitates reform.

⁵⁸ United Nations Convention against Transnational Organized Crime New York (adopted 15 November 2000, entered into force 29 September 2003)

⁵⁹ Guyana ratified CEDAW on 17 July 1980; Jamaica ratified CEDAW on 9 October 1984; SVG acceded to CEDAW on 4 August 1981; T&T ratified CEDAW on 12 January 1990.

⁶⁰ Guyana ratified the CRC on 14 January 1991; Jamaica ratified the CrC on 13 June 1991; SVG ratified this convention on 26 October 1993; T&T ratified this convention on 5 December 1991).

⁶¹ Guyana ratified ILO Convention 182 on 15 January 2001; Jamaica ratified ILO Convention 182 on 13th October 2003; SVG ratified this convention on 4 December 2001; and T&T ratified this convention on 23 April 2003).

⁶² Refugee Convention (adopted 2 to 25 July 1951) 189 UNTS 137, Article 33(1) (Jamaica acceded to this convention on 30 October 1980; SVG acceded to this convention on 3 November 2003; T&T acceded to this convention on 10 November 2000).

⁶³ Guyana ratified the ICCPR on 15 February 1977; Jamaica ratified the ICCPR on 3 October 1975; SVG ratified the ICCPR on 9 November 1981; T&T ratified the ICCPR on 21 December 1978)

⁶⁴ Guyana ratified ICESCR ratified on 15 February 1977; Jamaica ratified ICESCR on 3 October 1975; SVG ratified ICESCR on 9 November 1981; T&T ratified ICESCR 8 December 1978.

⁶⁵ Guyana ratified the CAT on 19 May 1988; SVG acceded to the CAT on 1 August 2001

6.1. Criminalisation of Trafficking-Related Offenses

The respective Commonwealth Caribbean TIP Acts identified in the foregoing section criminalise not only *internal*, but also *transnational* trafficking in persons. The respective TIP Acts, in much the same manner as the European criminalisation provisions discussed in chapter 3, adopt the tripartite definition of human trafficking, which, in the case of adults, requires a showing of unlawful ‘actions’, ‘means’ and ‘purposes’. More specifically, the respective Acts prohibit,

1. the ‘actions’ of:

Recruitment, transportation, transfer, harbouring or receiving of persons [...] ⁶⁶

2. when committed by ‘means’ of:

Threats or use of force or other forms of coercion; abduction; deception or fraud; abuse of power or a position of vulnerability; or the giving or receiving of a benefit in order to obtain the consent of a person who has control over another person. ⁶⁷

3. For the ‘purpose of:

Exploitation [...] Exploitation includes keeping a person in a state of slavery; subjecting a person to practices similar to slavery; compelling or causing a person to provide forced labour or services; the illicit removal of human organs; keeping a person in a state of servitude including domestic and sexual servitude; debt bondage; child pornography; the exploitation of the prostitution of another; engaging in any other form of commercial sexual exploitation, including, but not limited to, pimping, pandering, procuring, profiting from prostitution and maintaining a brothel; and [...] deriving a benefit through the abuse of another person. ⁶⁸

The ‘means’ identified above need not be present for the offense of child trafficking to have been committed in the Commonwealth Caribbean, ⁶⁹ which is similarly the case under European anti-trafficking law as described in chapter 3. Additionally, all of the foregoing ‘means’ need not be collectively established in order for a trafficking offense to have been committed in respect of an adult; rather, the presence of at least one of these ‘means’, in

⁶⁶ See section 5(1) TIP Act (Guyana); Section 4(1) (a) – (c) TIP Act (Jamaica); Section 2 PTIP Act (SVG); section 3 TIP Act (T&T)

⁶⁷ Section 2(k) TIP Act (Guyana); Section 4(2) (a) – (e) (Jamaica); Section 2 TIP Act (SVG); Section 3 TIP Act (T&T)

⁶⁸ Section 2(e) (i) – (vii) TIP Act (Guyana); Ibid Section 2 (1) (a) – (e) TIP Act and Section 2(b) of TIP (Amendment) Act (Jamaica); section 2 (a) – (k) TIP Act (SVG); section 3(j) TIP Act (T&T)

⁶⁹ Section 3(2) TIP Act (Guyana); Section 4(3) TIP Act (Jamaica); section 5(2) TIP Act (SVG); section 3 TIP Act (T&T)

conjunction with one of the foregoing ‘actions’, for the ‘purpose’ of exploitation, is sufficient.⁷⁰ On the question of ‘exploitation’, while it appears that this concept is non-exhaustively defined by the respective TIP Acts, it is clear that its constituent elements are not as explicit as those included under the concept of ‘exploitation’ in the European context. For instance, while the respective TIP Acts, with the exception of Guyana’s and Jamaica’s, include the phrase ‘causing a person to transport illegal items within or across borders’,⁷¹ the EU Anti-Trafficking Directive uses a broader, more explicitly defined phrase – ‘exploitation of criminal activities’.⁷² This phrase is understood to not only include the transportation of illegal items, but also compelling a person to commit, *inter alia*, ‘pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.’⁷³ That said, it is certainly commendable that both European and Commonwealth Caribbean anti-trafficking law converge on the point that a victim of trafficking cannot, in law, consent to his/her exploitation.⁷⁴

More generally, it is also important to note that, with the exception of Guyana⁷⁵ and Jamaica,⁷⁶ whose TIP Acts include a broad conception of *conspiracy*, the SVG and T&T TIP Acts expressly limit themselves to the prohibition of conspiracy to exploit *a person’s prostitution*,⁷⁷ seemingly to the exclusion of conspiracy to commit slavery, servitude, or, indeed, the other forms of exploitation identified above. Additionally, it must also be noted that, apart from the T&T TIP Act,⁷⁸ none of the other Commonwealth Caribbean TIP Acts prohibit the offense of *incitement* to commit a trafficking-related offense, which is in contradistinction to Article 3 of the EU Anti-Trafficking Directive. Notwithstanding this, however, the other inchoate offenses

⁷⁰ Section 2(k) TIP Act (Guyana); Section 4(2) (a) - (e) (Jamaica); Section 2 TIP Act (SVG); Section 3 TIP Act (T&T)

⁷¹ Section 2 (j) TIP Act (SVG); section 3(i) TIP Act (T&T)

⁷² Article 2 (3) EU Anti-Trafficking Directive

⁷³ Ibid Recital (11)

⁷⁴ Section 9 (1) TIP Act (Guyana); Section 4(4) TIP Act (Jamaica); section 9 (1) TIP Act (SVG); section 20 (1) TIP Act (T&T)

⁷⁵ Section 3 (1) TIP Act (Guyana)

⁷⁶ Section 3 of TIP (Amendment) Act (Jamaica)

⁷⁷ Section 7 (1) TIP Act (SVG); section 23(1) TIP Act (T&T)

⁷⁸ Section 17 TIP Act (T&T). Note that whereas incitement contemplates virtually every human means whereby one person seeks to influence another to the commission of a crime, such as encouragement or persuasion, a threatening act or other pressure, conspiracy goes much further, requiring that in addition to these means, there is in fact an ‘agreement’ to effect some ‘unlawful’ object. See Law Reform Commission Hong Kong, ‘Report on Codification: The Preliminary Offenses of Incitement, Conspiracy and Attempt’ (Law Reform Commission, March 1994) 20

that have traditionally been associated with trafficking in persons, such as *attempting, assisting, organising, directing* and *transporting*, have been criminalised.⁷⁹

A review of the respective TIP Acts suggests that only the T&T TIP Act⁸⁰ comprehensively criminalises the offense of threatening, assaulting or obstructing police officers, social workers, shelter workers and case management workers in the execution of their duties. By contrast, the Jamaica⁸¹ and SVG⁸² TIP Acts criminalise such an offense *only* when directed at *police officers*, while the Guyana TIP Act does not at all *explicitly* address this issue. It is submitted that a provision as broad as T&T's, which prohibits unlawful conduct directed at all persons actively working in the anti-trafficking field, should go a long way in reassuring stakeholders that they can enforce the criminalisation provision without fear of intimidation.

On a different note, it is worth noting that, in much the same manner as the CoE Anti-Trafficking Convention,⁸³ all four of the Commonwealth Caribbean states examined by this thesis have addressed one of the recurring ploys used by traffickers to intimidate victims, by criminalising the offense of knowingly *procuring, destroying, concealing, removing, confiscating*, or *possessing* the identity documents of trafficked victims.⁸⁴

While the relative dearth of information presently available on the question of the criminalisation of human trafficking prevents one from making a definitive statement as to the effectiveness of the respective TIP Acts, various sources have, however, indicated that competent national authorities in the respective states are increasingly relying on the provisions of the TIP Acts to investigate and prosecute myriad trafficking-related offenses, including sexual exploitation,⁸⁵ forced labour,⁸⁶ and domestic servitude.⁸⁷ The challenge, however, lies in

⁷⁹ Section 3(1) TIP Act (Guyana); Section 3 TIP (Amendment) Act (Jamaica); Section 3(1) TIP Act (SVG); section 17 (1) TIP Act (T&T)

⁸⁰ Section 14 TIP Act (T&T)

⁸¹ Section 15 TIP Act (Jamaica)

⁸² Section 18 TIP Act (SVG)

⁸³ Article 20 CoE Anti-Trafficking Convention

⁸⁴ Section 4 TIP Act (Guyana); Section 4(7) TIP Act (Jamaica); section 22 TIP Act (SVG); Section 6 TIP Act (T&T)

⁸⁵ 'Jamaica needs to do more about human trafficking' *The Voice Online* (London, 4 November 2013) <www.voice-online.co.uk/article/jamaica-needs-do-more-about-human-trafficking> accessed 11 April 2013; 'Jamaican Woman convicted of Human Trafficking in Bahamas' OG.NR (Kingston, 28 March 2014) <<http://www.og.nr/rbt/23547-jamaican-woman-convicted-of-human-trafficking-in-bahamas.html>> accessed 28 March 2014

⁸⁶ See e.g. 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

the fact that authorities in the states concerned are only just fully familiarising themselves with the criminalisation provisions of the respective TIP Acts,⁸⁸ which might account for why there is at present a gap between the number of identified victims and the number of ensuing prosecutions.⁸⁹ On a related point, the fact that non-traditional forms of exploitation, such as trafficking for the illegal production of cannabis⁹⁰ and the illicit removal of organs, amongst others, have not been investigated or prosecuted to date in the states under investigation⁹¹ also suggests that there is a need for more to be done to improve the criminalisation of traffickers in the Commonwealth Caribbean.

6.2. The Regulation of Legal Persons

In recent years, there have been an increasing number of reports which suggest that certain companies operating in the Commonwealth Caribbean states examined by this thesis might be involved in the commission of trafficking-related offenses.⁹² Against this backdrop, the respective TIP Acts, in much the same manner as the EU Anti-Trafficking Directive⁹³ and CoE Anti-Trafficking Convention,⁹⁴ provide that where a body corporate commits a trafficking-related offence, any officer, director or agent of that company who directed, authorized, assented to, acquiesced in or participated in the commission of such an offence will be liable on conviction, and accordingly made subject to appropriate sanctions.⁹⁵ The sanctions envisaged by

⁸⁷ See e.g. – 'Multi-million dollar sex trade in Trinidad' *TT News Flash* (Port of Spain, 31 October 2013) <<http://ttnewsflash.com/?p=45693>> accessed 19 May 2014; 'Date set for couple on human trafficking charges' *Jamaica Gleaner* (Kingston, 5 July 2013) <<http://jamaica-gleaner.com/latest/article.php?id=46259>> accessed 4 March 2014.

⁸⁸ Interview with S-2, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014)

⁸⁹ Interview with T-10, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014).

⁹⁰ Interview with S-6, NGO Representative (Kingstown, St. Vincent and the Grenadines, 2 April 2014)

⁹¹ Kimberly Castillo, 'Human trafficking one of the worst forms of abuse' *Trinidad Express Newspaper* (Port of Spain, 11 December 2013) <www.trinidadexpress.com/news/Human-trafficking-one-of-the-worst-forms-of-abuse-235507761.html> accessed 12 July 2013

⁹² – 'Jamaican Authorities Clamp Down On Companies Engaging In Human Trafficking' (Women's Affairs, 2013) <<http://womenaff.blogspot.com/2007/07/jamaican-authorities-clamp-down-on.html>> accessed 4 March 2014 (reporting that 'several persons have closed down their operations because of police clamping down on their businesses'); 'Six CARICOM countries on Watch List for human trafficking' *Suriname Nieuws* (Paramaribo, 24 June 2013) <atjoni.com/suriname/online/six-caricom-countries-on-watch-list-for-human-trafficking/> accessed 1 May 2013; Note that, in the context of SVG, field interviews revealed that since 2011 when the TIP Act was passed, at least one legal entity has been investigated for their suspected involvement in the commission of trafficking-related offenses. See Interview with S-5 (n 31)

⁹³ Article 5 EU Anti-Trafficking Directive

⁹⁴ Article 22 CoE Anti-Trafficking Convention

⁹⁵ Section 5(2) (b) TIP Act (Jamaica); section 14 TIP Act (SVG); sections 27 and 28 TIP Act (T&T)

the respective TIP Acts are not limited to the imposition of fines,⁹⁶ but also include revocation of company licences; winding up orders; forfeiture of relevant assets and properties; as well as prohibiting such companies from performing further activities.⁹⁷

Quite similarly to the approach countenanced in Europe as described in chapter 3, it is important to note that Guyana, SVG and T&T have all sought to effectively implement Article 11 of the Trafficking Protocol, which is concerned with the obligation to ensure that commercial carriers check that passengers are *in possession* of valid identity documents when entering the respective countries.⁹⁸ By contrast, the relevant piece of legislation in Jamaica takes a minimalist approach by merely requiring that commercial carriers *communicate* to immigration authorities the details of all passengers upon their arrival in Jamaica.⁹⁹ This legislative anomaly essentially means that, at present, commercial carriers travelling to Jamaica are not liable where they have failed to ensure that a trafficked victim is *in possession* of valid identity documents, so long as they have *communicated* the details of what might very well be fraudulent identity documents to immigration authorities.

Another example of a legislative anomaly in respect of the regulation of legal persons lies in the fact that while the Guyana TIP Act specifically provides for the possibility that legal persons, or more specifically, the directing minds of legal entities, can be prosecuted for the offense of procuring, destroying, concealing, removing, confiscating, or possessing the identity documents belonging to trafficked victims,¹⁰⁰ it does not, however, appear to explicitly prohibit the myriad forms of exploitation described in the foregoing section, such as forced labour, when committed by legal persons. Although G-6 explained that, in principle, legal entities complicit in forced labour will be prosecuted and subject to both administrative as well as criminal sanctions once identified as such,¹⁰¹ G-4 nevertheless suggested that several large firms, including a number of Brazilian companies that operate in Guyana's vast hinterland communities,¹⁰² have thus far managed to successfully evade detection.¹⁰³ While the veracity of

⁹⁶ Note that, unlike SVG and T&T, a fine alone is prescribed by the Jamaica TIP Act. See section 5 (3)

⁹⁷ Section 15 (a) - (d) TIP Act (SVG); section 27 (1) and section 28 (1) (a) - (d) TIP Act (T&T)

⁹⁸ Section 26 (1) TIP Act (Guyana); section 33 TIP Act (SVG); Immigration Act, Act 41 of 1969, section 32 (4) and (5) (T&T)

⁹⁹ Jamaican Immigration Restriction (Commonwealth Citizens) (Passenger Information) Regulations (2007)

¹⁰⁰ Section 3 (4) TIP Act (Guyana)

¹⁰¹ Interview with G-6, State Official (Georgetown, Guyana, 14 February 2014)

¹⁰² Interview with G-4 (n 39)

¹⁰³ Ibid

this could not be confirmed at the time of writing, it can nevertheless be argued that, similarly to that which generally transpires in Europe as described in chapter 3, legal persons who might be engaged in trafficking-related activities in the Commonwealth Caribbean are not routinely investigated or, indeed, prosecuted. This can perhaps be attributed to a lack of awareness about the legislative provision prohibiting the complicity of legal persons in trafficking-related activities, and/or institutional lethargy in so far as proactive investigations are concerned, as described in section 6.7. Whatever the explanation, however, the regulation of legal persons is certainly an area in relation to which improvements in state practice is urgently required.

6.3. Penalties

As intimated in chapter 3, without effective, proportionate and dissuasive penalties, traffickers will operate with impunity,¹⁰⁴ thereby subverting the rule of law upon which Commonwealth Caribbean states were constitutionally founded.¹⁰⁵ Against this backdrop, the respective TIP Acts provide for a wide range of penalties which, in many respects, go beyond those similarly provided for in Europe as described in chapter 3.¹⁰⁶ These penalties, which are intended to commensurate with the seriousness of the range of trafficking-related offenses described in section 6.1,¹⁰⁷ are outlined in the table below. For the purposes of this discussion, however, it is important to note that persons who are convicted on indictment¹⁰⁸ for the offenses described in section 6.1, can be subject to a *minimum* term of imprisonment of 5 years and 15 years in Guyana¹⁰⁹ and T&T,¹¹⁰ respectively, albeit that such a term, in the case of those convicted in T&T, can be augmented by a *minimum* fine of TT \$500, 000.¹¹¹ On the other hand, and in contrast to the SVG TIP Act which imposes a *fixed* fine of \$250, 000 *or* imprisonment for 15 years *or* both, the Jamaica TIP Act affords the court tremendous discretion in terms of the sentence to be imposed, evidenced by the fact that the fine stipulated by the Act is unspecified,

¹⁰⁴ Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Intersentia 2005) 1 (defining impunity as the impossibility of bringing perpetrators to account since they are not subject to appropriate penalties).

¹⁰⁵ Interview with T-8, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

¹⁰⁶ See e.g. Article 4 (1) and (2) EU Anti-Trafficking Directive (providing for penalties of 5 years imprisonment, or 10 years in the presence of aggravating circumstances)

¹⁰⁷ Interview with T-7, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

¹⁰⁸ Cf. Note that in the case of Guyana, provision is also made for summary conviction. In such cases, the TIP Act stipulates a minimum term of imprisonment of 3 years, but no more than 5 years. See Section 3 (1) (i) (a) TIP Act (Guyana).

¹⁰⁹ Section 3 (1) (ii) (a) TIP Act (Guyana)

¹¹⁰ Sections 16(v) and 17(v) TIP Act (T&T)

¹¹¹ *Ibid*

and the concomitant term of imprisonment can range greatly, provided that it does not exceed the *maximum* term of 20 years. While a wide judicial discretion of this nature is not uncommon in common law systems,¹¹² it does, however, mean that, in practice, judges can choose to impose non-dissuasive penalties in respect of trafficking-related offenses. This point is best illustrated by reference to the Jamaican case of *R v. Norcott Graham and Agon Stephens*.¹¹³

In that case, with the help of an undercover agent who purported to solicit the sexual services of a 14-year-old girl, Jamaican police were able to arrest and successfully convict the two defendants in question for having conspired to traffic a minor. Notwithstanding the serious nature of the offense, however, the court imposed a meagre term of imprisonment of *one* year with hard labour. In another case, albeit in the context of Guyana, a couple that lured four girls to a remote region in that country, and then forced them to work as prostitutes in a mining camp, was sentenced to a meagre term of imprisonment of five years.¹¹⁴ In a second Guyanese case, a disco owner was sentenced to only four years imprisonment after he was found guilty of engaging in the sexual exploitation of an Amerindian minor at his business place.¹¹⁵ Although, as described in chapter 3, the challenge of meagre sentences in respect of trafficking-related offenses is not unique to the Commonwealth Caribbean, such sentences do, however, beg the question as to whether the underlying statutory objective of deterrence is being achieved in practice.

More generally, it can be argued that, although the penalties prescribed by the respective Commonwealth Caribbean TIP Acts¹¹⁶ reflect the grave nature of the crime with appropriately severe penalties,¹¹⁷ several practical difficulties nevertheless arise in practice which require amelioration. First, the possibility of a judge imposing *only* a fine in respect of a trafficker who

¹¹² Rodney Engen, 'Discretion and Disparity under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives' (2003) 41(1) *Criminology* 99

¹¹³ *R v Norcott Graham and Agon Stephens* UNODC No JAM001 (2008) Home Circuit Court

¹¹⁴ Rebekah Rae, 'Guyana-Human Trafficking' *The Associated Press* (New York, 18 August 2013) <www.jm.com/kmtv/news/Guyana-Human-Trafficking-220110461.html> accessed 11 April 2013.

¹¹⁵ — 'Disco owner gets four years for human trafficking' *Guyana Times* (Georgetown, 26 June 2013) <www.guyanatimesgy.com/?p=20531> accessed 11 April 2013

¹¹⁶ Section 4 TIP Act (Guyana) prescribes a fine of one million dollars plus a term of imprisonment in the case of not less than 5 years; Section 7 TIP Act (Jamaica) prescribes a term not exceeding ten years or both such fine and imprisonment; section 7 TIP Act (SVG) prescribes a fine of one hundred thousand dollars or imprisonment for twelve years or both; section 22 TIP Act (T&T) prescribes a fine of three hundred and fifty thousand dollars and imprisonment for twelve years.

¹¹⁷ Latonya Linton, 'Severe Penalties for Human Trafficking' Jamaica Information Service (Kingston, 10 July 2013) <www.jis.gov.jm/news/leads/34523> accessed 24 October 2013

is found guilty of a trafficking-related offense in Jamaica and SVG raises the question as to whether such a fine will be effective in practice in the absence of a concomitant period of imprisonment. In this context, it must be borne in mind that trafficking is essentially a profit-driven enterprise; as such, well-resourced traffickers are perhaps more inclined to risk the possibility of being subject to a fine for engaging in trafficking-related activities than if imprisonment were an inevitable consequence. Second, notwithstanding the relatively stringent penalties introduced by the respective TIP Acts, one has no choice but to question how effective these penalties will be in practice, given that robust systems of surveillance are not presently in place,¹¹⁸ especially in the context of Guyana's 'hinterland communities'; Jamaica's 'inner city' or 'garrison' communities; SVG's largely uninhabited forested areas; and T&T's largely unmonitored coastal waters. The difficulty with weak surveillance systems lies in the fact that traffickers are rarely identified¹¹⁹ and, thus, these otherwise stringent penalties are hardly ever imposed in practice. Finally, the question also arises as to how effective these penalties are in terms of deterrence, particularly when viewed in light of the fact that similarly stringent penalties in respect of other serious offenses, such as rape, generally lack deterrence in the Commonwealth Caribbean.¹²⁰ In other words, if the perpetrators of rape, for example, have arguably not been effectively deterred to date, would it reasonably be the case that traffickers will be sufficiently dissuaded when the risks of detection are low and the financial returns high? This question, amongst others, must be seriously confronted by competent national authorities in the Commonwealth Caribbean.

¹¹⁸ Interview with S-2 (n 88)

¹¹⁹ Ibid

¹²⁰ Interview with J-2, State Official (Kingston, Jamaica, 11 March 2014) (noting that to assess whether the increased penalties would be effective, we would first have to evaluate whether penalties in general have been effective in terms of reducing incidents of crime. 'What I do know, though, is that the recent amendments to the penalties are intended to send a clear message to traffickers; we are putting the fight to them.');

Errol Benjamin, 'Deterrence the only way' *Trinidad Express Newspaper* (Port of Spain, 4 December 2013) <<http://www.trinidadexpress.com/letters/Deterrence-the-only-way-234523181.html>> accessed 16 May 2014 (noting that the measures currently in place to deter crime - including stiff penalties and extra policing - are mere 'plasters for a deep, enduring wound or like spinning top in mud!')

| OFFENSES | GUYANA | JAMAICA | SVG | T&T |
|--|--|--|--|--|
| Engaging in trafficking for the purposes of sexual exploitation, slavery, servitude, forced labour etc. | <p>Summary Conviction Minimum of 3 years, but no more than 5 years' imprisonment (+ forfeiture + restitution; no mention of 'fines')</p> <p>Conviction upon Indictment Minimum of 5 years or life imprisonment (+ forfeiture + restitution; no mention of 'fines')</p> | A fine (unspecified) and/or a term of imprisonment not exceeding 20 years | A fine of \$250, 000 or to imprisonment for 15 years or both | A minimum fine of \$500, 000 + minimum imprisonment of 15 years |
| Child Trafficking | Minimum fine of \$500, 000, but not more than 1 million dollars + maximum term of imprisonment not exceeding 5 years + possible additional 5 years ('age' as aggravating circumstance) | Term of imprisonment not exceeding 20 years + possible additional 10 years ('age' as aggravating circumstance) | 15 years + possible additional term not exceeding 15 years ('age' as aggravating factor) | A fine of one million dollars + minimum of 15 years imprisonment + up to additional 20 years ('age' as aggravating factor) |
| Destroying, concealing etc. victims' immigration or identity documents | Fine of one million dollars + the term of imprisonment of not less than 5 years | Term of imprisonment not exceeding 10 years or to both such fine and imprisonment. | A fine of \$100, 000 or imprisonment for 12 years or both | A fine of \$350, 000 + imprisonment for twelve years |

Figure 2: Statutory penalties prescribed for various trafficking-related offenses in the four countries under investigation.

6.4. Aggravating Circumstances

The respective Commonwealth Caribbean TIP Acts, quite similarly to their European counterparts,¹²¹ provide for a defined list of 'aggravating circumstances' which may be taken into account by courts when determining appropriate *additional* sentences to be imposed in respect of those convicted of trafficking-related offenses.¹²² The most noteworthy of these aggravating circumstances include, *inter alia*, whether the accused is a repeat trafficking offender; whether an offensive, explosive, biological or chemical weapon was threatened to be used or was in fact used in the trafficking ordeal; whether the offender caused the victim to be exposed to a life threatening illness, such as HIV/AIDS or tuberculosis; whether the victim is a child, disabled person or a person suffering from a mental disorder; and whether the person committing the offense is a public officer acting in his official capacity. In such circumstances, a court, upon conviction on indictment, can impose an additional term of imprisonment of up to 5 years in the case of Guyana;¹²³ up to 10 years in the case of Jamaica;¹²⁴ up to 15 years and, in some cases,

¹²¹ Article 4 (2) (a) - (d) and 4(3), Anti-Trafficking Directive; Article 24 CoE Anti-Trafficking Convention

¹²² Interview with J-4, State Official (Kingston, Jamaica, 13 March 2014)

¹²³ Section 8 (1) (a) - (h) TIP Act (Guyana). Note also that in respect of summary offenses, the magistrates court may impose an additional penalty of up to 5 years. See Section 5 (2) (a) - (d) TIP Act.

¹²⁴ Section 4 TIP (Amendment) Act (Jamaica)

up to 20 years, in the case of SVG;¹²⁵ and up to 15 years in the case of T&T.¹²⁶ In short, these additional penalties are intended to reflect the serious nature of the circumstances described above, which are deemed to aggravate a trafficking situation.

Despite the existence of these additional penalties, however, the question as to the potential deterrent effect of the enhanced *additional* penalties brought about by the inclusion of ‘aggravating circumstances’ by the various TIP Acts is again at issue, in large part, because of the general lack of deterrence in respect of similar penalties for other serious offenses, as described in the previous section. Additionally, in the case of Guyana, although G-6 revealed that almost all of the cases dealt with to date by competent national authorities in that country involved at least one aggravating factor,¹²⁷ such have nevertheless not resulted in the imposition of the additional penalties envisaged by the TIP Act.¹²⁸ Further, in contradistinction to the Jamaican TIP Act which provides for a *non-exhaustive* list of aggravating circumstances,¹²⁹ the Guyana and, by extension, the SVG and T&T, TIP Acts appear to be *exhaustive* in scope on the question of aggravating circumstances. That is, only a limited number of aggravating circumstances is identified by the Guyana TIP Act, for example, which would result in the imposition of an additional term of imprisonment not exceeding 5 years.¹³⁰ The exhaustive nature of these circumstances means that, in practice, new aggravating circumstances might not be properly accounted for; for example, the questions of whether the trafficker in question has facilitated a marriage ceremony involving trafficked victims, which is not included as an aggravating circumstance in the Guyana TIP Act; or whether the offense in question was committed against a person suffering from a physical or mental disability, which is not included as an aggravating circumstance in the SVG TIP Act; or, indeed, whether the trafficker in question is a recidivist, which is not included as an aggravating circumstance in the T&T TIP

¹²⁵ Sections 7 and 8 TIP Act (SVG)

¹²⁶ Section 21 T&T TIP Act (T&T)

¹²⁷ E.g. – ‘Guyana couple gets five years for trafficking four girls’ *The Daily Star* (London, 18 August 2013) <<http://www.dailystar.com.lb/News/International/2013/Aug-18/227760-guyana-couple-gets-five-years-for-trafficking-four-girls.ashx#axzz38EPkAukb>> accessed 22/7/2014

¹²⁸ Interview with G-6 (n 101)

¹²⁹ Section 4 (3) TIP (Amendment) Act (Jamaica) prescribes that ‘the factors specified in subsection (2) are in addition to any other factors or matters that are required or permitted to be taken into account by the court under this ACT or any rule of law.’

¹³⁰ Section 5(2) TIP Act (Guyana)

Act, albeit that a recent amendment to T&T's Bail Act provides that a recidivist trafficker may be denied bail for up to 120 days.¹³¹

In general, then, two points are worth noting from the foregoing discussion. On the one hand, the respective TIP Acts are clearer than the Hungarian and Bulgarian criminal codes, referred to in chapter 3, on the question of aggravating circumstances, since they define human trafficking in line with the Trafficking Protocol, and therefore do not include the 'means' elements as aggravating circumstances. On the other hand, however, the lack of practical application of the aggravating circumstances by the courts in the Commonwealth Caribbean to date suggests that the prospect of additional penalties might not at present be serving as a sufficient deterrent.

6.5. Forfeiture

The respective Commonwealth Caribbean TIP Acts, like their European counterparts,¹³² either explicitly¹³³ or implicitly¹³⁴ include forfeiture provisions, which confer upon the respective states' courts, pursuant to the respective Proceeds of Crime legislation,¹³⁵ the jurisdiction to render forfeiture orders in certain defined circumstances. More specifically, where a person is convicted of a trafficking-related offense, and the respective courts are satisfied that any property, including, but not limited to, money, valuables and other movable and immovable property of the person convicted, was used or intended to be used or was obtained in the course of the crime or any benefits were gained from the proceeds a trafficking-related offense, they are obliged to order that such property or benefit be forfeited, and disposed of in 'Confiscated / Consolidated Assets Funds'¹³⁶ or 'Seized Assets Fund,'¹³⁷ as the case may be. The

¹³¹ The Bail (Amendment) Act, 2014 targets repeat offenders and one prior conviction for a specified serious offence can result in the denial of bail for up to 120 days.

