

Theories, Practices and Promises: Human Trafficking Laws and Policies in  
Destination States of the Council of Europe

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## **List of abbreviations**

ATC – Anti-Human Trafficking Cyprus

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

CRC – Convention on the Rights of the Child

ECHR – European Convention on Human Rights

EU – European Union

EUROPOL – European Law Enforcement Organisation

GNIB – Garda National Immigration Bureau

GRETA – Group of Experts on Action Against Trafficking in Human Beings

HSE – Health Service Executive

ICC – International Criminal Court

ICCPR – International Convention on Civil and Political Rights

ICESCR – International Convention on Economic, Social and Cultural Rights

IGO – Intergovernmental organisation

ILO – International Labour Organisation

INTERPOL – International Criminal Police Organisation

IOM – International Organisation for Migration

MIGS – Mediterranean Institute of Gender Studies

MRCI – Migrant Rights Centre Ireland

NATO – North Atlantic Treaty Organisation

NGO – Nongovernmental organisation

OCRETH – Central Office for the Suppression of Trafficking in Human Beings

OHCHR – Office of the United Nations High Commissioner for Human Rights

OSCE – Organisation for Security and Cooperation in Europe

PFC – People for Change Foundation

UDI – Directorate of Immigration

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

UNODC – United Nations Office on Drugs and Crime



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## **ABSTRACT**

With the rapidly increasing rate of migration – a by-product of a more globalised world – human traffickers have greater opportunities to exploit those who migrate to other States.

A destination State can adopt one of two theoretical models when responding to human traffickers and trafficked persons: a criminal model and/or a human rights model. This dissertation examines whether international human trafficking law and destination States adopt a criminal or human rights model.

Chapter 1 introduces human trafficking, describes the methodology and defines key terms.

Chapter 2 establishes two theoretical models that a destination State can employ to regulate human trafficking.

Chapter 3 discusses the development of international human trafficking treaties in the pre-human rights law era, from the 1880s until 1945. Chapter 4 discusses the development of international human trafficking treaties in the human rights law era, from 1945 until the present and analyses this period in terms of the criminal and human rights models.

Chapter 5 uses a set of indicators to determine which model the six destination States have adopted. Chapter 6 draws conclusions.

## **CHAPTER 1: INTRODUCTION**

Chapter 1 sets out the dissertation's aim, methodology and definitions.

While human trafficking has recently come to the forefront the international agenda, international law on human trafficking has, in fact, been in existence for more than a century. This dissertation will examine the types of human trafficking laws and policies in existence on both an international and national level in six case studies, and consider the extent of their implementation. This will include providing a survey of existing human trafficking law and the evolution of the laws from being solely criminal to including varying levels of human rights.

### **1.1 AIM AND SCOPE**

The aim of this dissertation is to examine whether destination States adopt a criminal and/or human rights model in relation to traffickers and trafficked persons.

I have not included persons trafficked within a State because they are not as vulnerable because they are citizens of the State in which they are trafficked and therefore entitled to a different level of assistance and protection from the State; nor have I included trafficked persons who could be considered refugees.<sup>1</sup> I decided not to include refugees because they are entitled to a certain set of rights that trafficked persons not deemed refugees are not.

### **1.2 METHODOLOGY**

I used three different methodologies: developing theoretical models, analysis of international human trafficking law and case studies.

These methodologies are applied on a gender-neutral basis. This is because the most recent international human trafficking law does not grant any specific provisions to

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<sup>1</sup> In order to be considered a refugee, a trafficked person must have a “well-founded fear of persecution” linked to one or more of the grounds in the 1951 Convention Relating to the Status of Refugees – including race, religion, nationality, membership of a particular social group and political opinion. United Nations High Commissioner for Refugees. “Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.” HCR/GIP/06/07, 7 April 2006, pp 6; 12-13.

women that are not granted to men. This is not to contradict the generally-accepted fact that a vast majority of trafficked persons are women.

### **1.2a Developing theoretical models**

I developed theoretical criminal and human rights models of how destination States can respond to human trafficking. In order to do this, I considered all of the actions a destination State could take to respond to human trafficking and categorised them as coming under either a criminal or human rights model.