¹³² Article 7 Anti-Trafficking Directive

¹³³ See Section 7 TIP Act (Guyana); Section 12 TIP Act (SVG); section 24 TIP Act (T&T)

¹³⁴ Note that section 7 of the TIP (Amendment) Act (Jamaica) repealed the stand-alone forfeiture provision that was previously included under the Principal TIP Act. However, by virtue of Section 6(b) of the TIP (Amendment) Act, forfeiture is, by *implication*, possible. The amended provision (see section 6(3) TIP Act) reads 'restitution shall be paid to the victim from any property of the convicted person included as far as possible property *forfeited* under the provisions of the Proceeds of Crime Act for an offense of trafficking in persons or the proceeds thereof.'

¹³⁵ Anti-Money Laundering And Countering the Financing Of Terrorism Act 2009, Act No. 13 of 2009 (Guyana); Proceeds of Crime Act, Act No. 4 of 2007 (Jamaica); Chapter 181 Proceeds of Crime and Money Laundering (Prevention) Act, Act No. 39 of 2001 (SVG); Proceeds of Crime Act, Chapter 11:27, Act 55 of 2000 (T&T)

¹³⁶ Ibid Section 109 (Guyana); Section 81 (1) TIP Act (Jamaica); Section 55 (1) (SVG);

¹³⁷ Section 24 (1) TIP Act (T&T)

respective Directors of Public Prosecutions,¹³⁸ or Attorney General in the case of Jamaica,¹³⁹ can then apply to the court after a specified period of time has elapsed to have the forfeited property disposed of, and the proceeds appropriately applied to cover, among other things, compensation or costs awarded to trafficked victims.¹⁴⁰

Notwithstanding the importance of forfeiture orders,¹⁴¹ especially those issued against traffickers operating abroad,¹⁴² forfeiture proceedings against traffickers have rarely been initiated by prosecutors in the states examined by this thesis.¹⁴³ More specifically, although J-2 and J-10 revealed that there is currently one case before the courts of Jamaica for which the prosecution is seeking forfeiture of a motor vehicle which was used in the course of a trafficking-related offense,¹⁴⁴ the general perception is that the forfeiture provision is not being fully utilised in practice.¹⁴⁵ While J-10 attributed this to the fact that competent national authorities virtually ignore the otherwise appropriate statutory procedure for initiating forfeiture proceedings, relying instead on a subsidiary statutory procedure,¹⁴⁶ at least one other source suggested that ‘the judicial system is [simply] not warmed up to the idea [of forfeiture] as yet.’¹⁴⁷ This challenge is, however, not unique to Jamaica. As intimated in chapter 3, European countries also face similar challenges, which have resulted in the under-utilisation of the forfeiture provision in Europe.

More generally, in Trinidad and Tobago, although the Counter-Trafficking Unit does, at present, work closely with the Financial Intelligence Unit (FIU) to investigate the financial

¹³⁸ Section 47 (b) Anti-Money Laundering Act (Guyana); Section 51 (3) Proceeds of Crime Act (SVG); Section 41 (4) (b) Proceeds of Crime Act (T&T)

¹³⁹ Section 9 (4) (b) Proceeds of Crime Act (Jamaica)

¹⁴⁰ Ibid

¹⁴¹ Interview with G-6 (n 101); with J-2 (n 120); Interview with S-4, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014)

¹⁴² Section 7 TIP Act (Guyana); Section 12 (2) PTIP Act (SVG); Section 24 (2) TIP Act (T&T)

¹⁴³ Interview with G-7, State Official (Georgetown, Guyana, 14 February 2014); ‘St. Vincent and the Grenadines: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism’ (IMF Country Report No. 10/311, International Monetary Fund, October 2010); Interview with T-2, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014) (Also confirming that competent authorities in T&T are very tight on disclosure on the issue of forfeiture).

¹⁴⁴ Interview with J-2 (n 120)

¹⁴⁵ – ‘Proceeds of Crime Act not fully utilised, says Felice’ *Jamaica Observer* (Kingston, 24 July 2013) <http://www.jamaicaobserver.com/news/Proceeds-of-Crime-Act-not-fully-utilised-says-Felice_147281941/2> accessed 13 April 2014.

¹⁴⁶ Interview with J-10, State Official (Kingston, Jamaica, 21 March 2014)

¹⁴⁷ – ‘Proceeds of Crime Act not fully utilised, says Felice’ *Jamaica Observer* (Kingston, 24 July 2013) <http://www.jamaicaobserver.com/news/Proceeds-of-Crime-Act-not-fully-utilised-says-Felice_147281941/2> accessed 13 April 2014.

aspects of trafficking-related offenses,¹⁴⁸ human trafficking remains a 'low risk - high reward' crime for a number of reasons. In the first instance, it appears to be the case that, at present, there is a lack of financial awareness and training on the part of many investigators and prosecutors in this field.¹⁴⁹ This is further compounded by a general lack of appropriate infrastructure and equipment, including the variety of IT facilities needed to effectively initiate investigations into situations which may warrant the imposition of forfeiture orders.¹⁵⁰ Guyana, like T&T, also faces these, as well as other, challenges. More specifically, Guyana's 'soft touch'¹⁵¹ approach to forfeiture has been attributed to, among other things, ill-equipped, poorly-trained and inexperienced prosecutors.¹⁵² In view of this, it is widely felt that traffickers operating in Guyana continue to regard being caught as a mere occupational hazard and are, in most cases, prepared to pay a fine or serve a brief term of imprisonment, knowing full well that their assets would remain untouched in the vast majority of cases.¹⁵³

Against the backdrop of the foregoing, it is arguable that while the Commonwealth Caribbean countries examined by this thesis do have in place the necessary legislative framework to secure the forfeiture of traffickers' assets, existing state practice suggests that this framework has, quite regrettably, failed to send a 'clear message to those engaged in [trafficking] that they will not profit from their criminality.'¹⁵⁴

6.6. Compensation

Pursuant to Article 6 of the Trafficking Protocol, and in much the same manner as the provisions of European anti-trafficking law described in chapter 3, the respective Commonwealth Caribbean TIP Acts provide for the payment of compensation to victims of trafficking either upon the conviction of the perpetrator, or out of the proceeds of any property

¹⁴⁸ Interview with T-6 (n 25)

¹⁴⁹ Financial Action Task Force, 'Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants' (FATF Secretariat, France, July 2011)

¹⁵⁰ Ibid

¹⁵¹ Shahid Sukhmandan, 'UK wants anti-money laundering Act put to work' *Guyana Times* (Georgetown, 24 June 2013) <<http://www.guyanatimesgy.com/2013/06/24/uk-wants-anti-money-laundering-act-put-to-work/>> accessed 22 July 2014

¹⁵² – 'FIU filed one money laundering report since 2009 - DPP' *Guyana Times* (Georgetown, 4 March 2014) <<http://www.guyanatimesgy.com/2014/03/04/fiu-filed-one-money-laundering-report-since-2009-dpp/>> accessed 22 July 2014

¹⁵³ – 'DPP workshop targets members of the Judiciary on Prosecuting, Recovering Crime Proceeds' *Guyana Chronicle* (Georgetown, 20 June 2013) <<http://guyanachronicle.com/dpp-workshop-targets-members-of-the-judiciary-on-prosecuting-recovering-crime-proceeds/>> accessed 22 July 2014

¹⁵⁴ – 'Caribbean urged to strengthen measures to deal with proceeds of crime' *Jamaica Gleaner* (Kingston, 9 April 2014) <<http://jamaica-gleaner.com/extra/article.php?id=3512>> accessed 22 July 2014

forfeited under the respective Proceeds of Crime Acts.¹⁵⁵ The provision of compensation is intended to compensate victims of trafficking for the costs associated with medical and psychological treatment; costs associated with physical and occupational therapy and rehabilitation; costs associated with necessary transportation, temporary housing and child care; lost income; attorneys' fees and other legal costs; damages for emotional distress, pain and suffering; as well as the costs associated with returning foreign trafficked victims to their countries of origin.¹⁵⁶ Of note is the fact that the respective TIP Acts do not preclude foreign victims from receiving compensation in those circumstances where they are required to leave the respective Commonwealth Caribbean states under investigation for other countries.¹⁵⁷

In spite of the above, however, it is certainly regrettable that no victim of trafficking in the states under investigation has, to date, received compensation.¹⁵⁸ Further, it is regrettable that of the four TIP Acts examined, only the T&T TIP Act expressly requires that compensation be 'adequate',¹⁵⁹ albeit the Guyana TIP Act provides for 'prompt' compensation.¹⁶⁰ That said, the T&T TIP Act goes further than its Commonwealth Caribbean counterparts by providing in no uncertain terms that even where the prosecution or court inadvertently fails to consider a claim for compensation, a victim can nevertheless apply to the court for compensation, and, where the trafficker in question is convicted, the court 'shall' order him to pay adequate compensation to the victim.¹⁶¹

More generally, unlike the other Commonwealth Caribbean states, where a victim is unable to recover compensation in the context of criminal proceedings, he/she may still have the alternative option of applying for relief¹⁶² under the Criminal Injuries Compensation Act (CICA)

¹⁵⁵ Section 6 TIP Act (Guyana); Section 6 TIP (Amendment) Act (Jamaica); Section 16 (1) TIP Act (SVG); section 29(1) TIP Act (T&T)

¹⁵⁶ Section 6 (2) (a) - (g) TIP Act (Guyana); Section 6 TIP (Amendment) Act (Jamaica); Section 16 (2) (a) - (g) TIP Act (SVG); section 29 (2) (a) - (h) TIP Act (T&T)

¹⁵⁷ Section 6 (3) TIP Act (Guyana); section 6 (4) TIP Act (Jamaica); Section 16 (4) TIP Act (SVG); section 30 (4) TIP Act (T&T)

¹⁵⁸ Interview with G-6 (n 101); Interview with J-10 (n 146); Interview with S-2 (n 88); Interview with T-6 (n 25)

¹⁵⁹ section 29(2) TIP Act (T&T)

¹⁶⁰ Section 6(3) TIP Act (Guyana); section 29 (3) TIP Act (T&T)

¹⁶¹ Section 30(1) TIP Act (T&T)

¹⁶² Permanent Council of the Organization of American States, 'Presentation of Progress Reports on Implementation of the 2010-2012 Work Plan to Combat Trafficking in Persons in the Western Hemisphere: Trinidad and Tobago' (*Third Meeting of National Authorities on Trafficking in Persons*, Guatemala, 15 - 16 October 2012) (noting that victims of trafficking are also eligible to apply for relief under section 29 of the Criminal Injuries Compensation Act).

of T&T.¹⁶³ It is submitted that the importance of this alternative basis of relief lies in the fact that, similarly to the requirements of the EU Compensation Directive,¹⁶⁴ restitution is payable to victims of trafficking from a 'Consolidated Fund'.¹⁶⁵ The effect of this is that even if a trafficker is not convicted of a trafficking-related offense, a lump sum payment¹⁶⁶ can be made to compensate the victims in question for losses sustained. This is largely in-keeping with the recommendations concerning restitution recently published by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime.¹⁶⁷

That said, several challenges nevertheless arise in practice that question the efficacy of the compensation scheme described above. The first relates to the fact that in determining whether or not to award a payment of compensation to a trafficked victim, the T&T Criminal Injuries Compensation Board (CICB) will give consideration to whether such a person *cooperated* with the police and prosecutors in the investigation and prosecution of the case,¹⁶⁸ as well as the question of whether the conduct of the victim *contributed* to her injury/exploitation.¹⁶⁹ This provision is somewhat problematic, however, as it is often the case that trafficked victims, by virtue of the egregious nature of the exploitation which they have to endure, simply do not cooperate fully with competent authorities. More specifically, as the discussion in chapter 2 on 'hegemonic assumptions' intimated, the failure of victims to cooperate with competent national authorities does not invariably mean that these persons are any less 'real victims.' Rather, the failure to cooperate might reflect victims' distrust of the authorities, cultural or language barriers, or the existence of severe psychological trauma, among other things. As such, to suggest that victims who do not cooperate with the authorities run the risk of not benefiting from compensation under the CICA is cause for concern. On a related issue, the notion of a victim having 'contributed to his/her injury' is also problematic, and may result in victims being denied compensation, notwithstanding the fact that the TIP Act makes it clear that a victim of

¹⁶³ Criminal Injuries Compensation Act, Chapter 5:31, Act 21 of 1999, Amended by Act 14 of 2011 (section 3 defines "criminal injury" to include any harm or damage done to a person's physical or mental condition as a result of a crime listed in the First Schedule. First Schedule (i) mentions trafficking in persons).

¹⁶⁴ The European Union Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. Ukraine has established such a fund for the victims of trafficking. See Marieke van Doorninck, 'Compensation for Trafficked Persons' (Anti-Slavery International, 2012) 24.

¹⁶⁵ Section 20(1) TIP Act (T&T)

¹⁶⁶ Ibid section 35

¹⁶⁷ The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 'Compensation of victims of trafficking in persons' (Working Group on Trafficking in Persons, Vienna, 19 October 2010)

¹⁶⁸ Section 25 (3) (c) Criminal Injuries Compensation Act (T&T)

¹⁶⁹ Ibid section 25 (6)

trafficking cannot consent to his/her injury/exploitation.¹⁷⁰ Additionally, it is somewhat regrettable that the CICA does not mandate that the Criminal Injuries Compensation Board (CICB) consider submissions made on behalf of trafficked victims by legal officers or NGO representatives.¹⁷¹ Of note, in this regard, is the fact that these submissions might very well be of particular importance when cultural or language barriers prevent victims from fully making representations on their own behalf.

Apart from the issues identified above, it is also important to note that the CICA provides that the decision of the CICB is final.¹⁷² In other words, an adverse decision made by the CICB on the question of compensation cannot be appealed by a trafficked victim who may feel aggrieved by that decision. The difficulty with the finality of the CICB's decisions lies in the fact that if the Board were to render an adverse ruling on the basis that the victim in question has not cooperated with the authorities or 'contributed to his/her exploitation', there is no conceivable way to have such a decision impugned, although judicial review remains a remote possibility. Another point of uncertainty lies in the fact that the CICA envisages the filing of an application for compensation within one year of the victim's exploitation, albeit that the Board, in the exercise of its discretion, can extend this limitation period where 'good cause exists for the delayed application.'¹⁷³ The wide discretion afforded the Board in this regard, while not unique, raises questions as to how flexible the Board is willing to be when dealing with delicate cases such as trafficking for the removal of organs, where victims may only experience the full extent of the harm sustained after several years have passed since having been exploited. The final point of uncertainty surrounding the application of the CICA lies in the fact that the amount of compensation payable to a trafficked victim in respect of his/her exploitation is, in large part, fixed by the Act to be not more than twenty-five thousand dollars in *ex gratia* payment,¹⁷⁴ albeit that the relevant Minister may, by Order, increase the amount payable generally up to a maximum of fifty thousand dollars.¹⁷⁵

More generally, it is also important to note that, in much the same manner as that which at times transpires in a number of European countries as described in chapter 3, the process of claiming compensation in the Commonwealth Caribbean is fraught with difficulties. More

¹⁷⁰ Section 20 (1) TIP Act (T&T)

¹⁷¹ Section 26 Criminal Injuries Compensation Act (T&T)

¹⁷² *Ibid* section 28 (2)

¹⁷³ *Ibid* section 32

¹⁷⁴ *Ibid* section 34 (1) and (2)

¹⁷⁵ *Ibid* section 34 (3)

specifically, G-3 made it clear that, on at least one occasion, a victim who was subject to forced labour chose to contact his trafficker directly in search of compensation, rather than seeking compensation through the ordinary court process.¹⁷⁶ Asked to explain what may account for the victim's choice, G-5 explained that trafficked victims in Guyana are very well aware of the many practical challenges which sometimes arise in respect of formal claims for compensation, including the provision of cogent evidence that reflects the extent of their exploitation,¹⁷⁷ and therefore do not generally insist on making claims for compensation before the courts.

In light of the foregoing, it is arguable that Commonwealth Caribbean states, like many of their European counterparts, have struggled to fully operationalise compensation schemes that provide adequate and prompt access to compensation to victims of trafficking. More specifically, the findings presented in this section suggest that, in many respects, a 'disconnect' exists between anti-trafficking law and practice in the Commonwealth Caribbean in so far as the provision of compensation is concerned.

6.7. Investigations

Pursuant to Article 4 of the Trafficking Protocol, the respective Commonwealth Caribbean TIP Acts, in much the same manner their European counterparts,¹⁷⁸ place an obligation on competent authorities to investigate all reports of possible cases of trafficking in persons.¹⁷⁹ This obligation, in large part, implies the collection of relevant evidence, through the pursuance of both re-active and proactive measures,¹⁸⁰ including *surveillance*,¹⁸¹ *observations*¹⁸² and *test purchase*.¹⁸³ While members of the respective Counter-Trafficking Units are envisaged to take the lead in this regard, police officers are also under an obligation to initiate trafficking

¹⁷⁶ Interview with G-3 (n 24)

¹⁷⁷ Interview with G-5, State Official (Georgetown, Guyana, 13 February 2014)

¹⁷⁸ Article 9 (1) EU Anti-Trafficking Directive; Article 27 CoE Anti-Trafficking Convention

¹⁷⁹ Sections 35 (1) and 36 (2) TIP Act (Guyana); section 14 TIP Act (Jamaica); section 17 (1)(a) - (c) TIP Act (SVG) Section 12 (a) TIP Act (T&T)

¹⁸⁰ See e.g. section 11 (12) (a) TIP Act (T&T)

¹⁸¹ *Surveillance* measures typically involve planned and structured 'keeping watch' of premises for suspicious activities. Implementation Review Group, 'Review of implementation of the United Nations Convention against Corruption' (4th session, Panama City, 26-27 November 2013) 18 November 2013 (referring to the fact that electronic surveillance is rather new and untested, but authorized under the Interception of Communications Act, 2010).

¹⁸² *Observations* are usually a one off initiative.

¹⁸³ *Test purchase* typically involves employing undercover agents to make planned and coordinated visits to identified premises whilst posing as clients.

investigations,¹⁸⁴ through entering certain premises, searching and seizing property.¹⁸⁵ Furthermore, in appropriate circumstances, labour inspectors are empowered to enter, inspect, take photographs of and examine,¹⁸⁶ at reasonable times, *any premises*, presumably including domestic spaces, where a trafficking-related offense might be committed.¹⁸⁷ Investigations in the Commonwealth Caribbean are guided by Standard Operating Procedures (SOPs) in the case of Guyana;¹⁸⁸ the Law Enforcement Guide to Investigation in the case of Jamaica;¹⁸⁹ the Investigation Operations Manual in the case of T&T;¹⁹⁰ and Standardized Screening Procedures (SSPs) in the case of SVG.¹⁹¹

In practice, it appears that competent national authorities in the respective states are making tremendous strides to achieve what the respective TIP Acts describe as efficient, effective and proactive investigations.¹⁹² For instance, several reports indicate that members of the respective Counter-Trafficking Units have investigated, or are at present investigating, a number of actual and suspected trafficking-related offenses, including sexual exploitation,¹⁹³ domestic servitude,¹⁹⁴

¹⁸⁴ Richard Lord, 'Human trafficking alive in T&T' *Trinidad Guardian Newspaper* (Port of Spain, 5 May 2011) <<https://guardian.co.tt/news/2011/05/04/human-trafficking-alive-tt>> accessed 12 August 2013

¹⁸⁵ Section 17 (1)(a) - (c) TIP Act (SVG); section 13 TIP Act (T&T)

¹⁸⁶ Clive Pegus, 'A Review of Child Labour Laws of Trinidad and Tobago - a Guide to Legislative Reform' (ILO Regional Child Labour Project, International Labour Organization, Sub-regional Office for the Caribbean, 2005) (noting that inspectors may require the owner of premises to provide documents and information to show that all laws are being complied with).

¹⁸⁷ Occupational Safety and Health Act, Act No. 1 of 2004, section 72 (1) (a) (T&T). Cf. Labour Officers (Powers) Act Cap. 203. Law 26 of 1956, section 3 (Jamaica). Note that this Act does not empower labour officers to investigate situations of domestic servitude in the context of private dwellings.

¹⁸⁸ – 'TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility' (Government Information Agency, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

¹⁸⁹ Jamaican Law Enforcement Guide to Investigation Manual: Practicalities of the Trafficking in Persons [Prevention, Suppression and Punishment] Act 2007 (International Organisation for Migration, 2007)

¹⁹⁰ – 'Human trafficking: T&T gets US kudos' *Trinidad Express* (Port of Spain, Jun 23, 2014) <<http://www.trinidadexpress.com/news/Human-trafficking--TT-gets-US-kudos-264189831.html?m=v&smobile=v>> accessed 1 July 2014

¹⁹¹ Nelson King, 'Trafficking in Persons Report 'inaccurate', 'unfounded': SVG' (*Caribbean Life*, Kingstown, 28 June 2013) <www.caribbeanlifeneews.com/stories/2013/6/2013_06_27_nk_svg.html> accessed 11 June 2013

¹⁹² Interview with G-7 (n 145); Interview with J-10 (n 146); Interview with S-4 (n 141); Interview with T-6 (n 25)

¹⁹³ – 'Guyanese among 13 held in Jamaica human trafficking ring raid' *Stabroek News* (Georgetown, 17 September 2010) <<http://www.stabroeknews.com/2010/news/regional/09/17/guyanese-among-13-held-in-jamaica-human-trafficking-ring-raid/>> accessed 15 April 2014; – 'Police Clamp Down on Human Trafficking' (*The Jamaica Constabulary Force*, 2 February 2014) <<http://www.jcf.gov.jm/article/2014-02-12/police-clamp-down-human-trafficking>> accessed 15 April 2014; – 'Businesswoman on human trafficking charge faces court next year' *Jamaica Observer* (Kingston, 24 September 2013) <www.jamaicaobserver.com/news/Businesswoman-on-human-trafficking-charge-faces-court-next-year-11/4/13> accessed 13 April 2014

¹⁹⁴ Andrea Braham, 'Govt. Establishes Shelter for Victims of Human Trafficking' (*Jamaica Information Service* June 21, 2013) <<http://jis.gov.jm/govt-establishes-shelter-for-victims-of-human-trafficking/>> accessed 4 March 2014.

and forced labour.¹⁹⁵ More specifically, there have also been reports that competent national authorities in Jamaica and T&T, in particular, have uncovered, through proactive, intelligence-led, investigations several trafficking networks that facilitate human trafficking in the wider Caribbean region.¹⁹⁶ Complicit state officials, in the context of T&T, have also been investigated for their involvement in trafficking-related offenses.¹⁹⁷ The uncovering of these cases has been supported, in the case of T&T, by INTERPOL,¹⁹⁸ which has served as a key focal point between domestic enforcement agencies and relevant agencies in other countries, including Columbia¹⁹⁹ and the Dominican Republic.

Notwithstanding the positive strides identified above, however, it is important to note that a number of practical challenges continue to arise in practice which impede the effectiveness of investigations into human trafficking in the states concerned. The first of these challenges is geographical / topographical in nature. More specifically, Guyana's total landmass is 83, 000 square miles, which is roughly equivalent to the size of Great Britain, but its population size number just over 750, 000.²⁰⁰ The reality, therefore, is that large expanses of Guyana, including several mining camps in the 'hinterland' communities where trafficking frequently takes place, are simply not subject to official surveillance.²⁰¹ In fact, several sources have revealed that even where raids are conducted in these areas on the basis of sound intelligence, traffickers are hardly ever apprehended²⁰² due, in large part, to the inability of investigators to access remote communities, as well as the general unwillingness of most villagers to cooperate with

¹⁹⁵ – 'Local officials under investigation for human trafficking' *C-News* (Port of Spain, 5 December 2013) <http://ctntworld.com/cnews2/index.php?option=com_content&view=article&id=6344:local-officials-under-investigation-for-human-trafficking&catid=137:c-news&Itemid=280> accessed 12 May 2013

¹⁹⁶ – 'CDA Uncovers Suspected Human Trafficking Ring' (*Child Development Agency*, 12 March 2013) <<http://www.cda.gov.jm/CDA-Uncovers-Suspected-Child-Trafficking-Ring>> accessed 3 April 2014.

¹⁹⁷ See e.g. Kevon Felmine, 'Businessman linked to human trafficking ring' *The Trinidad Guardian Newspaper* (Port of Spain, 28 March 2013) <guardian.co.tt/news/2013-03-28/businessman-linked-human-trafficking-ring> accessed 11 May 2013 (a Colombian man was arrested during a sting operation after he allegedly offered immigration officials \$20,000 for the return of the women. A police officer also was questioned for his involvement in the operation of the hotel).

¹⁹⁸ INTERPOL, 'Connecting Police for a Safer World' (INTERPOL - Port of Spain, 2014) <www.interpol.int/Member-countries/Americas/Trinidad-Tobago> accessed 11 May 2013

¹⁹⁹ Interview with T-3, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014) (noting that one of the more recent cases of trafficking in T&T involved a Colombian woman who was held in the country for a week. After the family of the alleged victim made contact with Interpol, an investigation was commenced in T&T into the matter).

²⁰⁰ 'Synopsis of Guyana' <<http://www.guyana.org/guymap.html>> accessed 14 August 2014

²⁰¹ – 'Human Services, Natural Resources Ministries collaborating to combat TIP' (Ministry of Labour Human Services and Social Security, 2013) <http://www.mlhss.gov.gv/index.php?option=com_content&view=article&id=541:human-services-natural-resources-ministries-collaborating-to-combat-tip&catid=%E2%80%A6> accessed 11 April 2013

²⁰² Ibid

investigators in this regard.²⁰³ Investigators in SVG face relatively similar operational challenges, given the fact that the state is a multi-island nation that is comprised of 32 islands and cays, 8 of which are inhabited.²⁰⁴ In practice, this poses significant surveillance challenges for the limited number of specialist officers currently leading the Anti-Trafficking Unit in that country.²⁰⁵ Added to this is the fact that, like Guyana,²⁰⁶ the process involved in reaching remote areas where trafficking-related offenses are suspected of being committed is sometimes impeded by the hilly topography of SVG.²⁰⁷ According to S-5, the exorbitant costs associated with conducting investigations in these remote areas, in addition to limited equipment, manpower and, indeed, the requisite motivation on the part of some investigators, are perennial challenges that arise in SVG.²⁰⁸ These factors were also identified as key operational challenges in Guyana.²⁰⁹

Moreover, various sources revealed that threats issued by traffickers against investigators, including NGO representatives,²¹⁰ as well as the conflation of trafficking with other illegal activities by some front-line responders, also impede the efficacy of investigations into trafficking-related offenses in the Commonwealth Caribbean. Additionally, the low numbers of CCTV cameras, and, indeed, officers patrolling high risk areas are, at present, 'totally unacceptable.'²¹¹ Furthermore, despite the increased focus on the use of intelligence in trafficking investigations,²¹² it remains the case that lead anti-trafficking investigators in T&T, in particular, do not all command what T-2 describes as a 'certain presence', and are often ignorant of the 'bigger picture'.²¹³ That is, many investigators, particularly in T&T, simply do

²⁰³ Ibid

²⁰⁴ Interview with S-5 (n 31)

²⁰⁵ Interview with S-2 (n 88)

²⁰⁶ Interview with G-5 (177)

²⁰⁷ Interview with S-5 (n 31)

²⁰⁸ Ibid

²⁰⁹ David Jessop, 'Crime has an adverse effect on Caribbean development' *Stabroek News* (Georgetown, 27 January 2013) <<http://www.stabroeknews.com/2013/features/01/27/crime-has-an-adverse-effect-on-caribbean-development/>> accessed 22 July 2014; 'Guyana 2012 Crime and Safety Report' (Overseas Security Advisory Council, 4 July 2012) <<https://www.osac.gov/pages/ContentReportDetails.aspx?cid=12335>> accessed 22 July 2014

²¹⁰ — 'Guyanese victims in TT trafficking ring' *Guyana Times* (Georgetown, April 10, 2014) <<http://www.guyanatimesgy.com/?p=57781>> accessed 19 July 2014 (revealing that CURB volunteers were threatened, followed and had their telephones monitored for their awareness campaign).

²¹¹ — 'My Crime Reduction Plan for Trinidad' (Legal Rights: Trinidad and Tobago, 1 June 2010) <<http://trinidadandtobagolegalrights.blogspot.co.uk/2010/06/trinidad-and-tobagos-crime-reduction.html>> accessed 20 May 2014

²¹² Interview with T-8 (n 105)

²¹³ Interview with T-2 (n 145)

not view human trafficking as a serious problem. While various sources,²¹⁴ and, T-5, in particular, attributed this attitude on the part of many investigators to the weak entry requirements and lax training protocols for new officers joining the T&T police force,²¹⁵ others see the lack of standardization with regard to intelligence sharing as a key challenge.²¹⁶ Another pressing consideration is the prevailing 'mind-set' or hegemonic assumption countenanced by a number of police officers in T&T that when raiding 'whore houses', those in breach of anti-prostitution regulations are the prime targets of such investigations; not traffickers, as such.²¹⁷ This may be due, in large part, to the absence of standard departmental orders within the T&T police force that would otherwise explicitly spell out the requirement that when raiding brothels, officers should be open to the possibility that victims of trafficking might very well be among those identified.²¹⁸

More generally, perhaps the greatest challenge to efficient anti-trafficking investigations in the respective Commonwealth Caribbean states examined by this thesis is the uneasy relationship between the police and members of the community. More specifically, various sources revealed that in each of the states under investigation, this relationship is characterised by a widespread perception of police corruption,²¹⁹ which has bred an attitude of distrust,²²⁰ and overall low confidence²²¹ in the ability of investigators to initiate transparent investigations into human trafficking. In fact, in Jamaica and SVG, various sources indicated that police officers are

²¹⁴ Anthony Franklin, 'Prevention and Suppression of Transnational Organized Crime' (Institute of Marine Affairs, 2008) (noting that the efficacy of investigations in T&T is compromised by the limited capabilities of law enforcement and security agencies, as well inadequate liaison and information sharing with external partners).

²¹⁵ Interview with T-5, NGO Representative (Port of Spain, Trinidad and Tobago, 26 February 2014) (noting that at present, it only requires 3 O-level passes to enter the police force).

²¹⁶ – 'Study Finds Trafficking In Persons Have A "Deleterious" Impact On Trinidad And Tobago' | *Pride News Magazine* (Port of Spain, 10 January 2014) <<http://pridenews.ca/2013/11/19/study-finds-trafficking-in-persons-have-a-deleterious-impact-on-trinidad-and-tobago/>> accessed 14 April 2014

²¹⁷ Interview with T-6 (n 25)

²¹⁸ Interview with T-2 (n 145)

²¹⁹ Summer Walker, 'Getting Smart and Scaling Up: *The Impact of Organized Crime on Governance in Developing Countries* - A Desk Study of Guyana' (New York University, 2013)197

²²⁰ – 'Public confidence in police dangerously eroded - PSC' *Guyana Times* (Georgetown, 27 January 2014) <<http://www.guyanatimesgy.com/2014/01/27/public-confidence-in-police-dangerously-eroded-psc/>> accessed 22 July 2014

²²¹ Alissa Trotz, 'Public Confidence, Public Accountability and the Police' *Stabroek News* (Georgetown, 3 February 2014) <<http://www.stabroeknews.com/2014/features/in-the-diaspora/02/03/public-confidence-public-accountability-police/>> accessed 22 July 2014; – 'Police Force needs major transformation to remain relevant - Rohee' *Guyana Times* (Georgetown, 25 April 2014) <<http://www.guyanatimesgy.com/2014/04/25/police-force-needs-major-transformation-to-remain-relevant-rohee/>> accessed 22 July 2014; – 'Restoring confidence in the police' *Stabroek News* (Georgetown, 2 February 2003) <<http://www.landofsixpeoples.com/news301/ns30202.htm>> accessed July 2014

typically referred to as 'vicious brutes from a veritable "Babylon"',²²² most notably because of the perception that they operate as if 'normal rules don't apply to them.'²²³ Against this backdrop, police officers in the states examined by this thesis do not consistently receive a high level of support in carrying out their investigations into trafficking-related incidents. This disconcerting reality could be attributed to a number of factors, but J-11 pointed to a few considerations which are perceived to be most pressing: the perception that police officers are actually the real perpetrators of crime; the perception of a lack of professionalism that attends the police force; as well as the 'wild, wild, west' attitude of many police officers when interacting with members of the community.²²⁴

Although investigations into trafficking-related incidents in the context of the Commonwealth Caribbean are 'still in [their] embryonic stage',²²⁵ the existing state practice discussed above appears to suggest that more needs to be done to ensure that investigations are strategic and proactive. Given that many of the challenges discussed above do also arise at the European level, it is clear that, at both the Commonwealth Caribbean and European levels, the obligation to efficiently investigate trafficking-related incidents needs to be better operationalized in practice.

CONCLUSION

This chapter was the first of three chapters to address the effectiveness of the law and practice on human trafficking in the Commonwealth Caribbean. Apart from establishing that trafficking-related incidents do, in fact, occur in the Caribbean, this chapter provided evidence from a number of sources which collectively suggest that, in many respects, there is a normative 'disconnect' between the law and practice on human trafficking in the four Commonwealth Caribbean states examined by this thesis. This 'disconnect' as between 'law on the books' and 'law in action', while very similar to that which transpires in Europe as discussed in chapter 3, suggests that reform is required to ameliorate the many challenges identified hitherto, particularly in the areas of investigation, forfeiture, compensation and the imposition of

²²² Ralph Gonsalves, 'The Fight Against Crime in St. Vincent and the Grenadines' (Office of the Prime Minister, St. Vincent and the Grenadines, 2010)

²²³ Gordon Robinson, 'Jamaica Gleaner News - Beat down Babylon' *Jamaica Gleaner* (Kingston, 4 June 2013) <<http://jamaica-gleaner.mobi/gleaner/20130604/cleisure/cleisure2.php>> accessed 13 April 2014.

²²⁴ Interview with J-11, NGO Representative (Kingston, Jamaica, 26 March 2014)

²²⁵ – 'Challenges preventing police from solving more murders - Crime Chief Persaud' *Guyana Chronicle* (Georgetown, 13 December 2013) <<http://guyanachronicle.com/challenges-preventing-police-from-solving-more-murders-crime-chief-persaud/>> 22 July 2014

penalties. The theme of reform, which is a central aspect of Galligan's Socio-legal theory, is further explored in the next chapter, which addresses the *institutional* aspects of the law and practice on human trafficking in the Commonwealth Caribbean.

CHAPTER 7

INSTITUTIONAL ASPECTS OF COMMONWEALTH CARIBBEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

In chapter 4 of this thesis, a critical assessment of the main *institutional* aspects of the existing law and practice on human trafficking in Europe was presented. In this chapter, the central argument advanced by chapter 4 that there is, at present, a ‘disconnect’ between the law and practice on human trafficking will be further developed, this time by reference to the anti-trafficking *institutional* landscape currently in operation in the Commonwealth Caribbean. More specifically, this chapter will critically evaluate the extent to which the obligations to raise the profile of human trafficking, efficaciously conduct court proceedings, collaborate with stakeholders, as well as train key personnel in the anti-trafficking field are being effectively operationalized in practice. The conclusion ultimately reached by this chapter is that, in much the same manner as that which transpires in several European countries, a number of operational challenges arise at the institutional level in the Commonwealth Caribbean with regard to the regulation of human trafficking, which necessitate reform.

7.1. Human Trafficking on the National Agenda

Notwithstanding the fact that ‘the sudden introduction of [Commonwealth Caribbean anti-trafficking statutes] was less a response to the problem of human trafficking and more a reaction to external pressures’,¹ competent national authorities in the states examined by this thesis have sought, in sometimes ‘drastic’ fashion,² to place the regulation of human trafficking at the forefront of their respective states’ national agenda. Although no ‘meaningful assessment

¹ Kamille Adair, ‘Human Trafficking Legislation in the Commonwealth Caribbean: Effective or Effectuated’, in David Berry and Tracy Robinson (eds), *Transitions in Caribbean Law: Law making Constitutionalism and the Confluence of National and International Law* (Ian Randle Publishers 2013) 148

² Child Rights International Network, ‘Trinidad and Tobago: Child Rights References in the Universal Periodic Review Trinidad and Tobago’ (12th Session CRIN, 5 October 2011) <<http://www.crin.org/en/library/publications/trinidad-and-tobago-child-rights-references-universal-periodic-review>> accessed 9 July 2014 (noting that Government of T&T has taken drastic steps to reduce the impact of violent crimes in Trinidad and Tobago by the introduction of various pieces of legislation, such as Trafficking in Persons Act, 2011).

of the phenomenon³ has taken place to date, the respective countries have nonetheless enacted comprehensive Trafficking in Persons legislation which, as described in chapter 6, attempt to prevent trafficking in persons, prosecute offenders and, to the greatest possible extent, protect victims of the crime. Operationally, there has also been a marked improvement in institutional capacity in various areas, including training, sensitisation and collaboration. At the structural level, the four states have also taken significant steps in the direction of reducing vulnerability to human trafficking through investing large sums on an annual basis⁴ on measures aimed at reducing poverty⁵ and stigma and discrimination, whilst simultaneously improving access to education,⁶ health care⁷ and employment opportunities.⁸ Efforts have also been directed at improving the respective states' criminal justice systems,⁹ whilst specialized bodies, including Counter-Trafficking Units and National Anti-Trafficking Task Forces,¹⁰ have been operationalized with the specific mandate of liaising with vulnerable communities in an effort to prevent human trafficking, prosecute traffickers and protect victims.¹¹ Collectively, these legislative, operational and structural commitments are intended to create an anti-trafficking institutional framework that is robust enough to effectively achieve the myriad obligations that arise under the Trafficking Protocol.¹²

³ Kamille Adair (n 1) 149

⁴ – 'In 2012: Large sum expended on providing services for vulnerable' (Ministry of Labour Human Services and Social Security, 2013) <http://www.mlhsss.gov.gv/index.php?option=com_content&view=article&id=550:in-2012-large-sum-expended-on-providing-services-for-vulnerable&catid=2:news%E2%80%A6> accessed 11 April 2013

⁵ – 'National Economic and Social Development Plan 2013-2025' (Government of St. Vincent and the Grenadines, 11 January, 2013)

⁶ See e.g. US Government, 'Findings on the Worst Forms of Child Labor - Trinidad & Tobago' (United States Department of Labor, Bureau of International Labor Affairs, 2012) (noting that the Government of T&T has put in place several programs designed to encourage children to remain in school, including a school meal program providing breakfast and lunch to children from low-income families, a book grant program, and a School Support Services Program to aid high-risk students with homework, counselling, and other services).

⁷ Interview with J-6, State Official (Kingston, Jamaica, 14 March 2014). Note that the Jamaica Social Investment Fund has funded a number of social intervention programs that could assist in poverty reduction thereby reducing vulnerability to human trafficking. The Planning Institute of Jamaica is also currently working on a comprehensive approach to social intervention. 'Vision 2030' is also a useful resource that provides a comprehensive development plan that could potentially impact the efficacy of Jamaica's response to human trafficking.

⁸ Interview with S-2, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014)

⁹ See e.g. Ralph Gonsalves, 'The Fight Against Crime in St. Vincent and the Grenadines' (Office of the Prime Minister, St. Vincent and the Grenadines, August 2010)

¹⁰ – 'National Commission on Crime Prevention' (Government of St. Vincent and the Grenadines, 2014) <http://www.security.gov.vc/index.php?option=com_content&view=article&id=39:responsibilities&catid=8:national-commission-on-crime-prevention&Itemid=146> accessed 24 August 2014

¹¹ – 'Tackling Human Trafficking in Guyana' (Ministry of Labour Human Services and Social Security, 2013) <www.mlhsss.gov.gv/index.php?option=com_content&view=article&id=609:tackling-human-trafficking-in-guyana&catid=2:news&Itemid=45> accessed 11 April 2013

¹² Article 9(1) and (5) Trafficking Protocol

Since the passage of the respective TIP Acts, there is a growing body of evidence which suggests that several high ranking Commonwealth Caribbean officials, ranging from Government Ministers¹³ to Diplomats, are actively 'speaking out'¹⁴ against human trafficking at both the national and international levels, as well as consistently reiterating their respective states' commitment to fulfilling their international obligations under the Trafficking Protocol.¹⁵ More specifically, there have been several instances in which Commonwealth Caribbean officials have called upon their citizenry as well as their regional and international counterparts to eliminate the 'dehumanising practice'¹⁶ of human trafficking through 'new, imaginative and vigorous multifaceted approaches',¹⁷ as well as the 'long-standing discrimination'¹⁸ which fuels it.

Notwithstanding the strong rhetorical force of these sentiments, however, a number of institutional challenges continue to arise in practice, which adversely affect the extent to which the regulation of human trafficking has been ascribed the primacy that it deserves. The main challenge surrounds the respective governments' continued insistence that human trafficking is not a problem in their states,¹⁹ on the one hand, and the USA's as well as NGOs' insistence that

¹³ See e.g. – 'Dr. Ralph Gonsalves On Human Trafficking In SVG' *NBC SVG* (Kingstown, 25 June 2014) <<http://www.nbcsvg.com/2014/06/25/dr-ralph-gonsalves-human-trafficking-svg/#.U8W35vldUUQ>> accessed 16 July 2014

¹⁴ Rhonda Rambally, 'T&T makes some progress in tackling human trafficking' *Trinidad Guardian Newspaper* (Port-of-Spain, 4 July 2011) <<http://www.guardian.co.tt/news/2011/07/04/tt-makes-some-progress-tackling-human-trafficking>> accessed 14 April 2014

¹⁵ See e.g. Andrea Braham, 'PM Calls for United Effort to Fight Human Trafficking' (*Jamaica Information Service*, 30 September 2013) <<http://jis.gov.jm/pm-calls-for-united-effort-to-fight-human-trafficking/>> accessed 26 March 2014 (Jamaica's Prime Minister, Portia Simpson-Miller at the UN General Assembly, was of the view that 'we must unite in our efforts to eliminate this transnational scourge and bring an end to human trafficking, particularly among our women and children. We must ensure that in this modern time we do not have a re-enactment of slavery. We must stamp it out, wherever it exists, and bring the perpetrators to justice; we must protect the future generations'); Donn Bobb, 'Jamaica reiterates its political commitment to the fight against human trafficking' (*United Nations Radio*, 17 May 2013) <www.unmultimedia.org/radio/english/2013/05/jamaica-reiterates-its-political-commitment-to-the-fight-against-human-trafficking/> accessed 11 April 2013 (A senior representative from the Anti-Trafficking Secretariat noted that 'the Government of Jamaica accords the highest level of political commitment to the fight against human trafficking and unequivocally denounces the scourge').

¹⁶ – 'PM commits to prosecute human trafficking' *Newsday* (Port-of-Spain, 2 December 2013) <www.newsday.co.tt/politics/0,187311.html> accessed 12 May 2013

¹⁷ Rickey Singh, 'Time for regional war on human trafficking' *Trinidad Express Newspaper* (Port-of-Spain, 23 June 2012) <www.trinidadexpress.com/news/Time_for_regional_war_on_human_trafficking-160146245.html> accessed 14 April 2014

¹⁸ Ibid

¹⁹ – 'Inter-Agency Task Force launches TIP Report' (Ministry of Labour Human Services and Social Security, 2008) <http://www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=71%3Ainter-agency-task-force-launches-tip-report&catid=11%3Alabour-issues&Itemid%E2%80%A6> accessed 11 April 2013; – 'Human Trafficking Not Prevalent in Guyana, says Report' (*South-South Information Gateway*, 5 December 2008) <<http://www.ssig.gov.my/blog/2008/12/05/human-trafficking-not-prevalent-in-guyana-says-report/>> accessed 22 July 2014

the respective governments are in a state of denial, on the other.²⁰ More specifically, the USA's continued labelling of the four Commonwealth Caribbean states examined by this thesis as 'source, transit and destination count[ries]'²¹ in respect of trafficking in persons has not only resulted in state officials vehemently asserting that such a label has a chilling effect on the 'local investment climate',²² but also consistently reaffirming that trafficking is given 'priority one status',²³ and that it is not treated in isolation from other forms of criminal activity.²⁴ Additionally, several high profile state officials in each of the states examined by this thesis have consistently emphasized that their respective governments continue to allocate expenditure that is 'disproportionate to the scale of the problem.'²⁵

That said, there is, at present, a widespread perception across the Commonwealth Caribbean that regional governments are 'adept at saying the right things'²⁶ but, in practice, lack the requisite political will to combat human trafficking in its myriad forms.²⁷ Notwithstanding the fact that human trafficking is now included as an integral aspect of each state's 'national plan of action',²⁸ there remains a general lack of awareness as to the seriousness²⁹ and profound implications of human trafficking across the region,³⁰ even amongst members of the executive arm of regional governments.³¹ While chapter 4 suggests that this is also a major challenge in Europe, it is important to note that the problem of a lack of institutional awareness in the Commonwealth Caribbean is not due to a lack of information, but rather, a widespread perception amongst stakeholders that other forms of criminal activity, such as drugs and arms

²⁰ Svetlana Marshall, 'Motion passed to probe human trafficking' *Guyana Times* (Georgetown, 23 May 2013) <<http://www.guyanatimesgy.com/2013/05/23/motion-passed-to-probe-human-trafficking/>> accessed 22 July 2014

²¹ – 'Guyana: Transnational Issues' (CIA Factbook, 2011) <http://www.theodora.com/wfb2011/guyana/guyana_issues.html> accessed 11 April 2013

²² – 'Guyana unfairly targeted in US trafficking persons reports, says president' *WJTV 98.9* (Georgetown, 21 June 2013) <<http://www.wjtv.com/news/regional/4654-guyana-unfairly-targeted-in-us-trafficking-persons-reports-says-president>> accessed 22 July 2014

²³ Interview with J-10

²⁴ – 'US TIP Report on Guyana_inaccurate - Human Services Minister' *Trakker News* (Georgetown, 28 June 2014) <<http://www.caribbeantrakker.com/2014/06/us-tip-report-on-guyana-inaccurate-human-services-minister/#.U87JNldUUQ>> accessed 22 July 2014

²⁵ – 'TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility' (Government Information Agency, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

²⁶ – 'Trinidad and Tobago: The Beginnings of a Human Trafficking Investigation' (The Human Trafficking Project, 14 March 2011) <www.traffickingproject.org/2011/03/trinidad-and-tobago-beginnings-of-human.html> accessed 11 May 2013

²⁷ Interview with T-1, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 13 December 2013)

²⁸ Interview with T-7, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

²⁹ Interview with T-6, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

³⁰ Interview with T-8, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

³¹ Interview with T-2, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014)

trafficking, warrant priority status over human trafficking.³² In T&T, T-6 attributed this lack of urgency in prioritising the regulation of human trafficking to the fact that, over the last couple of years, there have been at least three changes to the post of Minister of National Security in that country, which has meant that renewed efforts have constantly had to be taken so as to educate each new minister about the priority that ought to be ascribed to the regulation of human trafficking.³³ More generally, several sources also indicated that the exorbitant costs typically associated with implementing the wide range of anti-trafficking measures envisaged by the Trafficking Protocol, including material support,³⁴ medical and psychological assistance³⁵ and repatriation,³⁶ seriously impede the ability of the states examined by this thesis to effectively place human trafficking on their national agendas.

7.2. Awareness-Raising

Pursuant to Article 9(1) of the Trafficking Protocol, and quite similarly to the approach taken by the vast majority of European countries as described in chapter 4, competent national authorities in the four Commonwealth Caribbean countries investigated by this thesis have undertaken a wide range of awareness-raising initiatives, which have had as their intended objectives the sensitisation of those most vulnerable to being trafficked on trafficking-related matters;³⁷ informing the general public about the risks associated with human trafficking; as well as encouraging the public to report suspected incidents of human trafficking.³⁸ These initiatives, which have largely been supported by various local NGOs, faith-based and other community-based organisations,³⁹ as well as key international partners, including the IOM, OAS and, in the case of Guyana, UNDP, have taken myriad forms, including the hosting of anti-trafficking press

³² Interview with S-6, NGO Representative (Kingstown, St. Vincent and the Grenadines, 2 April 2014)

³³ Interview with T-6 (n 29)

³⁴ Interview with T-7 (n 25)

³⁵ Interview with T-9, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014)

³⁶ Interview with T-5, NGO Representative (Port of Spain, Trinidad and Tobago, 26 February 2014)

³⁷ Interview with S-3, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014)

³⁸ Bryan Hunt, 'Remarks by Chargé d'Affairs at the Opening Ceremony Trafficking in Persons Training Workshop Ministry of Human Services and UN Development Program' (International Convention Center, September 4, 2013)

³⁹ See e.g. — 'Guyana's Network to counter-trafficking in persons' (Ministry of Labour Human Services and Social Security, 2010) <www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=296&Itemid=101> accessed 11 April 2013

conferences;⁴⁰ radio⁴¹ and television interviews;⁴² the publishing of newspaper editorials and commentaries;⁴³ blog postings;⁴⁴ public forums, workshops and sensitisation sessions.⁴⁵ These initiatives are typically conducted in schools, government departments and service clubs.⁴⁶ In addition to frequently issuing official public statements, competent national authorities in the respective Commonwealth Caribbean states have also publicly disseminated several anti-trafficking paraphernalia; these have taken the forms of handbills, flyers, posters,⁴⁷ brochures, bags, pamphlets and bumper stickers,⁴⁸ all bearing anti-trafficking messages,⁴⁹ and, in the case of Jamaica, even bus ads and billboards.⁵⁰ The media is also being increasingly utilised to disseminate information about the phenomenon of human trafficking, and, in particular, the risks associated therewith.⁵¹ Of note in this regard is the fact that, in the case of T&T, an anti-trafficking mobile app was recently launched by the Caribbean Umbrella Body for Restorative Behaviour (CURB), which is intended to empower citizens to report suspected cases of trafficking.⁵² More generally, whistle stops⁵³ and cultural and artistic programs⁵⁴ showcasing anti-

⁴⁰ See e.g. Malcolm Alvarez-James, 'Jamaica Appoints Caribbean's First Human Trafficking 'Rapporteur' (DIALOGO, 7 April 2015) <http://dialogo-americas.com/en_GB/articles/rmisa/features/2015/04/07/feature-07> accessed 13 April 2015

⁴¹ See e.g. – 'SVG Making Progress On Combating Human Trafficking' (Government of St Vincent and the Grenadines, 9 August 2012) <www.gov.vc/index.php?option=com_content&view=article&id=672%3Asvg-making-progress-on-combating-human-trafficking-&Itemid=159> accessed 11 June 2013

⁴² See e.g. – 'Risk Factors for Human Trafficking' (National Task Force against Trafficking in Persons, 23 December 2014) <<https://www.youtube.com/watch?v=X8nagDryWV4>> accessed 13 April 2015

⁴³ See e.g. Carolyn Kissoon, '14 suspected trafficking victims detained' *Trinidad Express Newspaper* (Port-of-Spain, 18 August 2014) <<http://www.trinidadexpress.com/news/14-suspected-trafficking-victims-detained-271771991.html>> accessed 13 April 2015.

⁴⁴ See e.g. Natalya Wallin, 'Breaking the Silence: Human Trafficking and the Struggle for Equality in Guyana' (Chicago Policy Review, 5 February 2014) <<http://chicagopolicyreview.org/2014/02/05/breaking-the-silence-human-trafficking-and-the-struggle-for-equality-in-guyana/>> accessed 13 April 2015

⁴⁵ See e.g. – 'Sensitization campaign on child trafficking' *Searchlight Newspaper* (Kingstown, 18 September 2012) <<http://searchlight.vc/sensitization-campaign-on-child-trafficking-p40806-81.htm>> accessed 13 April 2015

⁴⁶ – 'Public awareness campaign launched in Jamaica to protect vulnerable migrants' (International Organization for Migration, 24 September 2013) <<http://www.canada.iom.int/toronto/news/public-awareness-campaign-launched-jamaica-protect-vulnerable-migrants>> accessed 3 April 2014.

⁴⁷ – 'Counter-Trafficking Unit Conducts Outreach Programmes in Secondary Schools in the Essequibo Coast' (Ministry of Labour Human Services and Social Security, 2009) <http://www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=644:counter-trafficking-in-persons-department-conducts-outreachprogrammes-%E2%80%A6> accessed 28 July 2014

⁴⁸ – 'TIP sensitisation campaign taken to Region 9' (Government Information Agency, 2012) <http://www.mlhsss.gov.gy/index.php?option=com_content&view=article&id=569:-tip-sensitisation-campaign-taken-to-region-9&catid=2:news&Itemid=45> accessed 11 April 2013

⁴⁹ Ibid

⁵⁰ Interview with J-10, State Official (Kingston, Jamaica, 21 March 2014)

⁵¹ – 'TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility' (Government Information Agency, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

⁵² – 'Trafficking in Trinbago mobile app seeks to curb human trafficking in Trinidad' (*Silicon Caribe*, 17 April 2014) <<http://www.siliconcaribe.com/2014/04/17/8609/>> accessed 19 May 2014

⁵³ – 'Prostitution: One end result of Human Trafficking' *Vincentian Newspaper* (Kingstown, 15 April 2012) <<http://thevincentian.com/prostitution-one-end-result-of-human-trafficking-p3212-106.htm>> accessed 16 July 2014

trafficking messages have been undertaken, as well as structured inter-personal exchanges facilitated by trained Community Focal Points (CFP),⁵⁵ in the case of Guyana. The respective countries have also joined with their international and European counterparts to observe an *International Day against Sexual Exploitation and Human Trafficking of Women and Children*.⁵⁶

Despite the aforementioned measures, however, several sources revealed that these efforts have largely produced inconsistent results. Although no comprehensive empirical assessment of the effectiveness of these measures has been undertaken to date, quite a number of interviewees felt that awareness-raising measures have, in many respects, failed to motivate members of certain communities to regard human trafficking as an issue which poses significant risks, and about which they must take necessary precautions.⁵⁷ Interviewees in Guyana, for example, attributed this to the fact that many Guyanese nationals, and, in particular, those residing in the hinterland communities, do not possess even a basic level of education to fully appreciate the nuances associated with human trafficking.⁵⁸ That said, even those who have a basic appreciation of what human trafficking is, have nonetheless conflated trafficking with other phenomena, such as prostitution, in practice.⁵⁹ Interviewees in T&T also noted that the large majority of Trinbigionians are in a state of denial over the existence of human trafficking in that country,⁶⁰ or are adamant that it simply cannot happen to them.⁶¹ In SVG and Jamaica, respectively, the situation is no different. More specifically, various sources revealed that the largely 'spasmodic'⁶² anti-trafficking awareness-raising initiatives which have been conducted to date in SVG have arguably failed to make a significant impact on the most vulnerable group in society - young people⁶³ - presumably because mostly middle-aged women attend sensitisation

⁵⁴ – 'The National Commission on Crime Prevention Conducts Pan Against Crime Summer Program Starting Next Week' (Government of St. Vincent and the Grenadines, 18 July 2014)

⁵⁵ Interview with G-3, State Official (Georgetown, Guyana, 11 February 2014)

⁵⁶ – 'Jamaica Observes International Day Against Human Trafficking' (*Ministry of Justice*, 2013) <<http://moj.gov.jm/content/jamaica-observes-international-day-against-human-trafficking>> accessed 3 April 2014

⁵⁷ Interview with G-1, State Official (Georgetown, Guyana, 11 February 2014)

⁵⁸ See e.g. Interview with G-1, State Official (Georgetown, Guyana, 11 February 2014); Interview with G-3 (n 55)

⁵⁹ Ibid

⁶⁰ Interview with T-9 (n 35)

⁶¹ Interview with T-6 (n 29)

⁶² Interview with S-2 (n 8)

⁶³ Interview with S-6 (n 32)

sessions.⁶⁴ In the context of Jamaica, it is also generally felt that, in practice, ‘the issue [of human trafficking] is not at the top of the minds of most Jamaicans’.⁶⁵

More generally, it is also important to note that, at present, T&T lacks a robust and comprehensive awareness-raising program,⁶⁶ similar to that which exists in the other Commonwealth Caribbean states, and, indeed, in many European countries. In fact, interviews indicated that the absence of such a program is perhaps not surprising, given that T&T does not, at present, have the necessary infrastructural nor human resource capacity to deal with a potentially high number of trafficked victims, and the attendant services that might be required in this regard, should a major awareness program be effectuated in practice.⁶⁷ This lax approach, which is perhaps linked to the low level of political priority currently ascribed to human trafficking in T&T, is further compounded by the fact that there remains a strong cultural demand for the sexual services of trafficked victims in that country.⁶⁸ The widespread access to pornographic material in T&T has reportedly contributed to this perennial demand for sexual services.⁶⁹

Moreover, the lack of awareness about the dynamics of human trafficking in the media remains a significant problem in each of the four Commonwealth Caribbean states. This has reportedly resulted in the sensationalising of trafficking issues, since the ‘popular story’ is often presented at the expense of stories which describe the ethical considerations that attend the phenomenon.⁷⁰ Additionally, in the context of Guyana, interviews revealed that challenges arise in terms of bringing anti-trafficking awareness to the country’s many remote communities which are typically inaccessible by ordinary means of transportation.⁷¹ The absence of adequate

⁶⁴ Ibid

⁶⁵ – ‘Gov’t Launches Revitalized Human Trafficking Education Drive’ (*Jamaica Information Service*, 8 December 2012 <<http://jis.gov.jm/govt-launches-revitalized-human-trafficking-education-drive/>> accessed 26 March 2014

⁶⁶ Embassy of the United States -Trinidad and Tobago, ‘Trinidad and Tobago national among TIP Heroes 2014’ (Port-of-Spain, 20 June 2014) <http://trinidad.usembassy.gov/press_releases/tiphero.html> accessed 11 July 2014

⁶⁷ Interview with T-1 (n 27) (explaining that one of the major fears in this respect, however, is that if this were to be effectuated in practice, and many cases of human trafficking come to the fore, the institutional framework currently in place might not be capable of handling the increasing numbers of victims, or requests for charges to be laid. Evidence of this could be gleaned from an incident in which an anti-trafficking representative spoke on the radio about the indicators of human trafficking, and within minutes, calls were being directed to the radio station, indicating that victims were seen in several spheres. It appears that should a prevention exercise of a greater magnitude be undertaken, the institutional arrangements currently in place will invariably be ‘overwhelmed’).

⁶⁸ Richard Lord, ‘T&T on US human trafficking watch list’ *The Trinidad Guardian Newspaper* (Port of Spain, 22 June 2013 <guardian.co.tt/news/2013-06-22/tt-us-human-trafficking-watch-list> accessed 11 May 2013

⁶⁹ Interview with T-7 (n 25)

⁷⁰ Interview with T-9 (n 35)

⁷¹ Interview with G-2, State Official (Georgetown, Guyana, 11 February 2014)

financial resources to effectuate broad-based awareness-raising programs, as well as limited manpower and expertise, further compound this already delicate state of affairs.⁷²

Suffice it to say, it is certainly a positive development that, like many European countries, Guyana has established a National Plan of Action that specifically provides for increased awareness about human trafficking;⁷³ that Jamaica has established a specialised ‘prevention committee’ as part of its National Task Force against human trafficking;⁷⁴ that SVG continues to work with the IOM to bring the anti-trafficking message to various schools across the country;⁷⁵ and that T&T has only recently drafted a new prevention plan called the ‘National Awareness Campaign’.⁷⁶ That said, it would be remiss for these countries to execute these planned initiatives without first conducting an empirical assessment into how effective existing awareness-raising measures have been to date.⁷⁷

7.3. Victim Identification and Referral

In recognition of the fact that the majority of trafficked victims do not self-identify,⁷⁸ the respective Commonwealth Caribbean TIP Acts, like their European counterparts described in chapter 4, place an obligation on competent authorities in the four Commonwealth Caribbean states to correctly identify trafficked victims, and, in appropriate cases, refer these persons to service providers.⁷⁹

⁷² Interview with G-1 (n 58)

⁷³ – ‘New TIP Action Plan underway - aims to reduce vulnerability of youths to traffickers’ lure’ (Ministry of Labour Human Services and Social Security, 2014) <http://www.mlhsss.gov.gv/index.php?option=com_content&view=article&id=639:new-tip-action-plan-underway-aims-to-reduce-vulnerability-of-youths-to-traffi%E2%80%A6> 28 July 2014

⁷⁴ Interview with J-1, State Official (Kingston, Jamaica, 7 March 2014)

⁷⁵ Interview with S-1, State Official (Kingstown, St. Vincent and the Grenadines, 15 January 2014)

⁷⁶ – ‘Human trafficking: T&T gets US kudos’ *Trinidad Express* Newspaper (23 June 2014) <<http://www.trinidadexpress.com/news/Human-trafficking--TT-gets-US-kudos-264189831.html?m=v&smobile=v>> accessed 11 July 2014

⁷⁷ Sybil Ricketts and Leith Dunn, ‘Human Trafficking For Sexual Exploitation and Forced Labour in Jamaica’ (Inter-American Development Bank and National Task Force against Human Trafficking, 2007) (noting that public and institutional awareness about human trafficking is still limited in Jamaica, despite considerable public education and sensitisation sessions being held); see also, Government of Jamaica, *Draft National Policy and Plan of Action on International Migration and Development* (Planning Institute of Jamaica and Ministry of Foreign Affairs and Foreign Trade, June 2013)19 (noting that despite the current efforts of Jamaican authorities to sensitize the public about human trafficking, there is still a need for awareness-building to ensure migrants are fully aware of their rights and obligations and are knowledgeable of laws, customs and values existing in Jamaica and in partner countries).