### **1.2b Analysis of international human trafficking law**

International human trafficking law is found in international treaties. Chapter 3 analyses early international human trafficking law adopted between 1904 and 1933.<sup>2</sup> Chapter 4 examines the international human trafficking treaties adopted between 1945 and 2005 and their development in order to assess whether they adopt a criminal and/or human rights model.<sup>3</sup> I analysed the conventions, assessed their impact before and after the introduction of international human rights law, and identified three components: criminal law, human rights and prevention and monitoring. Criminal provisions in international human trafficking law criminalise every aspect of human trafficking, and components of the trafficking process. This is accomplished by requiring States parties to introduce criminal human trafficking legislation. Human rights provisions in international human trafficking law provide basic human rights to

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<sup>2</sup> The International Agreement for the Suppression of the “White Slave Traffic” (the “1904 Agreement”); the International Convention for the Suppression of the “White Slave Traffic” (the “1910 Convention”); the International Convention for the Suppression of the Traffic in Women and Children (the “1921 Convention”); the International Convention for the Suppression of the Traffic of Women of Full Age (the “1933 Convention”).

<sup>3</sup> The United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others (the “1949 Convention”); the United Nations Convention Against Transnational Organised Crime (the “2000 UN Convention”); the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “2000 Palermo Protocol”); and the Council of Europe Convention on Action against Trafficking in Human Beings (the “2005 Council of Europe Convention”). Furthermore, several soft law instruments also address human trafficking, for example: Declaration of the Rights of the Child, 1959, Principle 9; United Nations Declaration on the Elimination of Violence against Women, 1993, Art 2b; Beijing Declaration and Platform for Action, 1995; United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking, 2002; Office of United Nations High Commissioner for Refugees, Guidelines on International Protection: Gender-Related Persecution within the Context of Art 1a(2) of the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees (18), 2002; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002. For a further discussion of soft law on human trafficking, see Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, 2002, p 1158.

trafficked persons, who are in a particularly vulnerable position being the victims of a transnational crime, as well as being in a State illegally. I examined the international human trafficking treaties in their social and historical context in order to identify the States' motivations to enact international human trafficking law.

### **1.2c Case study selection**

I decided to examine six destination States for trafficked persons in the Council of Europe: Cyprus, France, Ireland, Luxembourg, Malta and Norway. I then developed a set of indicators to determine whether a destination State has adopted a criminal and/or human rights model. I contacted the relevant governmental ministries and agencies to obtain information on each State's laws and policies. To counterbalance that information, I obtained the opinions of nongovernmental organisations (NGOs), and referred to reports by intergovernmental organisations (IGOs).

## **1.3 DEFINITIONS**

### **1.3a Human trafficking**

Human trafficking is a complex process, and does not involve one single act which is easily distinguishable or recognisable. It is clandestine and operates within illegal systems and structures, which makes it difficult to trace and prosecute.

The internationally-accepted definition of human trafficking is found in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, ratified by 177 States. This definition is used in the Council of Europe Convention on Action against Trafficking in Human Beings, which was ratified by 25 member States and signed by 16 member States.<sup>4</sup> The definition states that the process of human trafficking can be divided into three related components: the movement of people, the means of controlling people, and the purpose of exploitation.

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<sup>4</sup> Council of Europe. [http://www.coe.int/t/DG2/TRAFFICKING/campaign/default\\_en.asp](http://www.coe.int/t/DG2/TRAFFICKING/campaign/default_en.asp). Last accessed 31 August 2009. This is the definition used for the purposes of this dissertation because all the case studies examined are members of the Council of Europe.

First, the movement of people includes the “recruitment, transportation, transfer, harbouring or receipt of persons.”<sup>5</sup> Secondly, the means of controlling the victims includes 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.”<sup>6</sup> Lastly, the purpose of trafficking in persons – exploitation – includes, 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.”<sup>7</sup> It also stipulates that the recruitment, transportation, transfer, harbouring or receipt of a child<sup>8</sup> for the purpose of exploitation is considered “trafficking in persons” even if it does not involve any of the means set out in the criteria above.<sup>9</sup> The Protocol goes on to state that whenever any trafficking activities take place, the consent of the victim is irrelevant,<sup>10</sup> and does not nullify a person’s claim of victimisation.

A human trafficker is one who participates in one or more stages of the human trafficking process described above. As previously described, human trafficking is a process with various stages, which transcends borders. A person can be considered a human trafficker if he or she takes part in any step of the human trafficking process, including recruitment, transportation, transfer, harbouring or receipt of persons. Although participation in the process of human trafficking at any level categorises a person as a human trafficker, the level of participation does affect the extent of a person’s criminal liability. For example, someone might receive a harsher punishment for forcing someone else into prostitution, than transporting a trafficked person within a State.