⁷⁸ Barbara Stolz, ‘Human trafficking’ (2010) 9(2) *Criminology & Public Policy* 267, 268

⁷⁹ Section 13 of the TIP Act (Guyana); section 9(1) TIP Act (Jamaica); section 20 (1) (a) TIP Act (SVG); section_12(a) and (h) TIP Act (T&T)

In practice, various sources revealed that competent national authorities in the four Commonwealth Caribbean states have operationalized National Referral Mechanisms (NRMs),⁸⁰ similar to those which exist in the UK, the Netherlands and Norway, as described in chapter 4. These NRMs are reportedly activated once there are reasonable grounds for believing that a person has been trafficked.⁸¹ More specifically, lead investigators in trafficking cases, who are generally officers from the respective Counter Trafficking Units as well as NGO representatives in the case of Guyana⁸² and T&T,⁸³ typically inform prosecutors that the person in question satisfies at the least some of the indicators of having been trafficked. Following this, prosecutors typically make contact with the relevant Ministries or National Task Forces, who will then refer the victims in question to designated facilities where they receive appropriate support and assistance.⁸⁴ Either NGO-run shelters⁸⁵ or government-run shelters⁸⁶ will then provide accommodation to these victims, whilst the IOM typically provides basic supplies.⁸⁷ In most cases, the IOM will also provide such guidance to foreign victims so as to facilitate their voluntary return to their countries of origin, provided that these victims are inclined to so

⁸⁰ – 'Guyana denounces US human trafficking lash' *Stabroek News* (Georgetown, 27 June 2012) <<http://www.stabroeknews.com/2012/news/stories/06/27/guyana-denounces-us-human-trafficking-lash/>> accessed 22 July 2014; Jamaican Law Enforcement Guide to Investigation Manual; 'Findings on the Worst Forms of Child Labor - Saint Vincent and the Grenadines' (United States Department of Labor Bureau of International Labor Affairs, 2012); – 'Trinidad and Tobago upgraded in the latest US trafficking in persons report' *Caribbean News Now* (Bridgetown, 23 June 2014) <<http://www.caribbeannewsnow.com/topstory-Trinidad-and-Tobago-upgraded-in-the-latest-US-trafficking-in-persons-report-21691.html>> 1 July 2014

⁸¹ Interview with G-1 (n 58); Interview with J-2, State Official (Kingston, Jamaica, 11 March 2014); Interview with S-4, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014); Interview with T-6 (n 29)

⁸² – 'US Honors Guyana Female Miner for Fighting Slavery' *The New York Times* (New York, 20 June 2013) <<http://www.nytimes.com/aponline/2013/06/20/world/americas/ap-cb-guyana-us-human-trafficking.html>> accessed 22 July 2014 (Noting that the Guyana Women Miners' Organisation (GWMO) has been at the forefront of a number of rescue efforts over the last few years. Often using their personal resources to finance identification efforts, members of the GWMO frequently travel to the remote hinterland/mining communities, in the hope of actively ascertaining whether the indicators of trafficking are present at mining camps and, ultimately, rescuing victims, where these indicators do, indeed, exist).

⁸³ – 'Trafficking in Trinbago mobile app seeks to curb human trafficking in Trinidad' (*Silicon Caribe*, 17 April 2014) <<http://www.siliconcaribe.com/2014/04/17/8609/>> accessed 19 May 2014

⁸⁴ Interview with G-5, State Official (Georgetown, Guyana, 13 February 2014); Interview with S-5, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014); Interview with T-6 (n 29); Interview with J-10 (n 50)

⁸⁵ Interview with G-4, State Official (Georgetown, Guyana, 12 February 2014); Interview with T-5 (n 36)

⁸⁶ – 'Jamaican government establishes shelter for human trafficking victims' (*Firstlook*, 18 June 2013) <www.go-jamaica.com/pressrelease/item.php?id=2211> accessed 4 November 2013; – 'Combating Human Trafficking in SVG - Part 3' *Searchlight Newspaper* (Kingstown, 24 August 2012)

⁸⁷ See Annmarie Barnes, 'Human Trafficking Data: Jamaica' (Organisation of American States, 2012) <www.oas.org/dsp/english/trata_jamaica.html> accessed 24 October 2013 (explaining that such assistance includes the provision of medical services; legal aid services; counselling and emotional support services; medical services; welfare services; technical services which assist in the provision of documents lost; witness protection services; interpretation and translation; as well as verifying victims' nationality).

return.⁸⁸ Various sources revealed that, throughout this delicate process, undue pressure is not placed on trafficked victims to provide written statements.⁸⁹ However, if these victims are willing to provide such statements, officers will typically conduct interviews and record any statements given.⁹⁰ In those circumstances where the victim in question is a minor, officials will usually allow his/her parents or guardians to be present during the interviews, provided that it is in his/her best interests to do so.⁹¹ In other instances where this is not feasible, social workers and, in some instances, legal guardians are assigned to minors to assist them in understanding their rights, and in accessing requisite support and assistance.⁹²

While it is felt that more and more victims of trafficking are being correctly identified and referred to service providers in the states examined by this thesis,⁹³ the day-to-day operations of the victim identification and referral mechanisms currently in place in the respective Commonwealth Caribbean states are nonetheless fraught with a number of practical weaknesses. The first of these weaknesses lies in the fact that there is, at present, very limited official surveillance, especially in the remote regions of Guyana⁹⁴ and SVG,⁹⁵ which has essentially meant that a number of victims of trafficking are not routinely identified in practice. The second relates to the fact that many potential victims simply do not self-identify. This has been attributed to a number of factors, including, victims' perception that they are not 'real' victims,⁹⁶ but rather 'criminals';⁹⁷ their close attachment to their traffickers (Stockholm syndrome), which prevents them from fully appreciating the full extent of their exploitation; the 'normalisation' of their exploitation, especially in the case of domestic servitude, where many

⁸⁸ Interview with T-1, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 13 December 2013)

⁸⁹ Interview with G-1 (n 58)

⁹⁰ Interview with G-5 (n 84)

⁹¹ Interview with J-5, State Official (Kingston, Jamaica, 14 March 2014)

⁹² Interview with G-1 (n 58)

⁹³ – 'Minister Griffith Confirms Safety of Witness Protection Program' *TT News Flash* (Port of Spain, 10 May 2014) <<http://ttnewsflash.com/?p=52251>> 20 May 2014

⁹⁴ Gabriela Garton, 'Guyana's Unacceptable Stance on Human Trafficking' (2012) 32(19) *Washington Report on the Hemisphere Council on Hemispheric Affairs* 3; 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

⁹⁵ Interview with S-2 (n 8)

⁹⁶ 'Message from the Hon. Prime Minister on the occasion of International Day for the Elimination of Violence Against Women 2013' (Office of the Prime Minister, Republic of Trinidad and Tobago, 2013) <http://www.opm.gov.tt/media_centre.php?mid=14&cid=484> accessed 19 May 2014

⁹⁷ Interview with T-7 (n 25)

victims believe that they are somewhat economically better off than in their countries of origin;⁹⁸ prolonged isolation; the non-possession of identity or travel documents;⁹⁹ restricted freedom of movement;¹⁰⁰ fear of retaliation from traffickers,¹⁰¹ both to themselves and their families;¹⁰² cultural and language barriers;¹⁰³ the perception of official complicity; as well as a basic lack of trust¹⁰⁴ in the capacity and, indeed, integrity¹⁰⁵ of police officers.¹⁰⁶ In relation to the latter point, it appears from the interviews conducted that many potential victims of trafficking are not identified or referred to appropriate facilities and service providers because front-line responders countenance the hegemonic assumption when raiding 'whore houses' that persons rescued could never be 'real' victims of trafficking.¹⁰⁷ The implications of officials countenancing this hegemonic assumption are manifold, but include, for example, the creation of a false dichotomy between those victims who have exercised some degree of agency by being in the vicinity of those 'whore houses', on the one hand, and other victims who might be rescued by competent authorities, on the other; the trivialisation of any exploitation which victims might report to have experienced in said places; as well as the tacit exclusion of victims who are found in these places from the formal national referral mechanism. In short, then, it is clear that this hegemonic assumption raises serious legal and ethical questions, which must be appropriately addressed.

⁹⁸ Curberime, 'Victims of Human Trafficking May Not Know They are Victims' (End Human Trafficking, May 7, 2014)

⁹⁹ It has been reported that some traffickers compose stories for victims to learn in case they are approached by the authorities. The intention of traffickers, in this regard, is to undermine the credibility of victims' stories were they to be identified as having been trafficked.

¹⁰⁰ Interview with J-10 (n 50)

¹⁰¹ Karrie Williams, 'Teens targeted - Couples paying minors to ramp up sexual pleasure' *Jamaica Gleaner* (Kingston, 17 November 2013) 4; Interview with J-8, NGO Representative (Kingston, Jamaica, 19 March 2014) (arguing that the 'informer fi dead' culture is rife in Jamaica. It seems that there is a low value for life, especially among the lower classes of the Jamaican society. This may explain why those who attempt to report the issue may be somewhat ostracised, if not killed).

¹⁰² Marissa Thomas, 'Trafficking in the Caribbean' (WomenSpeak, 24 June 2012) <womenspeak.tumblr.com/post/25822224131/trafficking-in-the-caribbean> accessed 11 May 2013

¹⁰³ Interview with S-6 (n 32)

¹⁰⁴ - 'A cautious tilt at community - police relations' *Stabroek News* (Georgetown, 15 April 2014) <<http://www.stabroeknews.com/2014/opinion/editorial/04/15/cautious-tilt-community-police-relations/>> accessed 22 July 2014

¹⁰⁵ - 'President wants Police Force to clean up house' *News Source Guyana* (Georgetown, 25 January 2013) <<http://newssourcegy.com/news/president-wants-police-force-to-clean-up-house/>> accessed 22 July 2014

¹⁰⁶ Stephen Randall and Juliana Ramirez, *Policing the Police: Formal and Informal Police Oversight Mechanisms in the Americas* (Canadian Defence and Foreign Affairs Institute, 2011)

¹⁰⁷ Interview with T-2 (n 31)

Suffice it to say, apart from 'painting everyone with the same broad brush',¹⁰⁸ there is, reportedly, also a basic lack of sensitivity surrounding the issue of human trafficking on the part of some first-responders, particularly in T&T.¹⁰⁹ Added to this is the existence of an increasing number of cases involving complicit state officials, particularly in T&T, which has meant that many potential victims of trafficking are not inclined to provide the requisite information to first-responders which might otherwise reveal that they may have been trafficked.¹¹⁰

More generally, there also appears to be, at present, a 'crisis in public confidence'¹¹¹ in relation to the police. As such, the general public, who would otherwise be the key focal point for identifying trafficked victims, simply do not assist, either because they falsely believe that human trafficking does not occur in their respective states,¹¹² or are simply not inclined to confide in the police for fear that their allegations might not be taken seriously.¹¹³ Interviews also indicated that a number of ordinary citizens do not report suspicious activities that might be linked to human trafficking because they are convinced that the police contribute to criminality through corruption and abuse.¹¹⁴ Poor police visibility in certain high risk areas, limited mobile patrols and widespread bureaucracy are also operational challenges which require amelioration.¹¹⁵

Moreover, ignorance among some key stakeholders, including police and immigration officers, as well as the stigma which is generally associated with people who have been sexually exploited,¹¹⁶ also reportedly impede victim identification and referral in the Commonwealth Caribbean. More specifically, S-4, in the context of SVG, was adamant that that the 'society is not kind' to victims of sexual violence.¹¹⁷ This sentiment was further echoed by interviewees in

¹⁰⁸ Interview with T-6 (n 29)

¹⁰⁹ Interview with T-9 (n 35)

¹¹⁰ The World Factbook, 'Trafficking in Persons' (US Government, 2013) <<https://www.cia.gov/library/publications/the-world-factbook/fields/2196.html>> accessed 11 May 2013

¹¹¹ Roger Parks and Stephen Mastrofski, 'Introducing Service-oriented Policing to Trinidad and Tobago' (Fourth Workshop, Bloomington, Indiana, June 3-7, 2009)

¹¹² Interview with J-12, State Official (Kingston, Jamaica, 4 March 2014)

¹¹³ Frederika Whitehead, 'Caribbean's high crime rate is hindering development, report says' *The Guardian* (Port-of-Spain, 17 February 2012) <<http://www.theguardian.com/global-development/2012/feb/17/caribbean-crime-hindering-development-report>> accessed 16 May 2014 (noting that levels of confidence in the police are low. In T&T, only 4.6% of respondents said they had 'a great deal of confidence in the police'.)

¹¹⁴ Interview with T-2 (n 31)

¹¹⁵ Richard Charan, 'People trafficking "a problem in T&T"' *Trinidad Express Newspaper* (Port-of-Spain, 20 June 2012) <http://www.trinidadexpress.com/news/People_trafficking_a_problem_in_T_T_-159824665.html> accessed 20 May 2014 (noting that identification procedures for the proactive identification of trafficking victims are, at present, insufficient).

¹¹⁶ Interview with T-8 (n 30)

¹¹⁷ Ibid

Jamaica, in particular, who indicated that a number of persons, including stakeholders, continue to countenance the hegemonic assumption that *only* foreign-born, young females who are forced into prostitution are trafficked victims.¹¹⁸ This situation is further compounded by the incessant failure by some investigating officers in the states under investigation to accurately distinguish between trafficking and other offenses,¹¹⁹ such as prostitution and smuggling. Finally, reports also indicate that some front-line responders actively involved in the victim identification process, including NGO representatives, are at times subject to ‘devious and malicious attacks’¹²⁰ intended to distract from the identification process.

In view of the foregoing, it can be argued that, although the respective Commonwealth Caribbean states examined by this thesis have operationalized NRMs to date, similar to those which exist in a number of European countries, several operational challenges nonetheless arise in practice. Among other things, these challenges suggest that at least some victims of trafficking might at present be excluded from the formal victim identification process.

7.4. Court Proceedings

Trafficking-related cases are, in the first instance, brought before the respective states’ Magistrates courts where preliminary inquiries are held in order to determine whether a *prima facie* case has been established against the accused.¹²¹ With the exception of Guyana (considered below),¹²² once this *prima facie* threshold is met, the matter is then transferred to the respective High Courts, which have unlimited jurisdiction to hear indictable matters, including trafficking-related offenses.¹²³ Trafficking-related cases are held *in camera*,¹²⁴ which, as

¹¹⁸ Interview with J-12 (n 112)

¹¹⁹ – ‘Guyana’s Response to Request for Information on The Implementation of UNHRC Resolution 11/3 - Trafficking in Persons, Especially Women and Children October 16, 2009’ (Cooperative Republic of Guyana, July 13, 2009) 1 - 3

¹²⁰ – ‘Simona Broomes accused of theft by suspected human trafficker’ *Guyana Times* (Georgetown, 26 August 2013) <<http://www.guyanatimesgy.com/2013/08/26/simona-broomes-accused-of-theft-by-suspected-human-trafficker/>> accessed 22 July 2014

¹²¹ – ‘TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility’ (Government Information Agency, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

¹²² Section 15 (2) TIP Act (Guyana)

¹²³ – ‘Travesty in the Guyana Judiciary: The case of the Chief Magistrate v. the Judicial service Commission’ (Legal Affairs Committee Caribbean Guyana Institute for Democracy, 2007); Interview with J-2 (n 81); ‘Judicial System in St Vincent and the Grenadines’ (Nexus Strategic Partnerships Limited, 2014) <http://www.commonwealthgovernance.org/countries/americas/st_vincent_and_the_grenadines/judicial-system/> accessed 5 August 2014; ‘The Judiciary of Trinidad and Tobago, Overview’ <<http://www.ttlawcourts.org/index.php/magistracy/overview>> accessed 21 July 2014.

described in chapter 4 on European anti-trafficking law and practice, effectively excludes members of the general public from attending.¹²⁵ Once court proceedings are underway, victims are typically guided by the prosecuting team, and, in appropriate cases, are also assisted by social workers or case management workers.¹²⁶ In Guyana, interviews revealed that witness statements are typically taken beforehand, and subsequently read out in court on behalf of child victims.¹²⁷ Where appropriate, attempts are also made to conduct Skype interviews with victims who have returned home so as to ensure that the relevant court proceedings are not unnecessarily compromised by the absence of these persons. While this method has largely proven to be unsuccessful in Guyana,¹²⁸ both Jamaica and SVG have nonetheless attempted to follow Guyana's lead by employing a range of technological facilities in the context of court proceedings involving trafficked victims. The challenges which arise in this regard, however, lie in the fact that the requisite enabling Regulations have yet to be promulgated in Jamaica,¹²⁹ while there is, at present, a lax judicial attitude toward the utilization of appropriate technology in the case of SVG.¹³⁰

More generally, although it is certainly commendable that in most of the Commonwealth Caribbean states examined by this thesis there have, in recent years, been a number of changes¹³¹ to the organisational structure¹³² of the judiciaries in order to better cater for the

¹²⁴ Section 15 (2) TIP Act (Guyana); section 11 TIP Act (Jamaica) section 22 (2) TIP Act (SVG); section 34 (2) TIP Act (T&T)

¹²⁵ See e.g. Sascha Wilson, 'New human trafficking law nets cop' *The Trinidad Guardian Newspaper* (Port of Spain, 10 April 2013) <www.guardian.co.tt/news/2013-04-10/new-human-trafficking-law-nets-cop> accessed 11 May 2013 (in the case involving a police constable with 25 years' service who was charged with ten counts of human trafficking involving three Colombian women, it is reported that presiding magistrate cleared the courtroom of members of the public and press).

¹²⁶ Interview with G-1 (n 58)

¹²⁷ Ibid

¹²⁸ Interview with G-7, State Official (Georgetown, Guyana, 14 February 2014)

¹²⁹ Interview with J-5(n 91)(Noting that although the Evidence Act has only recently been amended to allow for the use of technological facilities in trafficking-related cases, the enabling Regulations have yet to be promulgated. Requisite equipment has not been acquired as yet either).

¹³⁰ Note that although the recently passed Witness (Special Measures) Act makes special provision for the use of various technological facilities in appropriate proceedings involving victims of trafficking, there appears to be oppositional judicial attitudes to these measures. See e.g. Haydn Huggins, 'Judge refuses historic application' *The Vincentian Newspaper* (Kingstown, 31 July 2014) <<http://thevincentian.com/index97.htm>> accessed 6 August 2014

¹³¹ Ashni Kumar Singh, 'Budget Speech of the Minister of Finance' (Guyana Sessional Paper No. 1 of 2014 (10th Parliament of Guyana, 1st session 2012 - 2014, March 24, 2014) 52 - 54

¹³² 'Trinidad and Tobago: Amnesty International's submission to the UN Universal Periodic Review' (Amnesty International, 2014) <<https://www.amnesty.org/en/united-nations/universal-periodic-review/countries-under-review/trinidadandtobago>> accessed 20 May 2014

specific needs of trafficked victims,¹³³ including the establishment of additional court rooms and the hiring of additional specialist prosecutors,¹³⁴ various sources nevertheless revealed that, at present, there are a number of impediments which continue to adversely affect the conduct of court proceedings in these states.¹³⁵ The first of these impediments relates to the serious 'backlog' of cases in the respective state's court systems,¹³⁶ which has been attributed to inadequate staffing; deliberate delays by lawyers and other criminal justice practitioners; delays in evidence processing; poor management capacity, especially in terms of scheduling practices; and limited resource allocation to the judiciary.¹³⁷ In Guyana, there are some indications that senior judges and magistrates countenance a lax approach to granting adjournments,¹³⁸ on the one hand, while less experienced members of the judiciary appear to be reluctant to make adverse decisions for fear that their safety might be compromised¹³⁹ or are intimidated by the possibility of an appeal against their decisions,¹⁴⁰ on the other. This situation is further compounded by the fact that police prosecutors, who typically prosecute trafficking cases in the lower courts in Guyana, generally present files which show 'poor and inadequate work'¹⁴¹ and, indeed, 'shoddy investigations.'¹⁴² Apart from the fact that many of these police prosecutors take a disproportionate length of time to seek legal advice, reports also suggest that many of these persons are simply 'inefficient'¹⁴³ in dealing with forensic evidence, and, indeed, in promptly

¹³³ – 'Criminal justice system receives overhaul' (Government of Trinidad and Tobago, 23 May, 2013) <<http://www.news.gov.tt/content/criminal-justice-system-receives-overhaul#.U3ZP0vldUUQ>> accessed 21 July 2014

¹³⁴ – 'Trinidad and Tobago upgraded in the latest US trafficking in persons report' *Caribbean News Now* (Bridgetown, 23 June 2014) <<http://www.caribbeannewsnow.com/topstory-Trinidad-and-Tobago-upgraded-in-the-latest-US-trafficking-in-persons-report-21691.html>> accessed 1 July 2014

¹³⁵ – 'Caribbean Human Development Report 2012' (United Nations Development Programme, New York, USA, 2012) chp 5

¹³⁶ Wendy Lewis, *Transforming the Judiciary's Court Reporting System: Building and Effective Court Reporting Services Unit* (Institute for Court Management, 2007)

¹³⁷ – 'Trinidad and Tobago' (The Heritage Foundation, 2014)

¹³⁸ – 'Backlog of cases too much for Judges - Chancellor' *Stabroek News* (Georgetown, 26 October 2008) <<http://www.stabroeknews.com/2008/archives/10/26/backlog-of-cases-too-much-for-judges-chancellor-2/>> accessed 22 July 2014

¹³⁹ – 'Magistrates want more protection' *Guyana Times* (Georgetown, 1 March 2013) <<http://www.guyanatimesgy.com/2013/03/01/magistrates-want-more-protection/>> accessed 22 July 2014

¹⁴⁰ – 'Inexperienced judges, magistrates causing backlog of cases - Justice Kennard' *Guyana Times* (Georgetown, 15 February 2014) <<http://www.guyanatimesgy.com/2014/02/15/inexperienced-judges-magistrates-causing-backlog-of-cases-justice-kennard/>> accessed 22 July 2014

¹⁴¹ – 'DPP berates cops over handling of serious crimes' *Stabroek News* (Georgetown, Guyana, 31 March 2013) <<http://www.stabroeknews.com/2013/news/stories/03/31/dpp-berates-cops-over-handling-of-serious-crimes/>> accessed 22 July 2014

¹⁴² – 'President wants Police Force to clean up house' *News Source* (Georgetown, 25 January 2013) <<http://newssourcegy.com/news/president-wants-police-force-to-clean-up-house/>> accessed 22 July 2014

¹⁴³ Summer Walker, 'Getting Smart and Scaling Up: *The Impact of Organized Crime on Governance in Developing Countries* - A Desk Study of Guyana' (New York University, 2013) 197

securing witnesses for trial.¹⁴⁴ Given the consistency of this practice, which reportedly places a ‘tremendous burden on the [DPP’s] chambers,’¹⁴⁵ the question arises as to whether the lack of legal training is the underlying problem,¹⁴⁶ or a disregard for standard operating procedures. Whatever the underlying rationale, it is clear that the current state of affairs is unacceptable, as it risks, among other things, undermining victims’ confidence in the justice system.¹⁴⁷

That said, it is important to note that the existing situation in T&T is not very different from that which obtains in Guyana. More specifically, despite official assurances that more judges and magistrates¹⁴⁸ will be appointed, and that new forms of technology will be utilised in court proceedings,¹⁴⁹ many victims of trafficking, especially foreign victims, are simply not inclined to participate in criminal proceedings for the reasons identified above.¹⁵⁰ Suffice it to say, even when victims agree to participate in these proceedings, interviews, however, revealed that a vast majority of these persons often become despondent and frustrated¹⁵¹ as a result of lengthy court delays, which generally result in them being repatriated to their countries of origin,¹⁵² even before they have properly presented evidence before the court.¹⁵³

More generally, while it is commendable that T&T¹⁵⁴ is embarking upon a number of strategic relationships with other justice systems in an effort to alleviate at least some of the challenges

¹⁴⁴ Nivedta Kowlessar, 'Police to be asked to respond to DPP performance report' *Guyana Chronicle* (Georgetown, 12 September 2013) <<http://www.landofsixpeoples.com/news303/nc309124.htm>> accessed 22 July 2014

¹⁴⁵ Ibid

¹⁴⁶ – 'All prosecutors need to be legally trained' *Kaieteur News* (Georgetown, 13 March 2014) <<http://www.kaieteurnews.com/2009/06/07/all-prosecutors-need-to-be-legally-trained/>> accessed 22 July 2014

¹⁴⁷ Dale Andrews, 'Guyanese confidence in Police Force among the lowest in the Caribbean' *Kaieteur News* (Georgetown, 13 November 2012) <<http://www.kaieteurnews.com/2012/11/13/guyanese-confidence-in-police-force-among-the-lowest-in-the-caribbean/>> accessed 22 July 2014

¹⁴⁸ Denyse Renne, 'Archie wants backlog of cases cleared' *Trinidad Express Newspaper* (Port of Spain, 9 December 2013) <<http://www.trinidadexpress.com/news/Archie-wants-backlog-of-cases-cleared-235161411.html>> accessed 16 May 2014

¹⁴⁹ Indira Demeritte-Francis, 'The Reform Agenda, the Court Process and Technology' (The Commonwealth of The Bahamas Court of Appeal, 2013)

¹⁵⁰ Interview with T-9 (n 35)

¹⁵¹ Jorg Kilian, 'High Court in Trinidad and Tobago needs reform' *Tobago News* (Scarborough, 1 April 2011) <<http://www.caribbean.de/en/court.HTML>> accessed 16 May 2014 (noting that as a result of the frustration faced by many victims of crime, they lose faith in the justice system and feel encouraged to handle conflicts "among themselves").

¹⁵² Interview with J-1 (n 74)

¹⁵³ Interview with T-1 (n 88)

¹⁵⁴ 'AG meets delegation on crime fighting' *Newsday* (Port of Spain, 27 January 2014) <<http://www.newsday.co.tt/news/0,189782.html>> accessed 16 May 2014

identified above,¹⁵⁵ public confidence¹⁵⁶ in the respective criminal justice systems remains at an all-time low.¹⁵⁷ The limited availability of, and poor quality of some, courthouses is a major factor accounting for this lack of confidence.¹⁵⁸ More specifically, various sources revealed that the physical condition of some courthouses can be best described as insalubrious,¹⁵⁹ that is, they are typically dilapidated, have poor acoustics, lighting, ventilation and air conditioning, and lack proper equipment.¹⁶⁰ For this reason, the vast majority of trafficked victims identified in the states examined by this thesis have generally been unwilling to pursue lengthy and adversarial criminal proceedings that they perceive might ultimately only result in them being secondarily victimised.¹⁶¹

In short, while it can be argued that many of the challenges identified above are not unique to the Commonwealth Caribbean, as they also arise in many European countries as described in chapter 4, it is nevertheless clear that these challenges are real impediments to the successful prosecution of traffickers, and, accordingly, require amelioration.

7.5. Stakeholder Collaboration

The respective Commonwealth Caribbean TIP Acts, in much the same manner as their European counterparts as described in chapter 4, place an obligation upon competent national authorities to actively collaborate, both at the local and international levels.¹⁶² In practice, the four Commonwealth Caribbean states have developed vibrant and synergistic relationships with several international institutions in the anti-trafficking field, including the IOM, OAS and UNDP, as well as INTERPOL in the case of T&T.¹⁶³ Additionally, cooperation in respect of various trafficking-related issues continues to take place as between the respective states and

¹⁵⁵ Canadian Regional Chair of the Dublin Group, 'Regional report on the Caribbean' (Council of the European Union, Brussels, 7 November 2013)

¹⁵⁶ – 'Human rights concerns in Trinidad and Tobago' (Amnesty International Submission to the UN Universal Periodic Review, October 2011)

¹⁵⁷ Interview with T-10, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014)

¹⁵⁸ Interview with G-6, State Official (Georgetown, Guyana, 14 February 2014); Interview with J-2 (n 81); Interview with S-6 (n 32).

¹⁵⁹ Interview with J-2 (n 81)

¹⁶⁰ Interview with T-1 (n 88)

¹⁶¹ Government of Jamaica, *Jamaican Justice System Reform Task Force Final Report* (Ministry of Justice of Jamaica, 2007)

¹⁶² Sections 20 (4), 32(3) and 33(1) TIP Act (Guyana); section 10(2) of the TIP Act (Jamaica); Sections 35 TIP Act (SVG); section 5 TIP Act (T&T)

¹⁶³ Implementation Review Group, 'Review of implementation of the United Nations Convention against Corruption' (4th session, Panama City, 26-27 November 2013) 18 November 2013

various foreign Embassies and Consulates, particularly in so far as the repatriation of trafficked victims is concerned.¹⁶⁴

More generally, while the OAS and US Department of State have contributed in many respects to training and awareness-raising in the Commonwealth Caribbean, the IOM has reportedly had the strongest influence on the development and implementation of anti-trafficking policies in the region, in much the same manner as it has positively impacted the law and practice on human trafficking in Europe.¹⁶⁵ More specifically, the IOM continues to serve as a major conduit by facilitating contacts between the national authorities of the respective Commonwealth Caribbean states, thereby ensuring that the technical aspects of cross-border trafficking investigations, for example, are proactively addressed.¹⁶⁶ Additionally, the IOM has also provided direct assistance to a number of trafficked victims, in addition to having facilitated, in conjunction with the respective Counter Trafficking Units, the safe repatriation and reintegration of a number of foreign victims of trafficking.¹⁶⁷ Other tangible forms of assistance provided by the IOM to date have included funding to cover the training of competent authorities both at home and abroad; the provision of facilitators to spearhead various anti-trafficking workshops and conferences; as well as the provision of a range of public education paraphernalia.¹⁶⁸

At the inter-departmental level, various sources suggested that a reasonably well coordinated relationship¹⁶⁹ characterises the interactions between members of the various domestic agencies in the respective states examined by this thesis, including Counter-Trafficking Units, Police Forces, Ministries of National Security, and Offices of the DPP.¹⁷⁰ Moreover, with regard to the respective states' relationship with local NGOs, this can, in some respects, been described as encouraging,¹⁷¹ with several organisations leading the charge on a number of trafficking-related

¹⁶⁴ See e.g. Interview with T-5 (n 36); Interview with T-1 (n 88); Interview with J-7, Representative of International Organisation (Kingston, Jamaica, 17 March 2014)

¹⁶⁵ Jonathan Martens, 'IOM calls for action against exploitation on EU Anti-Trafficking Day' (*International Organization for Migration*, 18 October 2013)

¹⁶⁶ Interview with T-1 (n 88)

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Interview with T-7 (n 25)

¹⁷⁰ Interview with T-2 (n 31)

¹⁷¹ Interview with T-4, State Official (Port of Spain, Trinidad and Tobago, 25 February 2014)

issues, including efforts to reduce the demand for sexual services,¹⁷² awareness-raising, as well as the provision of basic supplies to victims of trafficking.¹⁷³

Notwithstanding the progress made to date, however, various sources revealed that perhaps the most overriding concern with regard to stakeholder collaboration in the Commonwealth Caribbean is the uneasy, if not tumultuous, interactions that at times characterise the relationship between competent national authorities in the respective states, on the one hand, and the USA, on the other.¹⁷⁴ This uneasy relationship stems largely from the fact that the USA has been particularly critical of the progress made to date by the respective states in combating human trafficking. In this regard, the USA, through its annual Trafficking in Persons (TIP) Reports have repeatedly criticised regional governments for being in denial as to the existence of human trafficking in their states, and, more specifically, for failing to effectively prosecute traffickers.¹⁷⁵ These states have, in turn, responded by critiquing the validity and reliability of data relied upon by the USA in arriving at its conclusions. In the recent past, the relationship between the USA and Guyana, in particular, has deteriorated to the point where the Guyanese government has recently announced that it will no longer be cooperating with the USA in so far as responding to questionnaires related to its annual TIP reports.¹⁷⁶

It is important to note that, at the domestic level, collaboration between the respective governments and local NGOs is at times fraught with a number of operational difficulties, which is also a major challenge facing a number of European countries as described in chapter 4. By way of example, in response to a statement recently made by the Guyanese government that human trafficking is not alarming in that country, the Guyana Women Miners Organisation (GWMO) engaged in a picketing exercise against the government of that

¹⁷² CurbCrime, 'Train the Trainer Workshop' (*End Human Trafficking in the Caribbean*, 26 March 2011) <<http://endhumantrafficking.wordpress.com/2011/03/26/train-the-trainer-workshop-day-3/>> accessed 19 February 2014

¹⁷³ – 'Local officials under investigation for human trafficking' *C-News* (Port of Spain, 12 May 2013) <http://cmtworld.com/cnews2/index.php?option=com_content&view=article&id=6344:local-officials-under-investigation-for-human-trafficking&catid=137:c-news&Itemid=280> accessed 12 May 2013

¹⁷⁴ – 'US and Guyana In Partnership On State Department's Trafficking In Persons Report' *Nice FM* (Georgetown, 9 September 2013) <<http://nicefmradio.com/featured/us-and-guyana-in-partnership-on-state-departments-trafficking-in-persons-report/>> accessed 11 April 2013

¹⁷⁵ – 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

¹⁷⁶ – 'TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility' (Government Information Agency, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

country.¹⁷⁷ The Guyanese government has, in turn, responded by criticising NGO representatives in that state for seeking ‘plaques and medals’¹⁷⁸ from the USA, and, in particular, for seeking unwarranted funding from the government of that country to support their programs.¹⁷⁹ Local NGOs, and, in particular, the GWMO, are nonetheless adamant that the government takes a lax attitude toward the issue of human trafficking, and, further, that it appears reluctant to welcome the input of civil society representatives actively working in the anti-trafficking field in its decision making processes.¹⁸⁰ While the relationship between civil society and the governments of the other countries appears to be more amicable than the foregoing, at least one interviewee in the context of Jamaica chided NGO representatives in that country for having submitted unsubstantiated information to international partners, presumably in the hope of maintaining their funding arrangements.¹⁸¹

More generally, interviews also revealed that, in the context of Guyana, certain organisations generally refuse to participate in sessions organised by other organisations, on the basis that they are not the main sponsors of such sessions.¹⁸² In T&T, interviews revealed a different situation which, however, requires no less attention. While NGOs in T&T are, at least in theory, statutorily listed as core participants in the National Task Force, they have nonetheless not been afforded the opportunity to participate therein, given that that the Task Force had not, at the time of writing, officially met as yet.¹⁸³ Additionally, T-5 suggested that competent national authorities in T&T are at times bureaucratic in their dealings with NGOs in the anti-trafficking field, particularly with regard to the timely release of moneys needed by these NGOs to provide the myriad needs of trafficked victims.¹⁸⁴

¹⁷⁷ 'Women's rights groups picket Parliament' *Guyana Times* (Georgetown, 17 April 2014) <<http://www.guyanatimesgy.com/2014/04/17/womens-rights-groups-picket-parliament/>> accessed 22 July 2014

¹⁷⁸ – 'Rohee, Simona Broomes clash over robbery allegation' *Kaieteur News* (Georgetown, 26 February 2014) <<http://www.kaieteurnews.com/2013/09/05/rohee-simona-broomes-clash-over-robbery-allegation/>> accessed 22 July 2014

¹⁷⁹ – 'TIP is a gimmick for Parliament - Simona Broomes' *INews Guyana* (Georgetown, 17 April 2014) <<http://www.inewsguyana.com/tip-is-a-gimmick-for-parliament-simona-broomes/>> accessed 22 July 2014

¹⁸⁰ – 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

¹⁸¹ Interview with J-6 (n 7)

¹⁸² Interview with G-1 (n 58)

¹⁸³ – '2011 Findings on the Worst Forms of Child Labour: Trinidad and Tobago' (International Labour Organisation, 2012)

¹⁸⁴ Interview with T-5 (n 36)

In sum, although it can be argued that many of the challenges discussed above also arise in many European countries, it is clear that stakeholder collaboration is one of the main areas in relation to which reform is required in the Commonwealth Caribbean. These reform efforts should not only be directed at addressing the uneasy relationship between competent national authorities and NGOs actively working in the anti-trafficking field, but also as between regional governments, especially in the area of inter-regional prosecutorial efforts.¹⁸⁵ More specifically, Guyana, Jamaica and SVG should also follow the lead of T&T in making greater use of the expertise of INTERPOL in so far as inter-regional prosecutorial efforts are concerned.

7.6. Training

Similar to the provisions of European anti-trafficking law as described in chapter 4, the respective Commonwealth Caribbean TIP Acts¹⁸⁶ require that key stakeholders working in the anti-trafficking field be appropriately trained so as to, among other things, correctly identify, refer and assist trafficked victims. In practice, various sources revealed that, pursuant to Article 10 of the Trafficking Protocol, competent national authorities in the respective Commonwealth Caribbean states, in conjunction with the IOM,¹⁸⁷ US Department of State,¹⁸⁸ the Organisation of American States,¹⁸⁹ UNDP, as well as several local NGOs,¹⁹⁰ have operationalized relatively intensive training programs in relation to various aspects of anti-trafficking law and practice to date.

More specifically, several representatives from a wide cross-section of each state's national anti-trafficking community have benefited from training conducted either at home or abroad,¹⁹¹ including personnel from the Counter Trafficking Unit, Office of the DPP, Police force,

¹⁸⁵ Interview with T-1 (n 88)

¹⁸⁶ See e.g. section 32 TIP Act (Guyana); section 35 (1) (k) TIP Act (SVG)

¹⁸⁷ International Trade Union Confederation, 'Report for the WTO General Council Review of the Trade Policies of Trinidad and Tobago (Geneva, 7 and 9 March, 2012); 'Caribbean Counter-Trafficking Conference' (End Human Trafficking in the Caribbean, 2010) <<http://endhumantrafficking.wordpress.com/2010/11/01/caribbean-counter-trafficking-conference/>> accessed 19 February 2014; IOM, 'Trinidad and Tobago: Terms of Office' (IOM, 2006)

¹⁸⁸ Interview with T-7 (n 25)

¹⁸⁹ Interview with T-8, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

¹⁹⁰ – 'Trafficking in Trinbago App Goes Live' *PRWeb* (Port of Spain, 7 April 2014) <<http://www.prweb.com/releases/2014/04/prweb11735391.htm>> accessed 19 May 2014; 'About' (*End Human Trafficking in the Caribbean*, 2014) <<https://www.facebook.com/curb.trafficking/info>> accessed 17 February 2014

¹⁹¹ Interview with T-1 (n 88)

immigration department and labour inspectorate,¹⁹² the judiciary, as well as various NGOs. These multi-sectorial training exercises, which typically include "Train the Trainers" programs,¹⁹³ have, in large part, focused on a number of key issues, such as the intricacies associated with the implementation of the provisions of the respective TIP Acts; victim identification and referrals;¹⁹⁴ victim care and assistance; child trafficking; as well as capacity building for prosecutors and members of the judiciary.¹⁹⁵ In view of these intensive training activities, there is a widespread perception that key personnel in the respective Commonwealth Caribbean states are now more informed, empowered, sensitised and equipped than ever before.¹⁹⁶

Quite similar to the argument advanced in chapter 4 on the institutional aspects of European anti-trafficking law and practice, various sources revealed that there is a need for more consistent, and, indeed, better targeted training¹⁹⁷ for certain groups of persons who have at times been inadvertently excluded from training exercises, including members of the judiciary and the media.¹⁹⁸ More specifically, in the context of T&T, interviews suggested that there is uncertainty surrounding the overall efficacy of the training received by some key stakeholders in that state to date. T-5, in particular, noted that while a number of front-line responders have been effectively trained in relation to identifying and responding to *transnational* trafficking, a comparatively lower number have received training on the issue of *internal* trafficking.¹⁹⁹ Additionally, T-5 was adamant that there needs to be greater emphasis on specialised training directed at newly recruited police officers who are expected to play a more sensitive role in the victim identification and referral process. In other words, those who are expected to interview trafficked victims should be expected to have a different skills-set compared to those officers

¹⁹² IOM, 'Victim Identification and Interviewing Techniques' (International Organization for Migration, 2008) <<http://www.iom.ch/cms/en/sites/iom/home/news-and-views/events/events-listing/victim-identification-and-interviewing-t.html>> accessed 16 May 2014

¹⁹³ IOM, 'Trinidad and Tobago' (Geneva, 2012) <www.iom.int/cms/en/sites/iom/home/where-we-work/americas/central-and-north-america-and-th/trinidad-and-tobago.html 1/8> accessed 11 May 2013

¹⁹⁴ Tom Sinkovits, 'Providing Vital Skills to Prevent and Combat Human Trafficking in Trinidad and Tobago - International Organization for Migration' (IOM, 2008) <<https://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2008/pbn-listing/providing-vital-skills-to-prevent-and-co.html> > accessed 16 May 2014

¹⁹⁵ - 'Training Programmes' (Judicial Education Institute, 2013) <<http://www.tlawcourts.org/index.php/judicial-education-institute/training-programmes-publications/current-programmes>> accessed 19 May 2014

¹⁹⁶ Interview with T-6 (n 29)

¹⁹⁷ Interview with G-4 (n 85)

¹⁹⁸ - 'Guyana's Response to OHCHR Request for Information on the Implementation of UNHRC Resolution 11/3, October 16, 2009' (Cooperative Republic of Guyana, July 13, 2009)

¹⁹⁹ Interview with T-5 (n 36)

who are expected to investigate trafficking-related incidents, given that the former is a more sensitive role that could, if not properly executed, expose victims to secondary victimisation.²⁰⁰

More generally, interviews also suggested that there needs to be more effective training of front-line investigators in the four Commonwealth Caribbean states in so far as the specific indicators of trafficking are concerned, so that they do not inadvertently raid 'whore houses' with the hegemonic assumption that prostitution, without more, is occurring.²⁰¹ Furthermore, given that there is, at present, a high turnover rate of officers who are trained to deal with trafficking-related issues, greater effort needs to be directed at ensuring that all persons, whether new to the police force or veterans, are on par with the training requirements in relation to the evolving dynamics of human trafficking.²⁰² In other words, it should not be that some stakeholders are ahead of the curve, some behind, and, others, nowhere at all.²⁰³

CONCLUSION

Like chapter 4, this chapter provided a critical assessment of the *institutional* aspects of the existing law and practice on human trafficking, albeit at the level of the Commonwealth Caribbean. The central conclusion reached by this chapter is that, in very much the same manner as that which typically transpires in Europe, there is an institutional 'disconnect' between anti-trafficking law as it appears 'on the books' and 'law in action' in the Commonwealth Caribbean. In short, while a number of measures have been taken in recent years to enhance the institutional framework relative to the regulation of human trafficking in the Commonwealth Caribbean, more needs to be done to address the prevailing hegemonic assumptions as discussed in the foregoing sections, as well as the 'social spheres' referred to by Galligan, such as the conventions, understandings and attitudes which influence the operationalisation of 'law in action'. More specifically, there is a need to strengthen the agencies and personnel that constitute this framework, so as to better achieve the three-prong objectives of preventing human trafficking, prosecuting traffickers, and protecting victims of trafficking. The theme of protection is addressed in greater detail in the next chapter.

²⁰⁰ Ibid

²⁰¹ Interview with T-2 (n 31)

²⁰² Interview with T-9 (n 35)

²⁰³ Interview with J-5 (n 91)

CHAPTER 8

INDIVIDUAL ASPECTS OF COMMONWEALTH CARIBBEAN ANTI-TRAFFICKING LAW AND PRACTICE

INTRODUCTION

In the previous two chapters, a critical assessment of the main normative and institutional aspects of Commonwealth Caribbean anti-trafficking law and practice was presented. This assessment revealed that, in a number of respects, reform is required as there is a ‘disconnect’ between anti-trafficking law and practice in the states examined by this thesis. This chapter, like chapter 5, addresses the *individual* aspects of Commonwealth Caribbean anti-trafficking law and practice from a comparative socio-legal perspective in an effort to determine the extent, and, specific ways in which, reform is required. The central conclusion arrived at by this chapter is that, in many respects, there is a ‘disconnect’ between law and practice in respect of the *individual* paradigm of the *INI* typology, which necessitates reform.

8.1. Primacy of Victims’ Rights

Through a variety of legislative provisions, as well as institutional and operational commitments, the rights of trafficked victims have reportedly been given primacy in the four Commonwealth Caribbean states examined by this thesis. More specifically, the respective Commonwealth Caribbean TIP Acts, at the very outset, mandate that competent national authorities must have regard to the primacy of victims’ human rights in all their operations. In this context, they are required, to the greatest extent possible, to take special account of victims’ ages(s), gender and special needs.¹ This provision sets the tone for the operationalisation of a ‘victim-centred’ approach to human trafficking in the respective states, to the extent that the rights of victims have been given statutory priority. Several examples illustrate the level of primacy afforded the rights of trafficked victims in this regard.

¹ Section 18 (8) and 18 (7) TIP Act (Guyana); Section 3(1) (a) TIP Act (Jamaica); Section 35 (3) TIP Act (SVG); Sections 4 (a) and 6 (2) TIP Act (T&T)

First, in setting out the threshold requirements for a finding of human trafficking, Commonwealth Caribbean legislators, like their European counterparts as described in chapter 5, sought to ensure that traffickers are not able to use the supposed ‘consent’ of trafficked victims as a legitimate defence.² In addition, legislators also sought to ensure that evidence of victims’ past sexual behaviour is inadmissible in the prosecution of trafficking-related offenses.³ Furthermore, the respective Commonwealth Caribbean TIP Acts also explicitly provide that trafficked victims, if they so desire, are to be afforded the opportunity by the court to present their views and concerns in criminal proceedings brought against traffickers.⁴ Added to this, the respective TIP Acts also provide that trafficked victims must be allowed to communicate and receive visits from family, friends and attorneys-at-law after they have been identified;⁵ and that repatriation to their countries of origin prior to the conclusion of criminal proceedings cannot prejudice their right to receive compensation.⁶

A. Non-Punishment of Trafficked Victims

The respective TIP Acts, like their European counterparts, provide that victims of trafficking shall not be penalised for any immigration-related offence, prostitution, or any other criminal offence that was the direct result of having been trafficked.⁷

Unlike the situation which obtains in a number of European countries as described in chapter 5, various sources revealed that the ‘non-punishment’ provision has largely been complied with in the Commonwealth Caribbean states examined by this thesis.⁸ Despite the fact that no confirmed case involving the alleged penalisation of trafficked victims has been decided upon to date by Commonwealth Caribbean courts, the vast majority of interviewees were adamant that trafficked victims are not in practice penalised for their involvement in offenses which they have been compelled to commit. A few interviewees, however, expressed concern over the possibility that at least some victims of trafficking might be inadvertently penalised in this regard.

² Section 9 (1) TIP Act (Guyana); section 9 (1) TIP Act (SVG); Section 4(4) TIP Act (Jamaica); section 20 (1) TIP Act (T&T)

³ Section 9 (2) TIP Act (Guyana); section 9 (2) TIP Act (SVG); section 20 (3) TIP Act (T&T)

⁴ Section 17 TIP Act (Guyana); Section 24 (1) TIP Act (SVG); section 36 TIP Act (T&T)

⁵ Section 18 (5) TIP Act (Guyana); Section 25 (4) TIP Act (SVG); Section 37 (2) TIP Act (T&T)

⁶ Section 6 (3) TIP Act (Guyana); Section 6(4) TIP Act (Jamaica); Section 16 (4) TIP Act (SVG); section 30 (4) TIP Act (T&T)

⁷ Section 11 TIP Act (Guyana); section 8 TIP Act (Jamaica); section 11 TIP Act (SVG)

⁸ Interview with S-3, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014)

Interviewees S-2 and S-6, in particular, were concerned about the possibility that at least a few of the young men who have been prosecuted to date for the production of cannabis in SVG might have been compelled to commit said illegal activity.⁹ While these assertions could not be substantiated at the time of writing, there was nonetheless a shared belief by the vast majority of interviewees that the possible exploitation of young men for the production of cannabis in SVG is an area in relation to which urgent action is required. T-6, in the context of T&T, also expressed similar concerns in relation to the possible penalisation of trafficked victims who might have been compelled to commit prostitution-related offenses in ‘whore houses’.¹⁰ As intimated above, however, these assertions are merely speculative, given that there have been no confirmed cases to date wherein which trafficked victims have been penalised for unlawful activities that they were compelled to commit,¹¹ which is in contradistinction to the UK, for example, as described in chapter 5.

Notwithstanding this, however, it is important to note that, unlike the Guyana and SVG TIP Acts,¹² the Jamaica and T&T TIP Acts place the burden of proof on trafficked victims to establish that they have committed unlawful activities as a direct result of having been trafficked. More specifically, section 31 of the T&T TIP Act, which is similarly worded to section 8 of the Jamaica TIP Act, provides that:

Where a victim has been compelled to engage in unlawful activities as a direct result of being trafficked and he has committed any immigration-related offence, or any other criminal offence for which he is being prosecuted, he may offer as a defence, evidence of having been compelled as a victim of trafficking to engage in such unlawful activities.¹³

While such an approach to the non-punishment of trafficked victims is not unique to Jamaica or T&T¹⁴ as described in chapter 5, it nevertheless raises a number of questions regarding the extent to which trafficked victims who are compelled to commit unlawful activities can provide

⁹ Interview with S-2, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014); Interview with S-6, NGO Representative (Kingstown, St. Vincent and the Grenadines, 2 April 2014)

¹⁰ Ibid Interview with S-2

¹¹ US Department of State, 'Trafficking in Persons Report - Trinidad and Tobago' (Office to Monitor and Combat Trafficking in Persons, 2014) (noting that the government did not punish any identified trafficking victims for crimes committed as a direct result of a trafficking situation).

¹² See e.g. section 11 TIP Act (Guyana). 'A victim of trafficking is not criminally liable for any immigration-related offence, prostitution, or any other criminal offence that was a direct result from being trafficked'.

¹³ Section 31 TIP Act (T&T)

¹⁴ Curberime, 'Victims Have a Defence If Charged for Crimes Committed Due to Trafficking' (*End Human Trafficking*, 15 May 2014); Interview with T-1 (n 70)

the type of evidence that is required to satisfy this burden of proof. Although the scope of this provision has not yet been tested before the courts of the Commonwealth Caribbean states examined by this thesis, the question also arises as to whether the courts in those states will be inclined to follow the narrow judicial approach to the non-punishment provision countenanced in England and Wales, as discussed in chapter 5, or will be inclined to adopt a more liberal approach in respect of ‘stay’ proceedings. While it is perhaps too early to speculate as to which approach might be favoured in the Commonwealth Caribbean, it is clear that front-line responders, prosecutors and judges must be sufficiently trained so as to prevent against the penalisation of trafficked victims for offenses that they have been compelled to commit.

B. Witness Protection

Although various sources revealed that, in keeping with the Jamaica,¹⁵ SVG¹⁶ and T&T¹⁷ TIP and Witness Protection Acts,¹⁸ there has to date been no specific instance in which victims of trafficking in the states examined by this thesis were subject to reprisals from traffickers or their associates, they did, however, suggest that witness protection systems in the region are far from impervious. At the elementary level, it is important to note that of all the countries under investigation, Guyana¹⁹ does not have a *comprehensive* witness protection program in place²⁰ which may in future prove to be detrimental to the primacy of victims’ rights should traffickers seek to intimidate or retaliate against victims. That said, the failure to operationalise a robust mechanism that provides for, amongst other things, relocation, new residences and new identities, in Guyana may explain why a number of trafficked victims have reportedly refused to cooperate with competent national authorities in the initiation of criminal proceedings in that country, or have pulled out half-way through such proceedings.²¹ Notwithstanding the fact that a Justice Protection Bill²² is currently before the parliament of Guyana, the relatively small size of

¹⁵ Section 9 (2) TIP Act (Jamaica)

¹⁶ Section 20 and 21 TIP Act (SVG)

¹⁷ Section 32 (b) TIP Act (T&T)

¹⁸ Justice Protection Act, Act 23 of 2001 and The Witnesses (Public Enquiries) Protection Act, Act 1 of 1964 (Jamaica); The Witness (Special Measures) Act, No: 37 of 2013 (SVG); Justice Protection Act, 2000, Act No. 78 of 2000 (T&T)

¹⁹ Cf. sections 18 and 14 TIP Act (Guyana)

²⁰ Interview with G-1, State Official (Georgetown, Guyana, 11 February 2014)

²¹ Interview with G-4, State Official (Georgetown, Guyana, 12 February 2014)

²² – ‘Witness protection, whistle-blower legislation coming’ *Guyana Times* (Georgetown, 9 April 2014) <<http://www.guyanatimesgy.com/2014/04/09/witness-protection-whistle-blower-legislation-coming/>> accessed 22 July 2014

that country's *inhabited* areas,²³ as well as the fact that personal information on victims of crime typically spreads quickly, are outstanding issues which merit consideration.

More generally, in the context of the other Commonwealth Caribbean states, there is some indication that public confidence in the respective witness protection programs remains at an all-time low,²⁴ to the extent that many trafficked victims do not agree to institute criminal proceedings against traffickers.²⁵ This unfortunate state of affairs can be attributed to the inability of competent national authorities to sufficiently persuade these victims that they will be adequately protected against retaliation from traffickers;²⁶ as well as the actual conditions in which victims of crime and, in particular, victims of trafficking, are held. For example, in their haste to secure the primacy of victims' rights, Jamaican authorities have reportedly become 'overprotective';²⁷ victims/witnesses of crime, in general, have complained of being held in 'hostage-like conditions'²⁸ in Guyana; while the system of witness protection in T&T has been described as 'ineffective, inefficient and a waste of time.'²⁹ The latter sentiment stems from the reportedly numerous instances in which persons have become despondent and frustrated by the strict rules of the program, and, in particular, 'their living arrangement and [meagre] standard of living.'³⁰ Added to this is the reportedly bad precedent set in earlier cases in T&T whereby, upon the collapse of cases in which certain individuals were called to give evidence as

²³ Esther Gittens, 'An Assessment of the Current Institutional Arrangements and programs to prevent and respond to trafficking in Persons in Guyana' (MSc Thesis, University of the West Indies, 2011)

²⁴ Government of Jamaica, *Jamaican Justice System Reform Task Force Final Report* (Ministry of Justice of Jamaica, 2007)

²⁵ – 'Trafficking In Persons Unit Cites Severe Limitations In Prosecutions' *RJR News* (Kingston, 5 January 2013) <<http://rjnnews.com/local/trafficking-in-persons-unit-cites-severe-limitations-in-prosecutions>> accessed 4 March 2014

²⁶ Interview with J-7, Representative of International Organisation (Kingston, Jamaica, 17 March 2014)

²⁷ Interview with J-1, State Official (Kingston, Jamaica, 7 March 2014)

²⁸ – 'Witness protection programme in shambles' *Kaiteur News* (Georgetown, 29 September 2010) <<http://www.kaiteurnews.com/2010/09/29/witness-protection-programme-in-shambles/>> accessed 25 February 2014

²⁹ Denyse Renne, 'Local witness protection programme misunderstood' *Trinidad Express Newspaper* (Port of Spain, 7 February 2011) <http://www.trinidadexpress.com/news/Local_witness_protection_programme_misunderstood_-115475199.html> accessed 20 May 2014

³⁰ Shaliza Hassanali, 'Lucky: Upgrade witness Protection Programme' *Trinidad Guardian* (Port of Spain, 13 October 2013) <<http://m.guardian.co.tt/news/2013-10-13/lucky-upgrade-witness-protection-programme>> accessed 20 May 2014

witnesses,³¹ they were excluded from the witness protection program without adequate follow-up.³²

Notwithstanding a recent press release from the Ministry of Justice of T&T that suggested that the country's witness protection program has been assessed by an 'international agency' and given a passing grade in respect of its staffing and operational systems,³³ it remains the case that public confidence in the program is quite low.³⁴ The lack of confidence in this program is linked to the often lengthy periods of time that it takes for criminal proceedings to be completed in T&T; victims' inherent fear that traffickers will intimidate their families abroad during this delicate time (a matter in relation to which T&T does not have jurisdiction);³⁵ and the general perception that, in a small society as T&T, 'everyone knows everyone and there are few secrets.'³⁶ On a practical level, and quite similar to the challenges identified in chapter 5 in respect of Europe, the reality is that providing adequate security, relocation and a change of identity is very costly,³⁷ and in those cases where a victim or potential witness refuses to enter the witness protection program, the state cannot compel him/her to do so.³⁸ Moreover, in SVG, although the country's legislators recently enacted the Witness (Special Measures) Act 2013³⁹ which provides for, among other things, anonymity,⁴⁰ voice modulation,⁴¹ evidence by means of live link,⁴² video evidence recording⁴³ and the use of intermediaries,⁴⁴ recent practice suggests that the judiciary in SVG may be unwilling at present to countenance the prospect of utilising the full range of changes brought about by the Act,⁴⁵ perhaps due to unfamiliarity.

³¹ – 'T&T witness protection programme has collapsed - former AG' *Stabroek News* (Georgetown, 6 October 2013) <<http://www.stabroeknews.com/2013/news/regional/10/06/tt-witness-protection-programme-has-collapsed-former-ag/>> accessed 11 July 2014

³² Shaliza Hassanali (n 30)

³³ Ministry of Justice, 'The Witness Protection Programme' (Government of Trinidad and Tobago, 8 October, 2013)

³⁴ Implementation Review Group, 'Review of implementation of the United Nations Convention against Corruption' (4th session, Panama City, 26-27 November 2013)

³⁵ Interview with T-2 (n 117)

³⁶ Shaliza Hassanali (n 30)

³⁷ Sejilla McDowall, 'Witness Protection in the Caribbean' (2013) 6 *Indictment* 3

³⁸ – 'Minister Griffith Confirms Safety of Witness Protection Program' *TT NewsFlash* (Port of Spain, 10 May 2014) <<http://ttnewsflash.com/?p=52251>> accessed 20 May 2014

³⁹ The Witness (Special Measures) Act, No: 37 of 2013 (SVG)

⁴⁰ *Ibid* section 5

⁴¹ *Ibid* section 5 (e)

⁴² *Ibid* section 16 (1)

⁴³ *Ibid* section 18 (1)

⁴⁴ *Ibid* section 20 (1)

⁴⁵ Haydin Huggins, 'Judge refuses historic application' *The Vincentian Newspaper* (Kingstown, 31 July 2014) <<http://thevincentian.com/index97.htm>> accessed 6 August 2014

Against the backdrop of the challenges identified above, it is perhaps not surprising that there have been increasing calls for the operationalisation of a robust CARICOM-wide witness protection program⁴⁶ aimed at better ensuring the safety and well-being of trafficked victims and witnesses throughout the region.

8.2. The Provision of Basic Supplies

The respective Commonwealth Caribbean TIP Acts,⁴⁷ like their European counterparts, expressly stipulate that, to the greatest extent possible, competent national authorities, in conjunction with local, regional and international organisations, shall provide basic supplies to victims of trafficking, commensurate with their individual needs. These basic supplies should include, at a minimum, food, clothing and personal hygiene products. While, in the main, this obligation has been complied with in the context of the states investigated by this thesis, a few operational challenges have nevertheless arisen in practice.