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<sup>5</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, Art 3. This definition is used by the OSCE, Council of Europe, NATO, EU, ILO, IOM, EUROPOL and INTERPOL.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> A “child” is any person under the age of 18. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, Art 3.

<sup>9</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000, Art 3.

<sup>10</sup> Ibid.

### 1.3b State Sovereignty

A State is a self-governing political entity or community that has legal jurisdiction and authority over a defined territory.<sup>11</sup> A State can take any action deemed necessary or beneficial to the population residing within its borders.<sup>12</sup> Sovereignty is the supreme power, dominion, authority or rule that a State exercises over a population and territory and all persons or things found under or above this territory.<sup>13</sup> It also involves independence, autonomy and freedom from interference from a foreign State.<sup>14</sup> There are four ways in which human trafficking may affect State sovereignty.

First, a State exercises its sovereignty by determining the criteria and period of time non-citizens may enter and remain in State territory. Secondly, a State exercises its sovereignty by making human trafficking a criminal offence in its criminal, labour and immigration law. When non-nationals, including traffickers and trafficked persons, attempt to gain entry to the State working outside the confines of the State's laws and regulations, it becomes a criminal matter, as well as a threat to the State. States that experience a loss of control in other areas may tighten restrictions on immigration as a way of asserting internal and external sovereignty<sup>15</sup> and controlling the movement of people as a means of controlling the territory.<sup>16</sup> Thirdly, State sovereignty requires a State to protect its own citizens. According to this concept, non-nationals, including trafficked persons, are not entitled to all of the same rights as

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<sup>11</sup> Montevideo Convention on the Rights and Duties of States, 1933, Art 1. Garner, Bryan A. *Black's Law Dictionary, Deluxe Seventh Edition*. 1999, p 1415; Miriam Webster's Dictionary of Law, 1996. Available at

<http://dictionary.lpfindlaw.com/scripts/results.pl?co=dictionary.lpfindlaw.com&topic=b9/b91cf4119cc211af5af192da09d83446>; Doolan, Brian. *Principles of Irish Law*, 6<sup>th</sup> ed. Gill & Macmillan, 2003, p 9.

<sup>12</sup> Cassese, Antonio. *International Law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005, p 51.

<sup>13</sup> Cassese, Antonio. *International Law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005, p 49; Garner, Bryan A. *Black's Law Dictionary, Deluxe Seventh Edition*. 1999, p 1402; Buovier, John. *Bouvier Law Dictionary*. Revised 6<sup>th</sup> ed. 1856. Available at <http://www.constitution.org/bouv/bouviertxt.txt>. Miriam Webster's Dictionary of Law, 1996. Available at

<http://dictionary.lpfindlaw.com/scripts/results.pl?co=dictionary.lpfindlaw.com&topic=40/40b4d9f02437d2e8ec5abb3bccd6aff3>; Mugerwa, Nkambou. "Subject of International Law" in Max Sorenson (ed) *Manuel of Public International Law*. London: Macmillan & Co Ltd, 1968, p 253.

<sup>14</sup> Cassese, Antonio. *International Law*, 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005, p 51; Garner, Bryan A. *Black's Law Dictionary, Deluxe Seventh Edition*. 1999, p 1402. Buovier, John. *Bouvier Law Dictionary*. Revised 6<sup>th</sup> ed. 1856. Available at <http://www.constitution.org/bouv/bouviertxt.txt>. Miriam Webster's Dictionary of Law, 1996. Available at

<http://dictionary.lpfindlaw.com/scripts/results.pl?co=dictionary.lpfindlaw.com&topic=40/40b4d9f02437d2e8ec5abb3bccd6aff3>.

<sup>15</sup> Davergne, Catherine. "Sovereignty, Migration and the Rule of Law in Global Times." *Modern Law Review*. Vol 67, 2004, p 601.

<sup>16</sup> Hirst, Paul and Grahame Thompson. *Globalisation in Question: International Economy and the Possibilities of Governance*. Cambridge: Polity Press, 2<sup>nd</sup> ed. 1999, pp 256-257.

citizens, but are protected by universal human rights, such as the prohibition on torture and the right to life. Therefore, a State is not obliged to provide them with the same protections or benefits as its citizens. Destination States also use sovereignty to exercise control over immigrant groups and their identities, promoting and protecting the dominant interests by institutionalising the new immigrants as the “others.”<sup>17</sup> Finally, a State exercises its sovereignty by choosing to adopt international human rights law treaties, which may have implications for citizens and non-citizens. International human rights law treaties also tend to limit a State’s sovereignty by obligating them to comply with certain international obligations.<sup>18</sup>

Furthermore, there is an interrelationship between these four aspects of State sovereignty. For example, it impacts people who are trafficked outside of their home State and how they are perceived and responded to by the destination State – whether they are viewed as a threat, or whether the State accepts a limit to its absolute sovereignty by granting certain human rights to those trafficked to its territory. Moreover, conferring human rights on trafficked persons limits State sovereignty, by requiring destination States to comply with an international set of standards.

### **1.3c Criminal law**

Criminal law defines the types of actions or omissions<sup>19</sup> which are prohibited<sup>20</sup> in order to prevent harm to individuals or the public,<sup>21</sup> and provides punishment as a penalty.<sup>22</sup>

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<sup>17</sup> Preston, Pamela and Michael P Perez. “The Criminalization of Aliens: Regulating Foreigners.” *Critical Criminology*. Vol 14, 2006, p 44.

<sup>18</sup> See Hudson, Barbara. “The rights of strangers: Policies, theories, philosophies.” in *Human Trafficking*. Maggy Lee (ed). Devon: Willan Publishing, 2007, p 221.

<sup>19</sup> This includes explicitly setting out what constitutes criminal behaviour, therefore safeguarding conduct that is not harmful, as well as clearly designating conduct that is considered an offence. American Law Institute’s Model Penal Code (Proposed Original Draft, Art. I 1.02(I). Cf. Walker, *The Aims of a Penal System.*) in Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 1.

<sup>20</sup> Murdoch, Henry. *Murdoch’s Dictionary of Irish Law*. 4<sup>th</sup> ed. Dublin: Tottell Publishing Ltd, 2006, p 280.

<sup>21</sup> American Law Institute’s Model Penal Code (Proposed Original Draft, Art. I 1.02(I). Cf. Walker, *The Aims of a Penal System.*) in Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 1; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 8.

<sup>22</sup> Murdoch, Henry. *Murdoch’s Dictionary of Irish Law*. 4<sup>th</sup> ed. Dublin: Tottell Publishing Ltd, 2006, p 280; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*, Dublin: Gill & Macmillan, 2005, p 8.



There are three potential sources of criminal law involved in human trafficking: international, transnational and national.

### ***International criminal law***

International criminal law can only be applied to human trafficking in a specific context: when it is a crime against humanity. It is listed as such in the Rome Statute of the International Criminal Court, when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>23</sup>

Except in cases when it is considered a crime against humanity,<sup>24</sup> international criminal law is not relevant to human trafficking because it aims to protect the international community of States, rather than the protection of individuals. While international criminal law may apply to non-State actors, such as liberation movements, it would not apply to those involved with organised crime, who are trafficking solely for criminal purposes.

Human trafficking, along with other transnational crimes such as drug trafficking and arms trafficking, cannot be regulated by international criminal law – except in cases when it is considered a crime against humanity – for two reasons.

First, the acts of human trafficking are committed by private individuals or criminal organisations that are not working as agents of a State, but rather for private gain,<sup>25</sup> and are committed against other individuals. Secondly, crimes such as human trafficking are dealt with in international treaties or conventions through transnational criminal law, rather than customary law.<sup>26</sup>

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<sup>23</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, 1998, Art 7.

<sup>24</sup> In the International Criminal Tribunal of the former Yugoslavia case against *Kunarac, Kovac and Vukovic* (2001), the Court found that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person, including human trafficking.

<sup>25</sup> Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003, p 24.

<sup>26</sup> Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003, p 24.