In Guyana, for example, interviews revealed that, despite best efforts, the provision of basic supplies continues to be impeded by a general lack of requisite financial resources for this purpose.⁴⁸ This situation is particularly acute when foreign victims, usually with no material resources of their own, require the provision of even the most basic of supplies; when trafficked children, who typically have no familial support, have to be extensively provided for; and when victims who undertake to initiate court proceedings have to be adequately provided for over the course of typically lengthy criminal proceedings.⁴⁹ Financial challenges also arise in respect of the provision of material assistance to the families of these victims who may wish to join them for the duration of criminal proceedings in Guyana⁵⁰ and, also, in providing social benefits to the dependent children of trafficked victims for extended periods of time. Although there have been no officially confirmed cases of human trafficking in SVG, interviewees there also expressed concerns about the country's ability to provide for the needs of *future* victims of trafficking, given the current economic climate.⁵¹

⁴⁶ – 'CARICOM witness plan needed' *Nation News Barbados* (Bridgetown, 17 March 2014) <http://www.nationnews.com/nationnews/letters_to_editor/4322/caricom-witness-plan> accessed 14 April 2015

⁴⁷ Section 18 (1) (a) TIP Act (Guyana); section 10 TIP Act (Jamaica); section 25 (1) and (2) TIP Act (SVG); section 37 (1) TIP Act (T&T)

⁴⁸ Interview with G-4 (n 21); Interview with G-5, State Official (Georgetown, Guyana, 13 February 2014)

⁴⁹ Interview with G-1 (n 20)

⁵⁰ Interview with G-4 (n 21)

⁵¹ Interview with S-6 (n 9)

Unfortunately, the existing situation is no different in T&T. In fact, interviews revealed that the Counter Trafficking Unit's ability to provide even basic supplies to trafficked victims to date has been severely constrained,⁵² thereby requiring, on a few occasions, staff members of the Unit to use their personal finances, with the prospect of being reimbursed.⁵³ Additionally, local NGOs have at times had to take the lead in terms of providing basic supplies to victims of trafficking, despite limited finances.⁵⁴ Moreover, as the recent case involving the rescue of 21 Honduran boys trafficked into forced labour in Jamaican coastal waters⁵⁵ demonstrates, providing for the immediate needs of trafficked victims is not a straightforward task for competent national authorities,⁵⁶ especially in light of increasingly difficult economic times.⁵⁷ In that case alone, various sources reported that over JD \$1 million was expended by the Jamaican government in providing for the living expenses of the victims in question before they were eventually repatriated to Honduras.⁵⁸

As described in chapter 5, although the challenges identified above in respect of the provision of basic supplies to trafficked victims also arise in several European countries, it appears that the situation in the Commonwealth Caribbean is far more problematic than that which obtains in Europe. This is perhaps due to the fact that the Commonwealth Caribbean states examined by this thesis are middle-income countries whose ability to provide the full range of financial resources needed to appropriately support and assist victims is perhaps not as strong as most European countries.

8.3. The Provision of Medical and Psychological Assistance

In furtherance of their obligations under Article 6(3) of the Trafficking Protocol, and in similar ways to that which typically transpires in Europe as described in chapter 5, competent national authorities in the respective Commonwealth Caribbean states examined by this thesis, in

⁵² Interview with T-6, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014)

⁵³ Ibid

⁵⁴ – 'Economic problems cannot be ignored' *Trinidad Express Newspaper* (Port of Spain, 26 April 2013) <<http://www.trinidadexpress.com/commentaries/Economic-problems-cannot-be-ignored-204946491.html>> accessed 23 July 2014

⁵⁵ Luke Douglas, '21 Honduran teens held on illegal fishing boat' *Jamaica Observer* (Kingston, 31 December 2012) <<http://www.jamaicaobserver.com/news/21-Honduran-teens-held-on-illegal-fishing-boat>> accessed 13 April 2015

⁵⁶ Interview with J-7 (n 26) (noting that many of the services that are provided [...] are constrained by resource limitations).

⁵⁷ Interview with J-12, State Official (Kingston, Jamaica, 4 March 2014) (noting that the major challenge of providing support and assistance to meet the needs of victims is primarily a limitation of resources).

⁵⁸ Andrea Braham, 'Govt. Establishes Shelter for Victims of Human Trafficking' (*Jamaica Information Service*, 21 June 2013) <<http://jis.gov.jm/govt-establishes-shelter-for-victims-of-human-trafficking/>> accessed 4 March 2014.

conjunction with local NGOs and international organisations, are statutorily mandated⁵⁹ to provide, *to the greatest extent possible*, requisite medical and psychological assistance to victims of trafficking.⁶⁰ Interviews revealed that, in practice, medical assistance is generally provided through the respective countries' Ministries of Health,⁶¹ and would typically entail, at the very least, the performance of various tests intended to determine whether victims may have contracted sexually transmitted diseases, become pregnant, or been infected with malaria (which is reportedly quite rampant in Guyana's hinterland communities, for example).⁶² While local NGOs may assist in this regard by organising for pro-bono medical services to be offered to some victims of trafficking,⁶³ interviews revealed that access to medical services through state-run medical facilities usually involves long waiting periods and, in some instances, poor quality service.⁶⁴ More generally, poor medical infrastructure, particularly in Guyana's hinterland communities,⁶⁵ as well as the limited capacity of healthcare facilities in Jamaica⁶⁶ and SVG,⁶⁷ are also real challenges that arise in practice in so far as the provision of medical services to trafficked victims is concerned in the Commonwealth Caribbean.

With regard to the provision of psychological assistance, interviews revealed that this service is typically provided free of cost to victims of trafficking by a number of government as well as private agencies. In practice, the provision of psychological assistance has reportedly proved to be very important, particularly in those cases where victims have shown signs of depression, post-traumatic stress disorder, and, increasingly, suicide.⁶⁸ In general, counsellors who provide psychological assistance to these victims are guided by a number of stringent principles, including respect for victims' privacy; confidentiality; as well as respect for victims' physical autonomy, dignity and agency.⁶⁹ From all reports, adherence to these principles has meant that, in practice, most victims, particularly foreign victims who typically feel despondent and isolated

⁵⁹ Section 18(1) (b) – (d) TIP Act (Guyana); section 35 (3) TIP Act (SVG) ("The Task Force shall take into account the [...] *special needs* of the victims and accompanying dependent children"; section 37(1) TIP Act (T&T)

⁶⁰ Interview with J-10, State Official (Kingston, Jamaica, 21 March 2014)

⁶¹ Interview with G-4 (n 21)

⁶² Interview with G-1, State Official (Georgetown, Guyana, 11 February 2014)

⁶³ Interview with J-5, State Official (Kingston, Jamaica, 14 March 2014)

⁶⁴ Ibid

⁶⁵ – 'Guyana: Country Cooperation Strategy at a Glance' (World Health Organisation, 2013) 1 <http://www.who.int/countryfocus/cooperation_strategy/ccsbrief_guy_en.pdf> accessed 18 August 2014

⁶⁶ Interview with J-9, State Official (Kingston, Jamaica, 21 March 2014)

⁶⁷ Interview with S-5, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014)

⁶⁸ Interview with T-6 (n 52)

⁶⁹ Ministry of Justice, *Victim's Charter (MIS Department)*, 19 July 2006)

in the respective countries,⁷⁰ are shielded from secondary victimisation that might otherwise arise during the course of the often lengthy criminal process.⁷¹

Notwithstanding the important work undertaken by those who provide psychological assistance to victims of trafficking in the respective Commonwealth Caribbean states, however, it remains the case that their efforts are sometimes constrained by a basic lack of resources, which is also a challenge that arises in a few European countries as described in chapter 5.⁷² For example, while Jamaica's Victim Support Unit's small staff size was expected to be expanded in early April 2014, some uncertainty nevertheless remained as to whether the currently available pool of counsellors, social workers and psychologists will be able to handle the pressure of several trafficking cases being referred to them all at once. In such circumstances, those providing psychological assistance through this Unit will invariably be stretched to maximum capacity, since the Unit not only provides its services to victims of trafficking, but also to victims of crime generally, including victims of domestic violence. More generally, in T&T, interviews revealed that while the CICB, at least in theory, is mandated to offer counselling referrals to victims,⁷³ counselling for these vulnerable persons is instead provided by local NGOs, and not by the CICB or any other government agency.⁷⁴ While the situation is slightly different in the context of SVG, to the extent that the government is mandated to take the lead in terms of providing psychological assistance to victims of trafficking, S-6, in particular, suggested that there is, at present, no specialised or targeted counselling for potential victims of trafficking as most, if not all, of the counsellors in SVG have a general interest in the area, rather than specialised expertise in trauma counselling, for example.⁷⁵ Additionally, in Guyana, concerns arise in respect of the sufficiency of existing resource allocations for the purposes of providing psychological assistance to victims of trafficking,⁷⁶ as well as the extent to which the state can sustain the provision of specialised counselling services for an extended period. Added to this are concerns over the adequacy and, indeed, robustness of the post-counselling assessments

⁷⁰ Interview with T-1 (Interview with T-1, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 13 December 2013)

⁷¹ Interview with T-6 (n 52)

⁷² Garfield Angus, 'JA Making Efforts to Combat Human Trafficking' (*Jamaica Information Service*, 23 September 2011) <<http://jis.gov.jm/ja-making-efforts-to-combat-human-trafficking/>> accessed 26 March 2014

⁷³ – 'Victim Support' (Ministry of Justice of Trinidad and Tobago, 2014) <<http://www.justice.gov.tt/get-assistance/victim-support/get-counselling/>> accessed 14 August 2014

⁷⁴ Interview with T-5, NGO Representative (Port of Spain, Trinidad and Tobago, 26 February 2014)

⁷⁵ Interview with S-5 (n 67)

⁷⁶ – 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

that are presently available for the purposes of evaluating the psychological and emotional states of trafficked victims *after* criminal proceedings have been completed.⁷⁷ These issues, amongst others, are ripe for consideration.

8.4. Special Measures to Protect Child Victims

The respective Commonwealth Caribbean TIP Acts, in much the same manner as their European counterparts, make explicit provision for the special protection of trafficked children, commensurate with their best interests.⁷⁸ Apart from requiring that competent national authorities provide child victims with housing, care, and other forms of appropriate support,⁷⁹ the respective TIP Acts also require that these vulnerable persons be reunited with their families as soon as practicable, wherever it is appropriate to do so.⁸⁰ Additionally, criminal proceedings involving trafficked children must be held *in camera*,⁸¹ which is intended to prevent against secondary victimisation. More generally, as a matter of legislative stipulation, children identified as having been trafficked in all of the Commonwealth Caribbean states examined by this thesis are not to be housed in prisons or other detention facilities.⁸² Furthermore, as both a matter of legislative stipulation and state practice, appropriate mechanisms are in place to ensure that where child victims of trafficking are required to participate in criminal proceedings, they are assigned trained social or case management workers, as the case may be, to support and assist them throughout the course of the often arduous criminal process.⁸³ In appropriate cases, child victims are also assigned legal guardians to aid in their recovery, should their parents not be suitable for these purposes.

Notwithstanding the existence of the special measures identified above, however, various sources revealed that a number of challenges arise in practice regarding the protection and assistance of trafficked children. In T&T, for example, interviews indicated that while, pursuant

⁷⁷ Interview with G-6, State Official (Georgetown, Guyana, 14 February 2014)

⁷⁸ Section 25 TIP Act (Guyana); section 11 TIP Act (Jamaica); section 32 (1) TIP Act (SVG); section 44(1) TIP Act (T&T)

⁷⁹ Section 25 (d) TIP Act (Guyana); Section 10(1) (f) TIP Act (Jamaica); section 32 (2) TIP Act (SVG); section 44(2) TIP Act (T&T)

⁸⁰ Section 25 (c) TIP Act (Guyana); section 32 (3) (d) TIP Act (SVG); section 44(3) (a) TIP Act (T&T)

⁸¹ Section 15 (2) TIP Act (Guyana); section 11(a) TIP Act (Jamaica); section 22 (2) TIP Act (SVG); section 34(2) TIP Act (T&T)

⁸² Section 18 (6) TIP Act (Guyana); section 13 (1) TIP Act (Jamaica); Section 25 (6) TIP Act (SVG); section 37 (4) TIP Act (T&T)

⁸³ Section 4(2)(b) Child Care and Protection Act (Jamaica); section 32 (3) (b) TIP Act (SVG); Interview with G-5 (n 48); Interview with T-5 (n 74)

to the Children Act,⁸⁴ the Counter-Trafficking Unit is working closely with the Child Protection Task Force to develop an appropriate procedure to protect children who have been trafficked, this has not materialised in practice to date. More specifically, although discussions have been had in the recent past about providing temporary guardianship and housing to trafficked children,⁸⁵ there is currently no designated shelter for trafficked children on the island of *Tobago*. The consequence of the lack of an appropriate shelter is that if a child victim were to be identified in Tobago, they would be kept at a hospital, overseen by medical staff and supervised by female police officers, until such time as they are able to travel over to neighbouring Trinidad.⁸⁶ While the distance between Trinidad and its sister island of Tobago is only 2.5 hours by boat, it is regrettable that a designated shelter has not to date been established in Tobago to accommodate child victims of trafficking. The reality is that having to wait for an extended period in order to travel over to Trinidad in an effort to access specialised services might very well be counter-productive in practice, given that the immediate aftermath of being trafficked is perhaps the most delicate time frame within which support and assistance might be most needed.

In the context of Guyana, interviews also revealed that, notwithstanding the existence of the special measures identified at the beginning of this section, the overriding challenge lies in the general unwillingness of trafficked children to participate in criminal proceedings, choosing rather to simply move on with their lives.⁸⁷ Additionally, in similar vein to that which obtains in Romania, Albania and Bulgaria, amongst others as described in chapter 5 with regard to trafficked children of Roma decent, it appears that the structural conditions which expose children to trafficking at the very outset largely continue to exist even after they have been returned to their communities of origin.⁸⁸ These conditions invariably expose trafficked children, and, in particular children of Amerindian decent, to the real possibility of being re-trafficked. This situation is further compounded by the strong cultural demand for the sexual services of Guyanese girls, particularly in the hinterland communities,⁸⁹ and even abroad, such

⁸⁴ Children Act Chapter 46:01, Act 4 of 1925, as amended by 3 of 2007

⁸⁵ Interview with T-6 (n 52)

⁸⁶ Interview with T-5 (n 74)

⁸⁷ Interview with G-5 (n 48)

⁸⁸ Gabriela Garton, 'Guyana's Unacceptable Stance on Human Trafficking' (2012) 32(19) Washington Report on the Hemisphere Council on Hemispheric Affairs 3

⁸⁹ – 'Child labour, trafficking in persons persist here despite legislation' (Ministry of Labour Human Services and Social Security, 2010) <http://www.mllhsss.gov.gy/index.php?option=com_content&view=article&id=268%3Achild-labour-trafficking-in-persons-persist-here-despite-legislationchild-labo%E2%80%A6 > accessed 11 April 2013

as in Barbados and Trinidad and Tobago.⁹⁰ The lack of surveillance in many Guyanese communities⁹¹ also means that, in practice, a potentially large number of trafficked children are still unaccounted for, thereby rendering the special measures currently in place to otherwise protect these vulnerable individuals of little practical utility .

More generally, in the context of Jamaica⁹² and SVG,⁹³ interviews revealed that while various legislative instruments collectively provide for an ambitious list of special measures aimed at assisting child victims in the context of court proceedings, including the use of audio-visual technology, the relevant Regulations and appropriate equipment needed for the operationalisation of these measures in the context of Jamaica,⁹⁴ as well as the general reluctance by the judiciary to utilise such modern forms of technology in the context of SVG,⁹⁵ prevent the full utilisation of such measures in practice. Added to this is the challenge of the possible invasion of privacy in a small society as SVG where information on issues of a sexual nature spreads quickly.⁹⁶ Another of the potential challenges which arises in the context of SVG, according to S-1, is the increasingly blurred line between what are culturally acceptable forms of behaviour, including family members' requests that children sell in family-owned shops or take care of family-owned livestock, and the TIP Act's definition of 'child trafficking', which does not require the 'means' element to be present for a trafficking-related offense to have been committed.⁹⁷ Questions also arise in respect of the extent to which adequate security and reintegration programs are in place to ensure that child victims, should they be identified in future in that country, are not prejudiced as a result of what S-4 describes as the general stigma associated with issues of a sexual nature in SVG.⁹⁸

⁹⁰ – 'Done in by \$10...The Guyana-Barbados human trafficking case' *Kaieteur News* (Georgetown, 7 May 2013) <<http://www.kaieteurnews.com/2013/05/07/done-in-by-10-the-guyana-barbados-human-trafficking-case/>> accessed 5 August 2014; – 'Human trafficking in Guyana' *Kaieteur News* (Georgetown, 25 April 2013) <<http://guyana.hoop.la/topic/human-trafficking-in-guyana>> accessed 11 April 2013; – 'A Human Rights Report on Trafficking in Persons, Especially Women and Children: Barbados' (Protection Protect, 2012) 1

⁹¹ Interview with G-2, State Official (Georgetown, Guyana, 11 February 2014)

⁹² Child Care Protection Act; Evidence (Amendment) Act; TIP Act

⁹³ Witness (Special Measures) Act

⁹⁴ Interview with J-5 (n 65)

⁹⁵ Haydin Huggins, 'Judge refuses historic application' *The Vincentian Newspaper* (Kingstown, 31 July 2014) <<http://thevincentian.com/index97.htm>> accessed 6 August 2014

⁹⁶ Interview with S-4, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014)

⁹⁷ Interview with S-1, State Official (Kingstown, St. Vincent and the Grenadines, 15 January 2014)

⁹⁸ Interview with S-4 (n 96)

8.5. Accommodation

A safe, well-resourced and discreetly located shelter is an absolute necessity for trafficked victims attempting to recover from the trauma associated with the exploitation which they have had to endure.⁹⁹ Against this backdrop, the respective Commonwealth Caribbean TIP Acts,¹⁰⁰ like their European counterparts described in chapter 5, provide that victims of trafficking shall be afforded appropriate accommodation, pursuant to Article 6(3) (a) of the Trafficking Protocol. The sources reviewed for the purposes of this thesis revealed that, while Guyana¹⁰¹ and T&T rely almost exclusively on local NGOs to provide accommodation to trafficked victims, the government of SVG provides a generic shelter for these purposes, referred to as the 'National Crisis Centre'.¹⁰² Jamaica, on the other hand, leads the way in so far as the provision of accommodation to trafficked victims is concerned, through its recently refurbished trafficking-in-persons shelter.¹⁰³ This impressive facility is reportedly furnished with a sick bay, recreational room, training room, a play room for children, as well as outdoor space for recreational facilities.¹⁰⁴ The shelter is also comprised of quarters which are manned by a house mother, and is closely watched by a security officer.¹⁰⁵ The daily operations of the shelter are guided by the *Guidelines for the Operation of Care Shelters for the Victims of Human Trafficking*. This document contains detailed provisions on the rules and regulations for residents which serve to prevent against the possibility of any interaction with traffickers. It also includes, in particular, special measures for the protection of vulnerable child victims of trafficking.¹⁰⁶

Though the new shelter is a significant initiative for which Jamaica must be commended, the overarching problem which arises in practice lies in the fact that the shelter was designed for

⁹⁹ – 'Shelter Established for Victims of Human Trafficking' *RJR News* (Kingston, 6 January 2013) <<http://rjrnews.com/local/shelter-established-for-victims-of-human-trafficking>> accessed 4 March 2014 (noting that the establishment of a shelter is one of the principal requirements when looking to aid victims of human trafficking).

¹⁰⁰ Section 25 TIP Act (Guyana); section 10(1)(f) TIP Act (Jamaica); section 25 (3) TIP Act (SVG); section 37(1) TIP Act (T&T)

¹⁰¹ – 'TIP Task Force rejects US State Department 2013 Report on Guyana - says lacks credibility' (*Government Information Agency*, 11 July 2013) <gina.gov.gy/wp/?p=13105> accessed 11 April 2013

¹⁰² – 'Combating Human Trafficking in SVG - Part 3' *Searchlight Newspaper* (Kingstown, 23 August 2012)

¹⁰³ Andrea Braham, 'Govt. Establishes Shelter for Victims of Human Trafficking' (*Jamaica Information Service*, 21 June 2013) <<http://jis.gov.jm/govt-establishes-shelter-for-victims-of-human-trafficking/>> accessed 26 March 2014

¹⁰⁴ Interview with J-2, State Official (Kingston, Jamaica, 11 March 2014); Interview with J-12 (n 57)

¹⁰⁵ – '8 Human Trafficking Cases Brought to Courts in Past 2 Years' (*Jamaica Information Service*, 24 February 2010) <www.jis.gov.jm/news/109-justice/23008-justice-8-human-trafficking-cases-brought-to-courts-in-past-2-years> accessed 24 October 2013

¹⁰⁶ Annmarie Barnes, 'Human Trafficking Data: Jamaica' (Organisation of American States, 2012) <www.oas.org/dsp/english/trata_jamaica.html> accessed 24 October 2013

only 10 persons, and, as such, cannot accommodate males and females at the same time unless they are of the same family.¹⁰⁷ More specifically, it does not appear that the shelter in question is capable of being fully operationalized under exceptional circumstances where a large number of victims are identified at once given its relatively small size. The capacity of the shelter clearly posed a problem in the recent case involving 21 Honduran boys who were rescued in Jamaican coastal waters. These persons, unfortunately, could not be accommodated at the designated shelter, and thus had to be housed at alternative locations, at a significant cost to the government of Jamaica.¹⁰⁸ Although the government is reported to be currently seeking to identify other emergency locations to cater for similar cases which might arise in future,¹⁰⁹ the alternative shelters which are currently available in Jamaica, as provided by local NGOs,¹¹⁰ either cannot accommodate trafficked victims for an extended period of time or are too small to accommodate many victims at once. The dilemma faced in practice, however, is that it is also proving quite costly for the government of Jamaica to maintain a shelter of the nature of the one currently in operation, given the fact that the number of victims typically housed at this location at any one time is quite small.¹¹¹

Interviews revealed that the existing shelters in Guyana are, by their very nature, quite expensive to operate, which has meant that, in practice, local NGOs are constantly placed under significant financial burden, notwithstanding government subsidies.¹¹² As chapter 5 intimates, this is not, however, a challenge unique to Guyana, as it also transpires in some European countries. Additionally, G-3 indicated that it often proves quite difficult, if not impossible, in practice to maintain the secrecy of the locations of shelters, given that victims would at times contact their traffickers or associates and provide them with such details.¹¹³ This

¹⁰⁷ Interview with J-12 (n 57)

¹⁰⁸ Interview with J-1, State Official (Kingston, Jamaica, 7 March 2014)

¹⁰⁹ Andrea Braham, 'Govt. Establishes Shelter for Victims of Human Trafficking' (*Jamaica Information Service*, 21 June 2013 <<http://jis.gov.jm/govt-establishes-shelter-for-victims-of-human-trafficking/>> accessed 26 March 2014)

¹¹⁰ Carolyn Gomes, Kimberley Byers and Rafael Tahan, 'NGO Report On the implementation of the International Covenant on Economic, Social and Cultural Rights' (*Jamaicans for Justice*, 2012) (noting that Woman Inc. a voluntary, non-profit organization, functions as an emergency temporary residence for women in crisis, but that due to limited funding, the women can only stay for a short time. This situation puts the women in danger and often forces them back to the situation that they escaped); Ruth Chisholm, 'Theodora's Place Protects Jamaican Girls from Trafficking' (*USAID FrontLines*, 10 September 2009) <http://www1.usaid.gov/press/frontlines/fl_sep09/p7_jamaica090919.html> accessed 16 April 2014 (noting that Theodora's Place can only accommodate six girls).

¹¹¹ Interview with J-6, State Official (Kingston, Jamaica, 14 March 2014)

¹¹² – 'US TIP Report on Guyana inaccurate - Human Services Minister' *TrakkerNews* (Georgetown, 28 June 2014) <<http://www.caribbeantrakker.com/2014/06/us-tip-report-on-guyana-inaccurate-human-services-minister/#.U87JNldUUQ>> accessed 14 August 2014

¹¹³ Interview with G-2 (n 91)

is cause for some concern, particularly in light of the fact that there is no extensive system of security currently in place to protect victims of trafficking housed at these shelters and, indeed, members of staff working at said shelters.¹¹⁴ Additionally, interviews revealed that some victims are simply not inclined to be housed at NGO-run shelters,¹¹⁵ presumably because of a perception that the operational rules of these shelters will curtail their agency. That said, even if some of these individuals wanted to utilise NGO-run shelters, they reportedly cannot practically so do if they are rescued within the general vicinity of Guyana's remote hinterland communities. In this regard, victims will be forced to stay at police stations for an extensive period of time after being rescued, until appropriate shelter can be afforded them in the capital city, Georgetown.¹¹⁶

More generally, interviews revealed that the existing shelters in T&T provide only limited accommodation,¹¹⁷ and rarely cater for the special needs of male or child victims of trafficking.¹¹⁸ Added to this is the fact that many trafficked victims, and, more particularly, foreign victims, often find themselves extremely bored, anxious and depressed whilst housed in these shelters.¹¹⁹ This is compounded by the fact that competent national authorities reportedly find it difficult in practice to strike an appropriate balance between allowing victims at least some agency in terms of their freedom of movement and protecting them from further victimisation in an island as small as T&T.¹²⁰ T-5, in particular, also voiced serious concern over the fact that some shelters are better supervised than others. The problem, in this context, appears to be that a few of the shelters generally have very limited security, especially after 4pm when the staff leaves.¹²¹ On another note, because cultural and language barriers exist in the context of these shelters, cliques sometimes reportedly develop, as local victims at times believe that foreigners are treated better than they are.¹²² The fact that victims of domestic violence also occupy these shelters further compounds this situation; in fact, T-9 was adamant that shared housing for victims of different crimes potentially exposes trafficked victims to re-victimisation. This is

¹¹⁴ Interview with G-3, State Official (Georgetown, Guyana, 11 February 2014)

¹¹⁵ Interview with G-5 (n 48)

¹¹⁶ Interview with G-3 (n 114)

¹¹⁷ Interview with T-2, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014)

¹¹⁸ — 'Local officials under investigation for human trafficking' *C-News* (Port of Spain, 5 December 2013) <http://ctntworld.com/cnews2/index.php?option=com_content&view=article&id=6344:local-officials-under-investigation-for-human-trafficking&catid=137:c-news&Itemid=280> accessed 14 August 2014

¹¹⁹ Interview with T-1 (n 70)

¹²⁰ Interview with T-6 (n 52)

¹²¹ Interview with T-5 (n 74)

¹²² *Ibid*

because the needs of these two types of victims are, in many cases, quite different, and the expectations that trafficked victims have whilst staying at these shelters may at times conflict with those of victims of domestic violence.¹²³

8.6. Privacy and Confidentiality

The respective Commonwealth Caribbean TIP Acts and associated legislative instruments,¹²⁴ in much the same manner as their European counterparts as described in chapter 5, contain a number of measures designed to ensure that the privacy of trafficked victims is fully respected, and that confidentiality regarding victims' identities, past experiences and present concerns is maintained.¹²⁵ More specifically, competent national authorities in the respective countries are under a statutory obligation to ensure that the names, locations and other identifying information of victims and their families are not made public, and that the media is, to the greatest possible extent, made aware of this, as well as the sensitive nature of trafficking investigations, in general.¹²⁶ Even further, as detailed in the previous chapter, criminal proceedings involving trafficked victims are to be held in *camera*¹²⁷ and, where appropriate, the court is also empowered to withhold, within the context of such proceedings, any information that might prejudice the interest of the victims in question.¹²⁸

To ensure that the foregoing protective mechanisms are complied with in practice, explicit provision is made for the imposition of commensurate penalties,¹²⁹ in respect of those who are found to be in breach of the statutory conditions imposed by the respective TIP Acts. In this regard, interviews revealed that strict adherence to the principles of privacy and confidentiality by key stakeholders in the respective Commonwealth Caribbean states examined by this thesis not only protects against trafficked victims being recaptured, intimidated or becoming the

¹²³ Interview with T-9, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014)

¹²⁴ Child Care and Protection Act, Evidence (Amendment) Act; Justice Protection Act, and Witness (Public Enquiries) Protection Act (Jamaica); Witness (Special Measures) Act (SVG); Data Protection Act (T&T)

¹²⁵ Section 15(1) TIP Act (Guyana); section 9(2) TIP Act (Jamaica); section 22 (1) TIP Act (SVG); section 34(1) TIP Act (T&T)

¹²⁶ Ibid

¹²⁷ Section 15 (2) TIP Act (Guyana); section 11 TIP Act (Jamaica); section 22 (2) TIP Act (SVG); section 34 (2) TIP Act (T&T)

¹²⁸ Ibid

¹²⁹ Section 15 (3) TIP Act (Guyana); Section 44; Child Care and Protection Act (Jamaica); section 22 (3) TIP Act (SVG); section 34 (3) TIP Act and section 3 Data Protection Act, 2011, Act No. 13 of 2011 (T&T)

object of reprisal by traffickers and their associates,¹³⁰ but also helps to prevent any secondary victimisation which might otherwise ensue if victims' details are revealed in small societies as those under investigation; that is, states wherein instances of stigma, discrimination and social exclusion of victims of sexual violence are reportedly widespread.¹³¹

Although there has not been any officially confirmed case of human trafficking in SVG to date, interviews revealed that, given the small size of that country, and the relative lack of awareness on the part of some key stakeholders, including members of the media, there is real potential for the statutory provision of privacy and confidentiality to be compromised in practice. More specifically, S-4, in reflecting on a newspaper report which allegedly carried a photograph of a young woman who was at the time alleged to be a victim of trafficking, noted that competent national authorities in SVG must constantly be on the alert for stories of this nature, so as to ensure that future victims are not subject to secondary victimisation at the hands of the media.¹³² This is, for the purposes of this thesis, a wise imploration, particularly in light of the fact that the above mentioned alleged victim, who had left SVG for a Central American country, subsequently refused to cooperate with competent national authorities, citing that she had not been trafficked.¹³³

8.7. Information, Documentation and Interpretation/Translation

In keeping with the statutory provisions stipulated by the respective Commonwealth Caribbean TIP Acts,¹³⁴ and in much the same vein as that which obtains in Europe, interviews revealed that competent national authorities in each of the four Commonwealth Caribbean states provide, to the greatest possible extent, requisite information to actual and potential victims of trafficking regarding their legal rights, as well the measures in place to ensure their safety, recovery and safe return to their places of origin.¹³⁵ In appropriate cases, legal assistance is also provided to victims who are inclined to institute criminal proceedings against their traffickers;

¹³⁰ Interview with J-9, State Official (Kingston, Jamaica, 21 March 2014)

¹³¹ Interview with T-6 (n 52)

¹³² Interview with S-4 (n 96)

¹³³ Kenton Chance, 'Vincentian woman victim of human trafficking - Eustace' *Searchlight Newspaper* (Kingstown, 24 July 2012) <searchlight.vc/mdetail.asp?hm=searchlight&cs=&l=vincentian-woman-victim-of-human-trafficking-eustace-p39938-82.htm> accessed 11 June 2013

¹³⁴ Sections 14 (b), 16, 18 (1) (f), 20 (1) (c), 33 (2) and 38 (1) TIP Act (Guyana); Section 10(1) of the TIP Act (Jamaica); sections 23, 20 (1) (e), 21 (2) (b) and 24 (2) TIP Act (SVG); sections 35 and 37 TIP Act (T&T)

¹³⁵ Interview with G-1 (n 62)

this is in an effort to both hold traffickers accountable and ensure that victims receive an adequate amount of compensation for the exploitation suffered.¹³⁶ Interviews also revealed that trafficked victims who are deprived of their identity documents as a result of the trafficking experience are afforded necessary documentation, including passports, visas and other forms of identification.¹³⁷ In conjunction with local NGOs, international organisations, and resident Embassies, victims of trafficking who do not speak English as their first language are also afforded the benefit of interpreters/translators;¹³⁸ these interpreters/translators reportedly work closely with victims to ensure that they fully understand their rights and interests, particularly over the course of the often lengthy criminal proceedings.¹³⁹

That said, interviews nonetheless revealed that one of the main challenges which arises in practice relates to the fact that, while translators versed in most of the major international languages are generally available in the four Commonwealth Caribbean states, very few, if any, translators versed in the more infrequently spoken international languages are readily available in the states in question. Although chapter 5 on European anti-trafficking law and practice suggests that this is not a problem that is unique to the Commonwealth Caribbean, it is nevertheless problematic, both from a protection as well as prosecution standpoint. This is because a failure to effectively communicate with trafficked victims in a language that they understand potentially deprives them of the opportunity to fully assess the options available to them, which may in turn expose them to re-victimisation if wrong choices are made.

Jamaican authorities reportedly faced this rather unfortunate situation recently when they discovered 21 Honduran boys who were trafficked through Jamaican coastal waters on a fishing boat. These boys only spoke a dialect of Spanish called ‘miskito’, which was not comprehensible by Jamaican authorities.¹⁴⁰ As Jamaican authorities could not readily ascertain the services of an appropriately skilled interpreter for the purposes of interpretation/translation at the relevant time, the boys had to be repatriated to Honduras so that they could receive a fuller evaluation from Honduran authorities. This also meant that the matter could not be

¹³⁶ Interview with G-5 (n 48)

¹³⁷ Ibid

¹³⁸ Interview with G-4 (n 21)

¹³⁹ Interview with J-1 (n 106)

¹⁴⁰ Interview with J-2 (n 104)

prosecuted by the Jamaican authorities, despite their best efforts to source an appropriately skilled interpreter.¹⁴¹

In Guyana, there also appear to be practical challenges in processing and, ultimately, in providing relevant documentation that may at times be needed by trafficked victims and their dependents. More specifically, T-5 recalled a recent situation in which a Guyanese woman who was trafficked to T&T, and who had a child there, allegedly found it difficult to ascertain relevant documentation needed for the purposes of being repatriated to Guyana.¹⁴² The dependent child, who was born in T&T during the period in which his mother was subject to exploitation, reportedly could not readily receive the relevant documentation needed to enrol in school, for example, upon his return to Guyana, as his birth certificate did not accurately reflect his Guyanese identity.¹⁴³ It is submitted that these are real challenges which must be ameliorated against so as to ensure that victims' right to receive appropriate information, documentation and translation is fully operationalized in practice.

8.8. Regularisation of Victims' Immigration Status

Interviews revealed that, in practice, foreign victims of trafficking are afforded an undefined period of recovery and reflection in the four Commonwealth Caribbean states, during which they are not required to cooperate with competent national authorities in the institution of criminal proceedings, and over the course of which they are provided with requisite support and assistance commensurate with their individual needs.¹⁴⁴ The challenge, however, lies in the fact that, unlike the European legislative framework which prescribes at the very least a 30-day recovery and reflection period as described in chapter 5, the respective Commonwealth Caribbean TIP Acts do not stipulate the exact duration of the recovery and reflection period. This lack of specificity is cause for some concern, as it potentially exposes foreign victims of trafficking to arbitrary treatment by competent national authorities, including being required to cooperate with the authorities in the institution of criminal proceedings before they have fully recovered, or deported prior to being afforded the opportunity to escape the influence of their traffickers.

¹⁴¹ Ibid

¹⁴² Interview with T-5 (n 74)

¹⁴³ Ibid

¹⁴⁴ Interview with G-1 (n 62); Interview with J-1 (n 106); Interview with T-1 (n 70); Interview with S-4 (n 96)

Suffice it to say, the respective TIP Acts,¹⁴⁵ like their European counterparts, empower competent national authorities in the four Commonwealth Caribbean states to afford victims of trafficking who are required to remain in the respective states for extended periods residence and work permits which enable them to live in those countries, work, and, ultimately, participate in criminal proceedings brought against their traffickers. Throughout the course of the time for which such permits are granted, victims are reportedly afforded the basic supplies¹⁴⁶ discussed in section 8.2 of this chapter, in addition to accommodation.¹⁴⁷ In appropriate cases, dependent children accompanying trafficked victims as well as their respective spouses are also eligible to, and sometimes do, join these victims in the respective Commonwealth Caribbean states.¹⁴⁸ Importantly, interviews revealed that victims (and their dependents) whose immigration status has been regularised are typically required to keep in regular contact with case officers so as to ensure that they are, indeed, making progress, and are free from any form of harassment.¹⁴⁹

The main challenge that arises in practice with regard to the regularisation of victims' immigration status in the four Commonwealth Caribbean states, as identified by several interviewees, relates to the exorbitant costs typically associated with providing the necessities that are required to ensure that victims,¹⁵⁰ and, in some cases, their dependents, live as comfortable a life as possible whilst in state care.¹⁵¹ Furthermore, practical challenges also arise in terms of providing jobs to these victims and their dependents who have attained the age of majority, given the relatively poor job prospects that currently characterise the search for employment in the four Commonwealth Caribbean states.¹⁵²

At the conceptual level, a review of the respective TIP Acts also reveals some uncertainty in terms of determining the precise conditions that should be satisfied for the purposes of granting and revoking permits in the states under investigation. In T&T, Guyana and SVG, for example, there is no reference to these circumstances in the respective TIP Acts or related instruments,¹⁵³

¹⁴⁵ Sections 18 and 19 TIP Act (Guyana); Article 13(1) TIP Act (Jamaica); section 26 TIP Act (SVG); section 38 TIP Act (T&T)

¹⁴⁶ Interview with J-2 (n 104)

¹⁴⁷ Interview with T-5 (n 74)

¹⁴⁸ Section 19 (3) TIP Act (Guyana); section 26 (3) and (4) TIP Act (SVG); section 44 (3) (a) TIP Act (T&T)

¹⁴⁹ Interview with T-6 (n 52)

¹⁵⁰ Interview with J-2 (n 104)

¹⁵¹ Interview with G-4 (n 21)

¹⁵² Interview with S-6 (n 9)

¹⁵³ E.g. Aliens (Immigration and Registration) Act, chapter 14:03 (Guyana); Immigration Act, Act 41 of 1969 (T&T)

while in Jamaica, the TIP Act appears to give the relevant Minister *wide* discretion to cancel at any time the visa or permit granted to foreign victims of trafficking.¹⁵⁴ The only limitation on this wide discretion appears to be, ‘where he considers it justified in the circumstances appropriate to do so’.¹⁵⁵ While many EU states exercise relatively wide discretion over the requisite conditions for revoking residence permits as described in chapter 5, it can nonetheless be argued that the foregoing provision does not adequately reflect emerging international standards in this delicate area, as it potentially exposes victims to arbitrary treatment at the hands of the state. More specifically, without detailed guidance on the appropriate procedure to be followed in respect of the revocation of residence permits in Jamaica and, indeed, the wider Commonwealth Caribbean, it can be argued that the immigration status of foreign victims of trafficking remains in limbo, as the respective Ministers can potentially terminate residence permits or visas granted, notwithstanding the existence of potentially frivolous circumstances. This is further compounded by the fact that none of the TIP Acts in question or related instruments make explicit reference to an appropriate appeals procedure in respect of adverse decisions reached by competent national authorities regarding the revocation of residence permits. This is, indeed, an area of concern, which requires careful attention.

8.9. Repatriation

Interviews revealed that foreign victims of trafficking are not, in practice, deported from the Commonwealth Caribbean states examined by this thesis.¹⁵⁶ Rather, pursuant to the respective TIP Acts,¹⁵⁷ and in much the same vein to that which obtains in many European countries as described in chapter 5, the respective governments, in conjunction with the IOM as well as various Embassies and Consulates,¹⁵⁸ facilitate the timely repatriation of such persons to their countries of citizenship,¹⁵⁹ having due regard to their safe return without undue delay; their wishes as to the choice of country to which they would like to be returned; as well as the status of any legal proceedings in which they are required to participate. For the purposes of this thesis, existing state practice suggests that, in large part, the *non-refoulement* obligation¹⁶⁰ is

¹⁵⁴ Section 12(2) TIP Act (Jamaica)

¹⁵⁵ *Ibid*

¹⁵⁶ Interview with J-2 (n 104)

¹⁵⁷ Section 22 TIP Act (Guyana); section 12 TIP Act (Jamaica); section 29 (1) TIP Act (SVG); section 39 (1) TIP Act (T&T)

¹⁵⁸ Interview with J-10 (n 60)

¹⁵⁹ Interview with G-5 (n 65)

¹⁶⁰ Article 14 (1) Trafficking Protocol

complied with in practice.¹⁶¹ It also appears that those victims who have been trafficked abroad, but who are ordinarily residents in the Commonwealth Caribbean, are, as a matter of legislative stipulation, afforded the necessary assistance to secure their safe return to the respective Commonwealth Caribbean states.¹⁶²

Interviews revealed that, in practice, one of the overriding concerns which arises from time to time, particularly in the context of T&T, is the general reluctance of both the government and some foreign embassies to finance the repatriation of trafficked victims, relying almost exclusively instead on the repatriation fund set up by the IOM to cover such expenses.¹⁶³ Given the potential for disagreements in this respect, which may in consequence prolong the length of time taken to effectively repatriate trafficked victims, it can be argued that this is, indeed, an area which needs to be re-examined by all concerned, in the hope of finding a more workable, collaborative solution to sharing the sometimes exorbitant costs associated with this delicate process.

More generally, however, it is also important to note that, in other countries, such as Guyana, interviews indicated that, apart from limited financial resources for the purposes of repatriation, competent national authorities also at times face the challenge of dealing with foreign victims' general unwillingness to return home,¹⁶⁴ which in effect means that their myriad needs must be taken care of in the host country for an extended period of time. Additionally, authorities in Guyana also face the challenge of dealing with the perennial collapse of criminal prosecutions once trafficked victims have returned to their countries of origin.¹⁶⁵

8.10. Reintegration

In furtherance of their obligations under Article 6 of the Trafficking Protocol, and in much the same manner as that which is statutorily provided for in the European context as described in chapter 5, competent national authorities in the states examined by this thesis provide, in accordance with their statutory obligations,¹⁶⁶ requisite employment, and education and training

¹⁶¹ Interview with J-7 (n 26); Interview with T-5 (n 74)

¹⁶² Section 20 (4) TIP Act (Guyana); section 27 (5) TIP Act (SVG); Section 42(1) TIP Act (T&T)

¹⁶³ Interview with T-5 (n 74)

¹⁶⁴ Interview with G-7, State Official (Georgetown, Guyana, 14 February 2014)

¹⁶⁵ Interview with G-3 (n 114)

¹⁶⁶ Section 18 (1) (a) TIP Act (Guyana); Section 10 (2) TIP Act (Jamaica); Section 31 TIP Act (SVG); section 37(1) TIP Act (T&T)

opportunities for victims of trafficking. According to several interviewees, these reintegration programs have to date produced a number of success stories. For example, in Guyana, interviews revealed that at least two trafficked victims were, at the time of writing, enrolled in different programs at an institute for higher education in Guyana, while several others have successfully completed, amongst others, cosmetology and catering courses.¹⁶⁷ Younger victims of trafficking have also been successfully reintegrated into schools on the same terms as other students; older teens have been provided with training by the Guyana Board of Industrial Training;¹⁶⁸ while adult victims of trafficking have been granted training and assistance in finding jobs from the Central Recruitment and Man Power Agency, as well as soft loans from the Ministry of Human Services to assist in getting their lives together.¹⁶⁹ Yet, still, other victims of trafficking have been reintroduced into recreational and faith-based settings,¹⁷⁰ which has largely served to prevent them from becoming re-victimised. In general, apart from equipping victims with the necessary skills to lead a life as close to 'normal' as possible, these reintegration efforts have reportedly instilled a greater sense of self-worth in many victims, whilst decreasing the chances of re-trafficking.¹⁷¹ A similar situation is said to generally obtain in Jamaica and Trinidad and Tobago, albeit with much less success.

Notwithstanding the considerable progress which has been made to date, a number of practical challenges do arise in practice with regard to successfully reintegrating at least some victims of trafficking.¹⁷² The first relates to the fact that, on a few occasions, albeit in the context of Guyana, it has been reported that some victims of trafficking have been re-trafficked or become homeless after they have returned to their places of origin in that country,¹⁷³ because follow-up investigations and, indeed, assistance have not always been provided by the relevant Ministries. Added to this is the fact that, given the mobility of Guyana's Amerindian people, it often proves quite difficult in practice to locate and assist trafficked victims belonging to this ethnic group

¹⁶⁷ Interview with G-1 (n 20)

¹⁶⁸ Interview with G-5 (n 48)

¹⁶⁹ 'Support to Victims of and Families Affected by Human Trafficking in Guyana' (UNDP, 2012)

¹⁷⁰ Danica Coto, 'U.S. Honors Simona Broomes For Her Work Fighting Human Trafficking In Guyana' *Huffington Post* (London, 20 June 2013 <www.huffingtonpost.com/2013/06/21/simona-broomes-human-trafficking_n_3479565.html> accessed 11 April 2013)

¹⁷¹ Interview with G-4 (n 21)

¹⁷² Interview with G-7 (n 164)

¹⁷³ – 'US condemns Guyana again on human trafficking' *Kaieteur News* (Georgetown, 21 June 2014) <<http://www.kaieteurnews.com/2014/06/21/us-condemns-guyana-again-on-human-trafficking/>> accessed 22 July 2014

who return to their families following the trafficking experience.¹⁷⁴ In this regard, G-2 was adamant that a more robust follow-up system needs to be operationalized so as to constantly evaluate the effectiveness of reintegration efforts, thereby ensuring that, to the greatest extent possible, victims do not become subject to re-trafficking after they have returned to their communities of origin.¹⁷⁵

In Jamaica, interviews also pointed to the existence of a number of challenges. The first relates to the high financial costs generally associated with providing training, education and job opportunities to victims of trafficking as part of the reintegration package, particularly in respect of those trafficked victims who, because of their precarious situation, might require the use of such services for an extended period.¹⁷⁶ Moreover, inter-country dialogue, which is necessary to ensure that trafficked victims who return home are properly reintegrated into their home countries, and therefore not subject to further victimisation, is at times not forthcoming in practice,¹⁷⁷ presumably because of different national priorities between countries. There is also, at present, no standardised or comprehensive procedure setting out the step by step processes which must be followed in respect of reintegrating trafficked child victims who are desirous of returning to the formal education system in Jamaica.¹⁷⁸ In general, however, an *ad hoc* procedure to this effect is relied upon in practice, led by the Children's Advocate.¹⁷⁹ That said, while this *ad hoc* procedure is seemingly working relatively well in practice, this procedure should be formally translated into a comprehensive protocol, in order to ensure that reintegration efforts are given legal, rather than mere rhetorical force.

The same argument can also be made in respect of Trinidad and Tobago, which does not, at present, have in place a robust system designed to provide an appropriate level of protection, including security, to child victims of trafficking who return to school after having been trafficked.¹⁸⁰ SVG, like its Commonwealth Caribbean counterparts, also faces the potential challenge of providing adequate security to protect trafficked children who might in future wish to return to school after they have been identified, as well as in providing the requisite follow-

¹⁷⁴ Interview with G-3 (n 114)

¹⁷⁵ Interview with G-2 (n 91)

¹⁷⁶ Interview with J-1 (n 106)

¹⁷⁷ *Ibid*

¹⁷⁸ Interview with J-5 (n 65)

¹⁷⁹ *Ibid*

¹⁸⁰ Interview with T-6 (n 52)

up procedures to ensure that future victims of trafficking are not re-trafficked.¹⁸¹ Although chapter 5 suggests that this is also one of the challenges faced by a number of countries in Europe, it must nonetheless be borne in mind that follow-up procedures are especially important for the purposes of preventing re-victimisation, particularly in light of the experience of Guyana, where a few victims have reportedly been re-trafficked or become homeless after they have returned to their places of origin in that country.¹⁸²

CONCLUSION

This chapter was the final of three chapters that critically examined the law and practice on human trafficking in the four Commonwealth Caribbean states examined by this thesis, from a comparative socio-legal perspective. This chapter, like chapter 5, presented evidence to the effect that, in many respects, a ‘disconnect’ exists at present between anti-trafficking law and state practice. This ‘disconnect’, which Galligan's Socio-legal theory characterises as symptomatic of the dichotomy between 'law on the books' and 'law in action', is best illustrated in respect of witness protection, the protection and assistance of child victims of trafficking, as well as in the provision of accommodation, amongst others. Against the backdrop of this ‘disconnect’, the argument was advanced that reform, particularly of state practice, is required. The theme of reform is explored in greater detail in the next chapter.

¹⁸¹ Interview with S-6 (n 9)

¹⁸² Interview with G-6 (n 77)

CHAPTER 9

CONCLUSION: *TOWARDS AN ENHANCED LEGAL FRAMEWORK*

INTRODUCTION

Human trafficking involves the commission of severe forms of exploitation against human beings. It thrives in conditions of poverty, prejudice, inequality and discrimination, and has a deleterious impact on its victims. Its perpetrators come from all walks of life, and are actively involved in myriad forms of exploitation which generate billions in profits on an annual basis. While there has been an increase in anti-trafficking measures at the international, regional, and domestic levels since the early 2000s, the effectiveness of these measures remains a hotly contested issue,¹ particularly when viewed in light of the relative dearth of sustained data and research into anti-trafficking law and practice. It is against this backdrop that this thesis was both conceptualised and developed over the preceding eight chapters. Given space constraints, this chapter will not comprehensively repeat all of the arguments presented hitherto, nor, indeed, attempt to provide a model for reform. Rather, it will adopt a principles-based approach, by exploring a set of key principles that should inform the reform of anti-trafficking law and practice in the regions examined.

A. GENERAL FINDINGS

Several key findings were identified in the context of this thesis, which have a direct bearing on the specific reform possibilities that will be explored in the subsequent section. First, chapters 2 - 8 revealed that, in a number of instances, ‘hegemonic assumptions’ are countenanced by state authorities when operationalizing the criminal justice and human rights dimensions of anti-trafficking law. While these assumptions seemingly do not, in large part, exist in anti-trafficking law, this thesis illustrated several instances in which they are nonetheless countenanced in practice. For instance, in chapters 3 - 5, various examples were provided which suggest the operation of a number of hegemonic assumptions in practice in Europe, including, the

¹ Anne Gallagher and Rebecca Surtees ‘Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who decides—and how?’ (2012) 1(1) *Anti-Trafficking Review* 10, 12

perception that compensation should not extend to third-country victims of trafficking as they are complicit in their own exploitation, particularly where a degree of agency is exercised; the assumption that marriages entered into by people of Roma decent, irrespective of whether they are consensual, are legitimate expressions of Roma traditions; the assumption that victims with a history that is characterised by engagement in prostitution can never be 'real' victims of trafficking; the assumption that if no physical injury is immediately discernible, especially in cases involving male victims who are subject to labour exploitation, there can be no case of human trafficking; as well as the assumption that 'historic' victims of trafficking should not benefit from support and assistance, and, in particular, medical and psychological assistance, because the passage of time delegitimizes a claim to victimhood. These hegemonic assumptions are, however, not unique to Europe, as chapters 6 - 8 aptly demonstrate. More specifically, the analysis of the law and practice on human trafficking in the Commonwealth Caribbean revealed that in raiding 'whore houses', first responders, particularly in T&T, continue to countenance the assumption that only prostitutes who are willingly meeting the demand for sexual services are present in those places, and not victims of trafficking. The assumption that *only* foreign-born, young females who are forced into prostitution are trafficked victims also remains a hegemonic assumption in the Commonwealth Caribbean. Notwithstanding this, however, this thesis suggested that with increasing awareness and training, competent national authorities in both regions are gradually beginning to eliminate many of the aforementioned hegemonic assumptions, though much more needs to be done in practice, particularly in the Commonwealth Caribbean.

Second, the obligations provided for under the criminal justice and human rights approaches, which inform the *normative*, *institutional* and *individual* aspects of anti-trafficking law, are not necessarily in conflict with each other, but rather, reinforce each other. In other words, the punishment of traffickers, as discussed in chapters 2, 3 and 6, serves to reinforce the legitimacy of human rights standards by protecting victims from further exploitation.² In addition, the human rights approach, which is characterised by a strong focus on addressing the causes and consequences of human trafficking, serves to reinforce the criminal justice's primary focus on

² Nerida Chazal, 'The Rationale of International Criminal Justice: Idealpolitic, Realpolitic and the International Criminal Court' in Willem de Lint, Marinella Marmo and Nerida Chazal (eds), *Criminal Justice in International Society* (Routledge 2014) 22 (Relying on Bassiouni, Chazal contends that 'the coupling of human rights norms with the framework of criminal justice invokes punishment as a legitimate mechanism that reinforces the legitimacy of human rights standards'. In other words, 'criminal justice provides a preventative, enforcement mechanism for human rights standards.')

prosecuting traffickers.³ Third, while the respective normative frameworks at both the European and Commonwealth Caribbean levels have been enhanced in recent years by the enactment of wide-ranging measures that stipulate binding obligations, existing state practice suggests that gaps continue to exist, which arguably threaten to subvert the overall efficacy of anti-trafficking law in these regions. Fourth, the existing institutional landscape relative to the regulation of human trafficking comprises myriad actors and agencies, which have been instrumental in implementing various anti-trafficking obligations in the fields of prevention, prosecution and protection. Notwithstanding the largely positive contributions of these institutions, however, several actors have arguably engaged in what Denis Galligan describes as ‘creative compliance’;⁴ that is, by adopting a minimalist approach to the operationalisation of their anti-trafficking obligations. For example, in chapters 5 and 8, in particular, several examples are provided whereby actors in the regions examined, for political, ideological, social or economic reasons, have adopted a minimalist approach towards the implementation of their anti-trafficking obligations in so far as victim protection is concerned.

Fifth, one of the greatest challenges in so far as the operationalisation of anti-trafficking law is concerned, particularly in Europe, arises at the *individual* level, discussed in chapter 5, whereby an apparently lack of commitment to the protection of trafficked victims remains a central concern. A major part of the challenge, it seems, flows from the fact that providing support and assistance to victims of trafficking is a resource-intensive process that raises political, social, ethical and wider economic questions, particularly when viewed in light of competing regional/national priorities. That said, given the adverse consequences that have in recent years ensued from a failure or inconsistent approach to the protection and assistance of trafficked victims, some interesting questions also arise as to role of international human rights law, and, in particular, its treaty bodies, in ameliorating at least some of these consequences.

More generally, it can be argued that the respective approaches countenanced at both the European and Commonwealth Caribbean levels have their distinct, as well as overlapping strengths and weaknesses. At the European level, the proliferation of hard- and soft-law anti-

³Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 169 (arguing that the human rights approach and the criminal justice approach are mutually reinforcing and not necessarily conflicting with each other. In other words, while the criminal justice approach focuses primarily on prosecution, and largely neglects the causes and consequences of trafficking, the human rights approach can serve as reinforcement given its near-ubiquitous focus on the latter consideration.)

⁴Denis Galligan, *Law in Modern Society* (Oxford University Press 2006) 343

trafficking measures has meant that a robust set of rules and principles currently exist to ensure the prevention of human trafficking, the prosecution of perpetrators and the protection of victims. These rules are, in large part, enforced by a number of actors and institutions in the field, which have as their goal the stream-lining of regional and domestic action to promote a better understanding of the dynamics of human trafficking, to enable the identification of victims, and to secure their support and assistance, amongst others. The fact that monitoring mechanisms are in place to continually evaluate the progress made in the implementation of European anti-trafficking law is also a major strength of the European approach to human trafficking. Notwithstanding these strengths, however, gaps do exist in practice, particularly in so far as identifying and assisting victims of trafficking, as discussed in chapters 4 and 5. Of note, in this context, is the minimalist approach countenanced by a number of European countries primarily towards the identification and referral of trafficked victims, affording them appropriate redress and, more controversially, ensuring that they are free from punishment for activities which they have been compelled to commit. The systemic obstacles that frequently arise in the context of fostering political support for anti-trafficking measures, especially those directed at particularly vulnerable groups such as people of Roma origin, are also of concern, as discussed in chapter 4.

In the Commonwealth Caribbean, there are indications that the countries under investigation are consistently enhancing their commitment to eradicating human trafficking. This commitment is evident in the criminalisation of the phenomenon in all its forms, and, more importantly, in meeting the needs of trafficked victims. The evidence presented in chapters 6 – 8, in particular, suggests that awareness about the phenomenon is on the increase in the countries under investigation, which has arguably contributed to very few, if any, confirmed reports to the effect that trafficked victims have been penalised for unlawful activities that they have been compelled to commit by their traffickers. Notwithstanding this, however, existing state practice in the Commonwealth Caribbean suggests that, due to a number of extra-legal factors, victim identification and referral, investigations, institutional synergy, and, in general, sustained political commitment to the eradication of human trafficking, are the major areas in relation to which reform is required.

In short, then, the findings from this thesis give credence to the assumptions advanced by Denis Galligan. Indeed, the application of Galligan's theory reveals that, first, anti-trafficking law cannot be assessed in isolation, as this will only paint a partial picture of the effectiveness of this law. Rather, anti-trafficking law must be viewed in light of the social contexts within which it

operates. Second, when anti-trafficking law interacts with its social contexts, a number of results are produced in practice, both positive and negative. Examples of positive results include the criminalisation of non-traditional forms of exploitation, including forced begging and the removal of organs; the imposition of dissuasive penalties on an increasing number of perpetrators; the provision of compensation within the context of civil proceedings for an increasing number of victims of trafficking; raising national and regional awareness about the nature and effects of human trafficking; improved coordination in the anti-trafficking field; and the provision of appropriate support and assistance to a number of victims of trafficking. On the other hand, however, when one assesses 'anti-trafficking law in action', it is also clear that a number of negative results are produced in practice, including national authorities' countenancing of various hegemonic assumptions; the improper identification of a large number of trafficked victims; the punishment of a number of victims for offenses they were compelled to commit; the deportation of a number of victims; and largely inadequate systems for the reintegration of victims. Third, these results not only reflect the challenges associated with how anti-trafficking law is interpreted, but also social, political and economic factors. More specifically, social factors, such as stigma, xenophobia, discrimination and inequality, particularly in Eastern European countries, remain concerns which must be addressed if anti-trafficking law is to achieve its intended objectives. Additionally, political factors, such as the turbulent relationship between Caribbean states and the USA or the fractured relationship between some Western and Eastern European countries when it comes to cooperation on a number of issues, are also at play. Economic factors, such as the lack of employment opportunities, the large scale disenfranchisement of certain groups, including victims of Roma or Amerindian descent, as well as the lack of resources for the purposes of meeting even the most basic of needs of some victims of trafficking, also remain issues in relation to which serious attention must be paid. Fourth, states at times engage in what Galligan describes as 'creative compliance', particularly when faced with competing priorities; the minimalist approach countenanced by a number of countries referred to throughout this thesis is evidence of this. And, fifth, there are 'gaps' in implementation, which, according to Galligan, necessitate reform. The theme of reform is explored in greater detail in the next section.

B. REFORMING ANTI-TRAFFICKING LAW AND PRACTICE

This section briefly explores possible reform options which might be pursued by competent authorities in the regions surveyed so as to militate against the 'disconnect' identified in the

preceding chapters. Before discussing the key principles which should guide the reform of anti-trafficking law and practice in both regions, it is, however, important to briefly identify those areas in which Europe can learn from the Commonwealth Caribbean, and vice versa.

In the first instance, based on the findings presented in this thesis, it can be argued that Europe can learn from the manner in which the Commonwealth Caribbean countries have to date operationalised the *individual* aspects of their law and practice on human trafficking. More specifically, a number of European countries, and England and Wales, in particular, can learn from the Commonwealth Caribbean's approach to the non-punishment of trafficked victims, which is characterised by a high degree of flexibility, as opposed to rigidity. Additionally, a number of European countries can learn from the high degree of primary ascribed by Commonwealth Caribbean states in so far as affording foreign victims access to basic supplies, medical and psychological assistance and accommodation on equal footing to victims of internal trafficking. On the other hand, Commonwealth Caribbean countries can learn from the robust manner in which most European countries have placed human trafficking on their national agendas, and, in particular, the strong political will that characterises the fight against human trafficking in these countries. Commonwealth Caribbean countries can also learn from the strong institutional framework currently in place in Europe, and, more especially, the numerous regional agencies and personnel charged with the responsibility of investigating trafficking-related incidents, identifying and assisting victims, and monitoring key developments in the anti-trafficking field. On the latter point, while it is a positive development that Jamaica has sought to enhance transparency and accountability in its anti-trafficking field by only recently establishing the Office of the National Rapporteur on human trafficking,⁵ in line with developments in several European countries, the other Caribbean countries are still lagging behind in this regard. That said, it can be argued that the Commonwealth Caribbean can also learn from the fact that European countries, cognizant of their inability to address human trafficking on their own, have sought to actively cooperate with each other in a number of areas, in pursuance of their obligations under the CoE Anti-Trafficking Convention. This not only begs the question as to whether CARICOM ought to play a greater role in terms of facilitating cooperation between the countries in question, but also whether the time is ripe for the

⁵ – 'Office of National Rapporteur for Trafficking in Persons to be Strengthened' *News Jamaica* (Kingston, 3 July 2015) <<http://www.newsjamaica.net/index.php/news/item/2040-office-of-national-rapporteur-for-trafficking-in-persons-to-be-strengthened>> accessed 20 July 2015

adoption of a regional anti-trafficking treaty that is similar in nature to the CoE Anti-Trafficking Convention.

9.1. Ensuring Clarity and Consistency

This thesis has argued that a key challenge in the anti-trafficking field is a lack of clarity and consistency. This challenge arises at the normative, institutional and individual levels. Against this backdrop, competent authorities in the countries concerned must endeavour to clarify a number of important issues. First, clarification is needed in respect of the appropriate sentences to be imposed in *practice* in light of aggravating circumstances. Notwithstanding the wide discretion typically afforded judges in the jurisdictions concerned, clarity could be achieved by reliance on up-to-date sentencing guidelines.⁶ Second, there is a need for clarity regarding the sensitive question of who is a ‘victim of trafficking.’ More importantly, there is a need to consistently apply the CoE Anti-Trafficking Convention’s definition of a victim of trafficking,⁷ as well as the T&T TIP Act’s definition in the context of the Commonwealth Caribbean.⁸ This will ensure that once there are reasonable grounds for believing that an adult victim of trafficking has, for example, been subject to one of the elements from the tripartite ‘actions’, ‘means’ and ‘purposes’ paradigm, that that person will be regarded as a victim and afforded appropriate support and assistance. Third, in the context of Europe, there is also a need to clarify the relationship between the provisions of the EU Residence Permit Directive and the CoE Anti-Trafficking Convention regarding the grounds that competent authorities can rely on as a basis for terminating victims’ immigration status. Fourth, in both Europe and the Commonwealth Caribbean, there is also a need to clarify and consistently apply the ‘non-

⁶ See e.g. Sentencing Council, *Sexual Offences Definitive Guideline: Trafficking people for sexual exploitation* (Sentencing Council of England and Wales, 2014) 99 - 103; see also Pam Bowen, ‘Trafficking-related Criminal Legislation in the UK, Special Measures for Victims and Sentencing Guidelines’ in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011) chp 19

⁷ Article 4(e) CoE Anti-Trafficking Convention (“Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article). Note that GRETA has clarified on several occasions that additional requirements, such as proof of financial or physical damage, should not be a prerequisite for the acquisition of victim status. See GRETA, *Report on Iceland* (GRETA(2014)17) [55]

⁸ Article 4 TIP Act (T&T) (“victim” means a person against whom an offence is committed or against whom an offence is alleged to have been committed under this Act).

punishment of trafficked victims' obligation so as to ensure that victims are not unnecessarily exposed to re-victimisation at the hands of the state.⁹

More generally, consistent action is needed to raise awareness about human trafficking, and, in particular, about neglected forms of trafficking, such as forced begging, the cultivation of cannabis, and the removal of organs.¹⁰ Consistent training of key personnel in the anti-trafficking field, including judges and health workers who have been shown in chapter 5 to countenance 'hegemonic assumptions', is also needed. Additionally, there is also a need for state authorities to consistently engage in proactive investigations into exploitative activities, particularly those committed in diplomatic households,¹¹ as well as those perpetrated by legal entities.¹² Several organisations have played, and should continue to play a key role in this regard; GRETA, the EU Commission, the OSCE and the IOM, to name a few.

9.2. Building Capacity

The existing state practice on human trafficking outlined in chapters 4 and 7 suggests that another major challenge is inadequate capacity on the part of a number of state actors and agencies. Notwithstanding this, however, enhanced training of key actors in the anti-trafficking field;¹³ increased funding allocations;¹⁴ improved awareness, particularly amongst those who come in direct contact with victims;¹⁵ as well as increased political commitment to the goals of prevention, prosecution and protection can ameliorate the challenge of inadequate capacity.¹⁶ The strengthening of key institutions, such as TIP Units, Task Forces and NRMs, through the increased provision of staffing, financing as well as efforts aimed at reducing the involvement of

⁹ CoP to the CoE Anti-Trafficking Convention, *Recommendation CP(2014)6 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Serbia* (7 February 2014) [26]

¹⁰ CoP to the CoE Anti-Trafficking Convention, *Recommendation CP(2014)12 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden* (7 July 2014) [12]

¹¹ See generally OSCE, 'How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers' (OSCE 2014)

¹² OSCE, 'Ending Exploitation: Ensuring that Businesses do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector' (2014) OSCE Occasional Paper Series No. 7, 95

¹³ CoP to the CoE Anti-Trafficking Convention, *Recommendation CP(2014)18 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ukraine* (5 December 2014) [7]

¹⁴ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina', CEDAW/C/BIH/CO/4-5, Adopted by the Committee at its fifty-fifth session (8 - 26 July 2013) [24(e)]

¹⁵ Committee on the Rights of the Child, 'Concluding observations on the report submitted by Hungary under article 12, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography', CRC/C/OPSC/HUN/CO/1, 3 November 2014 [18]

¹⁶ Kathryn Cullen-DuPont, *Human Trafficking* (Infobase Publishing 2009) xii

state officials in trafficking-related offenses, can also serve to enhance capacity, whilst simultaneously ensuring that transparency and accountability are achieved.¹⁷ The systematic collection of data, as well as consistent research into the quickly evolving dynamics of human trafficking, can also contribute to the enhancement of institutional capacity.¹⁸ In short, it is arguable that these reform possibilities will not only buttress knowledge and understanding about the dynamics of human trafficking among key stakeholders, but will also serve to circumvent the institutional lethargy that has at times plagued action against human trafficking in the regions examined.

9.3. Affording Redress

Securing redress for victims of trafficking has been a perennial impediment to victims' recovery and, indeed, empowerment. In this context, it is important to recall the examples presented in chapters 3, 4, 6 and 7 which appear to suggest that the route of criminal proceedings is not always available, accessible or, indeed, appropriate. More pointedly, existing state practice suggests that due to a lack of evidential corroboration, weak witness protection systems, inadequate structures for legal aid, insufficient judicial awareness of the legal dynamics of the myriad forms of trafficking and conceptual conflation, amongst others, criminal proceedings involving trafficked victims have proved to be a necessary, though inadequate, route for securing redress. Without being too prescriptive, a number of reform possibilities should be explored to ensure that redress in trafficking cases is effective.

First, there is a need to strengthen investigations into human trafficking through proactive evidence gathering techniques;¹⁹ institutional lethargy, partly manifested in the practice of waiting on victims to self-identify, should be a thing of the past. Second, stronger emphasis should be placed on confiscating the assets of traffickers, aided by enhanced cooperation between government agencies and financial institutions.²⁰ Accountability mechanisms must also be put in place to ensure that any funds confiscated are actually used to enhance the protection

¹⁷ CoP to the CoE Anti-Trafficking Convention, *Recommendation CP(2014) 7 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Slovenia* (7 February 2014) [1]

¹⁸ Committee against Torture, 'Concluding observations on the combined fifth and sixth periodic reports of Portugal', CAT/C/PRT/CO/5-6, 23 December 2013 [19(c)]

¹⁹ Alexis Aronowitz, Gerda Theuermann and Elena Tyurykanova, *Analysing the business model of trafficking in human beings to better prevent the crime* (OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010) 83

²⁰ OSCE, 'Leveraging Anti-Money Laundering Regimes to Combat Trafficking in Human Beings' (OSCE 2014)

of trafficked victims. Third, victims of trafficking need to be empowered to more effectively utilise civil proceedings as an avenue for redress. Legal aid, particularly in the context of the Commonwealth Caribbean, should be afforded victims of trafficking to bring actions in the law of torts for assault, battery, false imprisonment as well as claims in *Wilkinson v Downton*.²¹ Given that the potential of these causes of action has been comprehensively examined in the existing literature,²² it suffices here to note that civil actions can serve to augment criminal proceedings, thereby affording trafficked victims the opportunity to claim damages against their traffickers, should criminal proceedings not afford such.

At the level of the CoE, it is submitted that professional bodies offering *pro bono* services should continue to encourage and support trafficked victims in their petitioning of the ECtHR in search of redress in those circumstances where their member states are allegedly in violation of anti-trafficking obligations. On a related point, NGOs actively working in the anti-trafficking field should continue to provide *third party submissions* briefs before the ECtHR, similar to Interights and the AIRE Centre in the context of the *Rantsev* case.²³

In so far as the Commonwealth Caribbean is concerned, it is submitted that the major UN Treaty bodies, including the Human Rights Committee, CEDAW Committee and CRC Committee, amongst others, should increase their engagement with the countries investigated by this thesis in an effort to not only enhance the visibility of international human rights law in the region but, more importantly, to ensure that any gaps in implementation are effectively rectified. This can be effectuated through continued requests for the submission of periodic reports from the states concerned, the issuance of comprehensive country-specific as well as thematic reports, the provision of pragmatic recommendations, and follow-up visits to ensure that proper implementation is achieved. On a related point, there is also a need for the Special Rapporteur on Human Trafficking, in particular, to visit the states concerned as part of her mandate so as to clarify the extent to which these countries under investigation are, by virtue of their state practices, in breach of international human rights law.²⁴ The Conference of the

²¹ Tsachi Keren-Paz, *Sex Trafficking: A Private Law Response* (Routledge 2013)

²² Pam Stewart, 'Tortious remedies for deliberate wrongdoing to victims of human trafficking and slavery in Australia' (2011) 34 (3) University of New South Wales Law Journal 898

²³ *Rantsev v Cyprus and Russia* ECHR 22 [264] - [271]

²⁴ See Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 243 (relying on the landmark case of *Velásquez Rodríguez*, Gallagher argues that a breach of the due diligence obligation in international human rights law will be found to exist where a state has failed to prevent an anticipated or actual human rights violation by a private individual or entity. State responsibility, according to Gallagher, would

Parties to the Trafficking Protocol, which has arguably not lived up to expectations in the past,²⁵ also has an important role to play in this context, particularly in bringing to the fore issues of compliance with regard to the central obligations outlined under the Trafficking Protocol.

More generally, it is imperative that the EU Commission continues to closely monitor the implementation of EU anti-trafficking law by member states and, where, appropriate, enforcement action must be brought before the CEJU against infringing states.²⁶

9.4. Facilitating Effective Rehabilitation

Chapters 5 and 8, in particular, suggested that a number of perennial obstacles continue to impede the level of support and assistance that victims of trafficking benefit from subsequent to their identification. These obstacles range from a lack of awareness of the specific needs of individual victims to misdirected measures that sometimes result in secondary victimisation. To counter at least some of these challenges, competent authorities must ensure that each victim of trafficking is at the very outset subject to an individual assessment aimed at ascertaining their specific needs, which may vary with their sex, age, background and type of exploitation endured. In addition, targeted support and assistance should be provided to particularly vulnerable groups, such as people of Roma origin in the context of Europe²⁷ and Amerindians in the context of Guyana. Such assistance should not, however, be restricted to the post-identification stage; rather, these persons should be afforded protection and support, including, but not limited to, material assistance, social inclusion, as well as equal access to education and employment opportunities, prior to actually being trafficked.²⁸

also arise where the State is found to be responsible for human rights violations that can be attributed to the act or mission of a public official. A State will not, however, be responsible for purely private harm).

²⁵ Ibid 469 (arguing that ‘reporting rates are low and the information received is uneven, shallow, and often ambiguous.’)

²⁶ A review of the CJEU’s case law reveals that on only one occasion has the Commission brought infringement proceedings against a member state (Spain) for failing to transpose the Residence Permit Directive. The CJEU ruled against Spain in Case C-266/08 *Commission v Spain*, Judgment of the Court (Sixth Chamber) of 14 May 2009.

²⁷ Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the second periodic report of Serbia’, Adopted by the Committee at its fifty-second session (28 April 23 May 2014), E/C.12/SRB/CO/2, 10 July 2014 [12]

²⁸ Committee on the Elimination of Racial Discrimination, ‘Concluding observations on the combined second and third periodic reports of Montenegro’, Adopted by the Committee at its eighty fourth session (3–21 February 2014), CERD/C/MNE/CO/2-3, 13 March 2014 [14(a-f)]

More generally, the role of the UN Voluntary Trust Fund for Victims of Trafficking²⁹ would benefit from a higher profile and funding in order to carry out its important work, which involves the provision of humanitarian, legal and financial assistance to victims of trafficking. At the levels of the EU, CoE and, indeed, Commonwealth Caribbean, there is also a need for competent national authorities in the respective territories to re-conceptualise the provision of material, medical, psychological and legal assistance to victims of trafficking using the threshold concepts of *availability*, *accessibility*, *acceptability* and *adaptability*.³⁰

9.5. Improving Coordination

While considerable progress has been made in recent years to promote collaboration between key actors and agencies, chapters 5 and 7 nonetheless identified a number of operational challenges. Among the main challenges identified are the unnecessary duplication of work; a lack of synergy as between the work of state officials, on the one hand, and civil society representatives, on the other; as well as other institutional issues relating to the allocation of competence. Against this backdrop, improved coordination is not merely desirable, but necessary. Coordination must not only be a prominent feature of municipal anti-trafficking law and practice, but also regional and international efforts to combat human trafficking.³¹ At the municipal level, the private sector can play a more significant role than at present by, for example, working closely with state officials to eradicate trafficking in the context of supply chains, and by supporting awareness-raising and reintegration initiatives.³²

A more inclusive, coordinated approach should also be fostered at the regional level, first, as between major EU and CoE agencies, such as the EU Commission and GRETA, and, second, at the Commonwealth Caribbean level as between the IOM, UNDP and the Caribbean Community (CARICOM). The aims of inter-institutional coordination are to, among other things, ensure the avoidance of duplication of efforts, the appropriation of best practices, and, more importantly, ensuring that victims are protected from re-victimisation in the context of

²⁹ UN Resolution A/RES/64/293, General Assembly, 12 August 2010, Article 38

³⁰ Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined sixth and seventh periodic reports of Cyprus', CEDAW/C/CYP/CO/6-7, adopted by the Committee at its fifty-fourth session (11 February - 1 March 2013) [20(b)]

³¹ UN, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo', United Nations A/HRC/23/48, UN General Assembly, 18 March 2013 [58]

³² Alexis Aronowitz, Gerda Theuermann and Elena Tyurykanova, *Analysing the business model of trafficking in human beings to better prevent the crime* (OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010)81

repatriation procedures. In short, institutional synergy has the advantage of ensuring greater consistency between actors' efforts, whilst also ensuring transparency and accountability.

9.6. Addressing Broader Structural Conditions

Throughout the preceding chapters, reference has consistently been made to the fact that the phenomenon of human trafficking thrives in conditions of poverty, political and economic instability, as well as social disorganisation. In this context, evidence has been presented which suggest that exploitation, in its myriad forms, remains prevalent in respect of traditionally disenfranchised groups in both Europe and the Commonwealth Caribbean, including people of Roma decent and Amerindians, respectively. In view of these challenges, a holistic solution to the phenomenon of human trafficking requires more fundamental action to address global injustices such as discrimination; unequal access to education and employment opportunities;³³ and prejudices and stereotypes.³⁴ There is also a need to promote the beneficial aspects of investment and trade in the jurisdictions examined by this thesis.³⁵ Furthermore, the EU, through its Action Plan that targets third countries, as well as the more wealthy European nations which have in place bilateral commitments with countries of origin for victims of trafficking, must remain true to their commitments. The same argument can be made in relation to international donors who, as discussed in this thesis, play a crucial role in the operationalisation of anti-trafficking measures in a number of countries. Moreover, those countries which have drafted Poverty Reductions Strategy Papers (PRSPs) need to re-conceptualise these important documents to ensure that adequate account is taken of the need to combat human trafficking.³⁶ The challenges inherent in these reform options are great, particularly when viewed in light of increasingly turbulent economic times, but they are certainly not insurmountable.

³³ Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined second and third periodic reports of Montenegro', Adopted by the Committee at its eighty-fourth session (3–21 February 2014), CERD/C/MNE/CO/2-3, 13 March 2014 [14]

³⁴ Committee on Economic and Social Rights, 'Concluding observations on the combined third to fifth periodic reports of Romania', E/C.12/ROU/CO/3-5, Adopted by the Committee at its fifty-third session (10–28 November 2014), 9 December 2014 [9(d)]

³⁵ Frank Laczko and Gergana Danailova-Trainor, 'Tracking in Persons and Human Development: Towards A More Integrated Policy Response', UNDP Research Paper 2009/51, 22

³⁶ *Ibid* 35

SUMMARY

To conclude, this thesis has argued that the socio-legal approach, which involves assessing 'anti-trafficking law in action', is a useful framework of analysis, as it provides a robust and comprehensive indication of the challenges and complexities inherent in the operationalisation of anti-trafficking law in Europe and the Commonwealth Caribbean, and, more particularly, some of the social, political and economic factors that impact upon the effectiveness of anti-trafficking law. In so far as the findings presented are concerned, the thesis has also argued that, on the one hand, given the general robustness of legislation enacted to date in the regions surveyed to combat human trafficking, only to a *limited extent* is reform of anti-trafficking *law* required. On the other hand, however, given the gaping 'disconnect' that currently exists between anti-trafficking law and practice, it is arguable that, to a *large extent*, reform of *state practice* is required.

APPENDICES

APPENDIX 1: Interviewees' Anonymous Citations

| INTERVIEWEES' ANONYMOUS CITATIONS | | CODE |
|--|--|-------------|
| GUYANA | | |
| Interview with G-1, State Official (Georgetown, Guyana, 11 February 2014) | | G-1 |
| Interview with G-2, State Official (Georgetown, Guyana, 11 February 2014) | | G-2 |
| Interview with G-3, State Official (Georgetown, Guyana, 11 February 2014) | | G-3 |
| Interview with G-4, State Official (Georgetown, Guyana, 12 February 2014) | | G-4 |
| Interview with G-5, State Official (Georgetown, Guyana, 13 February 2014) | | G-5 |
| Interview with G-6, State Official (Georgetown, Guyana, 14 February 2014) | | G-6 |
| Interview with G-7, State Official (Georgetown, Guyana, 14 February 2014) | | G-7 |
| JAMAICA | | |
| Interview with J-1, State Official (Kingston, Jamaica, 7 March 2014) | | J-1 |
| Interview with J-2, State Official (Kingston, Jamaica, 11 March 2014) | | J-2 |
| Interview with J-3, State Official (Kingston, Jamaica, 13 March 2014) | | J-3 |
| Interview with J-4, State Official (Kingston, Jamaica, 13 March 2014) | | J-4 |
| Interview with J-5, State Official (Kingston, Jamaica, 14 March 2014) | | J- |
| Interview with J-6, State Official (Kingston, Jamaica, 14 March 2014) | | J-6 |
| Interview with J-7, Representative of International Organisation (Kingston, Jamaica, 17 March 2014) | | J-7 |
| Interview with J-8, NGO Representative (Kingston, Jamaica, 19 March 2014) | | J-8 |
| Interview with J-9, State Official (Kingston, Jamaica, 21 March 2014) | | J-9 |
| Interview with J-10, State Official (Kingston, Jamaica, 21 March 2014) | | J-10 |
| Interview with J-11, NGO Representative (Kingston, Jamaica, 26 March 2014) | | J-11 |
| Interview with J-12, State Official (Kingston, Jamaica, 4 March 2014) | | J-12 |
| ST. VINCENT AND THE GRENADINES | | |
| Interview with S-1, State Official (Kingstown, St. Vincent and the Grenadines, 15 January 2014) | | S-1 |
| Interview with S-2, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014) | | S-2 |
| Interview with S-3, State Official (Kingstown, St. Vincent and the Grenadines, 16 January 2014) | | S-3 |
| Interview with S-4, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014) | | S-4 |
| Interview with S-5, State Official (Kingstown, St. Vincent and the Grenadines, 21 January 2014) | | S-5 |
| Interview with S-6, NGO Representative (Kingstown, St. Vincent and the Grenadines, 2 April 2014) | | S-6 |
| TRINIDAD AND TOBAGO | | |
| Interview with T-1, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 13 December 2013) | | T-1 |
| Interview with T-2, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014) | | T-2 |
| Interview with T-3, State Official (Port of Spain, Trinidad and Tobago, 21 February 2014) | | T-3 |
| Interview with T-4, State Official (Port of Spain, Trinidad and Tobago, 25 February 2014) | | T-4 |
| Interview with T-5, NGO Representative (Port of Spain, Trinidad and Tobago, 26 February 2014) | | T-5 |
| Interview with T-6, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014) | | T-6 |
| Interview with T-7, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014) | | T-7 |
| Interview with T-8, State Official (Port of Spain, Trinidad and Tobago, 27 February 2014) | | T-8 |
| Interview with T-9, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014) | | T-9 |
| Interview with T-10, Representative of International Organisation (Port of Spain, Trinidad and Tobago, 28 February 2014) | | T-10 |

APPENDIX 2: Consent Form



TITLE OF PROJECT:

Rethinking Anti-Trafficking Law and Practice: International, European and Commonwealth Caribbean Perspectives.

(The participant should complete the whole of this sheet himself/herself)

*Please cross out
as necessary*

Have you read the Participant Information Sheet? YES / NO

Have you had an opportunity to ask questions and to discuss the study? YES / NO

Have you received satisfactory answers to all of your questions? YES / NO

Have you received enough information about the study and the Intended uses of, and access arrangements to, any data which you supply? YES / NO

Were you given enough time to consider whether you want to participate? YES/ NO

Who have you spoken to? Dr/Mr/Mrs/Ms/Prof.....

Do you consent to participate in the study? YES/ NO

Do you consent to having the interview recorded? YES / NO

Do you consent to having excerpts from the interview published as part of the researcher's thesis? YES / NO

Do you consent to having excerpts from the interview published as part of a series of articles/monograph in the future? YES / NO

Do you understand that you are free to withdraw from the study:

- * at any time and
- * without having to give a reason for withdrawing and
- * without any adverse result of any kind? YES / NO

Signed Date

(NAME IN BLOCK LETTERS)

* This project has been given approval by the Durham Business School Sub-Committee for Ethics.

APPENDIX 3: Participant Information Sheet



PARTICIPANT INFORMATION SHEET

The interview is expected to last for one hour or less, and will be (voice) recorded, so as to facilitate accurate transcription. You can, however, choose not to have the interview recorded.

Provided that you consent to having the interview recorded, please note that the recording will be securely stored.

The recording will be accessible only to the researcher, his supervisors, and examiners.

The researcher will treat your information with utmost confidence, and should you indicate that you do not wish to have your identity revealed when the researcher publishes his results, this will be respected.

You will incur no financial costs as a result of participating in this interview.

No major risks are anticipated by virtue of your taking part in this exercise.

Following the completion of the fieldwork, you will be provided with a brief written summary of the exercise.

Finally, it is worth reiterating that your participation in this exercise is entirely voluntary. You may choose to renege on participating at any time, or choose not to have the information supplied recorded or published as part of the researcher's thesis. This should, however, be indicated at the earliest possible time so that alternative arrangements can be made.

APPENDIX 4: Interview Request Letter

Ustinov College
South Road
Durham
England
DH1 3DE

[Name of stakeholder]
[Occupation of stakeholder]
[Address of stakeholder]

REQUEST FOR AN INTERVIEW: PHD CANDIDATE

Dear [Name of stakeholder]

Warmest regards!

I am Jason Haynes, a 2nd year Vincentian student, pursuing a PhD in Law at Durham University, UK, in the area of human trafficking, under the supervision of Professors Fiona De-Londras and Clare McGlynn. My University Profile can be viewed here: <https://www.dur.ac.uk/law/staff/stafflist/?id=11004>

As part of my program, I am required to conduct a fieldwork exercise, involving interviews with key stakeholders in the Commonwealth Caribbean, in order to critically evaluate the law and practice on human trafficking in the region.

One aspect of the fieldwork exercise involves interviews to be conducted with state officials and representatives of civil society organisations between [date], in [country].

In this regard, I am kindly requesting, should you be available during this time, an interview with you to discuss a number of issues related to human trafficking in your country, the findings from which will be essential to my successfully completing the PhD thesis.

I would be most grateful if you would agree to this. Should you be so inclined, I would also be grateful if you could kindly indicate a tentative date, within the above mentioned time-frame, which would be most appropriate for an interview to be conducted with you.

I have attached a *draft* list of questions for your perusal, should you be inclined to assist in this venture. I have also attached a *Consent Form* and *Participant Information Sheet*, as per University regulations.


I will be in contact with you over the next few months regarding the proposed interview. Should you require further information, however, I can be contacted at: j.k.haynes@durham.ac.uk

I am most grateful for your time and assistance in this venture.

Looking forward to your favourable response!

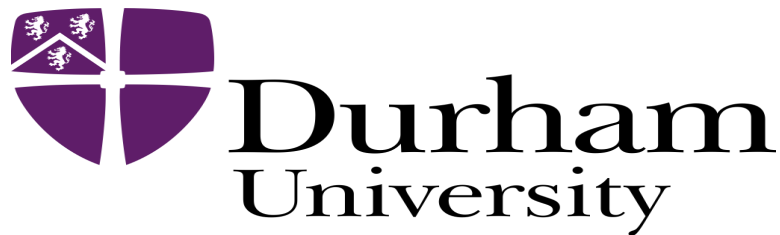
Kind regards,

Jason Haynes



.....
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APPENDIX 5: Interview Guide



INTERVIEW GUIDE - STATE OFFICIALS

Definitions of key terminologies

Human Trafficking: 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 includes 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.

Effectiveness: the extent to which an activity's stated objectives have been met.

1. Do you have any statistics on the state of affairs in relation to human trafficking in your country over the last two years? Could you kindly indicate:
 - a. The number of victims, if any, that have been identified? [Could you please state their gender & type of exploitation subjected to?]
 - b. The number of prosecutions, if any, that have been instituted against traffickers? [Could you please state their gender & type of exploitation inflicted?]
 - c. The number of convictions, if any, that have been successfully secured?
2. Have you implemented awareness-raising, education, or any similar type programs? To what extent would you say these measures have been effective in terms of preventing human trafficking?
3. What would you say are some of the major challenges that currently exist in relation to:
 - a. identifying trafficked victims?
 - b. Providing support and assistance to meet their needs?
 - c. Securing arrests/prosecutions/convictions?
4. To what extent has your country been able to secure cooperation with the following agencies in the fight against human trafficking:
 - a. Civil society organisations/NGOs?

- b. Media?
 - c. International Organisations, especially those working in your country?
 - d. Other Governments (judicial and law enforcement personnel/prosecution services)?
5. To what extent, and in what ways, would you say the training of competent national authorities has improved your country's overall response to human trafficking?
 6. What challenges, if any, would you say currently exist in relation to the following:
 - a. Protection of victims /their family members from retaliation during trial?
 - b. The repatriation of trafficked victims?
 - c. Provision of appropriate compensation to trafficked victims?
 7. To what extent would you say the rights of victims are respected after they have been identified?
 8. In what ways would you say your current methods of research and data collection have improved your national response to human trafficking?
 9. Overall, to what extent would you say that your domestic response to human trafficking over the period 2011 - 2013 has accomplished the following objectives when compared to the period 2008 - 2010:
 - a. Increased national awareness about human trafficking?
 - b. Decreased the number of vulnerable persons falling prey to traffickers?
 - c. Increased the number of victims identified?
 - d. Increased the number of victims who have successfully claimed compensation?
 - e. Decreased the number of victims criminalised for their involvement in trafficking-related offenses?
 - f. Increased the number of victims receiving support and assistance?
 - g. Increased the level of cooperation between relevant agencies with an anti-trafficking mandate?
 - h. Increased the number of arrests/prosecutions/convictions?
 - i. Decreased the number of victims secondarily victimised/ re-trafficked?
 10. To what extent, and in what ways, do you think your country's plan of action for the upcoming 4 years will enhance its efforts to combat human trafficking?

**** Do you have any document(s) related to the issue of human trafficking in your country which might be of assistance to the researcher? If so, the researcher will greatly appreciate copies of these.**



Durham University

INTERVIEW GUIDE - CIVIL SOCIETY

Definitions of key terminologies

Human Trafficking: 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 includes 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.

Effectiveness: the extent to which an activity's stated objectives have been met.

1. To what extent would you say that human trafficking [and, in particular child trafficking] is a significant problem affecting Trinidad and Tobago?
2. To what extent would you say your country's current response to human trafficking in the following areas is effective:-
 - a. The identification of trafficked children?
 - b. The non-punishment of child victims for their involvement in trafficking-related offenses?
 - c. The arrest, prosecution and conviction of perpetrators?
 - d. The implementation of measures to prevent child trafficking?
 - e. The provision of appropriate support and assistance to child victims?
 - f. The protection of child victims in accordance with their best interests, especially during criminal proceedings?
 - g. The forging of partnerships with relevant agencies/organisations to combat child trafficking?
 - h. The training of competent national authorities to prevent and combat human trafficking?

In your estimation, what challenges do you see exist in relation to each of the above?

3. What areas do you think are the major action points in order to secure a more effective response to child trafficking in your country?

**** Do you have any document(s) related to the issue of human trafficking in your country which might be of assistance to the researcher? If so, the researcher will greatly appreciate copies of these.**



Durham University

INTERVIEW GUIDE - INTERNATIONAL ORGANISATION REPRESENTATIVES

Definitions of key terminologies

Human Trafficking: 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 includes 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.

Effectiveness: the extent to which an activity's stated objectives have been met.

1. To what extent would you say that your organisation's response to the regulation of human trafficking has contributed to the prevention of the phenomenon, the protection of its victims and the prosecution of traffickers in this country?
2. In practice, what are some of the major challenges that exist in relation to regulating human trafficking in this country?
3. What do you think needs to be done to secure a more effective response to human trafficking in this country?

**** Do you have any document(s) related to the issue of human trafficking in your country which might be of assistance to the researcher? If so, the researcher will greatly appreciate copies of these.**

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