### ***Transnational criminal law***

Transnational criminal law comes into existence when States agree to use national laws as part of a coordinated and collective effort to criminalise behaviour that causes or has the potential to cause detrimental trans-border effects, and to prosecute offenders.<sup>27</sup> It is comprised predominantly of international treaties agreed upon by groups of States.<sup>28</sup> Crimes that have transnational implications involve or impact on two or more States in their planning, preparation or commission; and/or involve perpetrators and victims of various nationalities; and/or employ means that transcend national boundaries.<sup>29</sup> The criminalised behaviour may be ongoing, or simply seen as conduct that does not involve an inherent transnational element, but should be outlawed for moral reasons.<sup>30</sup>

Transnational criminal law may be developed by States in a relatively short period of time in order to respond to new forms of criminality, oftentimes linked to organised crime, including acts such as human trafficking, drugs trafficking and illegal arms trade. Resulting from globalisation, transnational criminal law derives from the modern sentiment that international cooperation is required to combat certain crimes that affect States across borders.<sup>31</sup> Transnational criminal organisations are mobile, well-organised, internationally-adaptable and can be involved in multiple activities in several countries.<sup>32</sup>

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<sup>27</sup> Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol 14, 2003, p 963; Broomhall, Bruce. "State Actors in an International Definition of Terrorism from a Human Rights Perspective." *Case Western Reserve Journal of International Law*. Vol 36, 2004, p 425; Drumbl, Mark A. "Review of *Introduction to International Criminal Law* by M Cherif Bassiouni." *The American Journal of international Law*. Vol 99, 2005, p 287.

<sup>28</sup> Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol 14, 2003, p 963; Broomhall, Bruce. "State Actors in an International Definition of Terrorism from a Human Rights Perspective." *Case Western Reserve Journal of International Law*. Vol 36, 2004, p 425; Sornarajah, Muthucumaraswamy. "Transnational Crimes: The Third Limb of the Criminal Law." *Singapore Journal of Legal Studies*. 2004, p 398; Drumbl, Mark A. "Review of *Introduction to International Criminal Law* by M Cherif Bassiouni." *The American Journal of international Law*. Vol 99, 2005, p 287.

<sup>29</sup> Bassiouni, M Cherif. *Introduction to International Criminal Law*. Ardsley, New York: Transnational Publishers Inc, 2003, p 119.

<sup>30</sup> Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol 14, 2003, p 967; Sornarajah, Muthucumaraswamy. "Transnational Crimes: The Third Limb of the Criminal Law." *Singapore Journal of Legal Studies*. 2004, p 397.

<sup>31</sup> Sornarajah, Muthucumaraswamy. "Transnational Crimes: The Third Limb of the Criminal Law." *Singapore Journal of Legal Studies*. 2004, p 396.

<sup>32</sup> Heikkinen, Hanni and Reinhard Lohrmann. "The Involvement of Organized Crime in the Trafficking in Migrants." IOM unpublished paper, 1998, p 3 in Salt, John. "Trafficking and Human Smuggling: A European Perspective." *International Migration*. Special Issue, 2000, p 36.

While the transnational criminal law conventions may outline some criminal requirements for States to implement, it is frequently the norms of criminal law and punishment of more influential States that determine the standard for other States' punishment.<sup>33</sup> As a result, more influential States take advantage of transnational criminal law as a way of extending their own criminal jurisdiction through the prosecution of criminal acts that have taken place not only in the State itself, but other States as well.<sup>34</sup> When more powerful States utilise transnational criminal law, it may influence the criminal laws of weaker States, which may choose to adopt similar laws for the purpose of further cooperation. This is not an issue of breaching State sovereignty, because States would only have the ability to prosecute crimes that took place within its territory. Rather, when States adopt laws to keep up with those of other States, it encourages cooperation between States and further harmonisation of human trafficking laws.

Human trafficking is transnational in both commission and effect.<sup>35</sup> Human trafficking involves many levels best dealt with by transnational criminal law: from those who run trafficking operations with possible links to organised crime, to those who initially deceive trafficked persons convincing them they are assisting their legitimate migration, to those who physically transport trafficked persons across borders, to those who buy and sell the people in the destination State. Some of those involved in human trafficking may not be members of the destination State's society and as such have no right to reside in the State. They are not considered persons who have the lawful right to reside in a jurisdiction and may be considered a threat to State sovereignty, and therefore must be dealt with using transnational criminal law.

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<sup>33</sup> Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol 14, 2003, p 958.

<sup>34</sup> Boister, Neil. "Transnational Criminal Law?" *European Journal of International Law*. Vol 14, 2003, p 959.

<sup>35</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008, p 334.

### ***National criminal law***

National criminal law defines the types of actions or omissions<sup>36</sup> which are prohibited by the State<sup>37</sup> in order to prevent harm to individuals or the public,<sup>38</sup> and provides punishment as a penalty.<sup>39</sup>

The main purpose of national criminal law is to achieve social control<sup>40</sup> by identifying<sup>41</sup> and suppressing criminal activity,<sup>42</sup> in addition to setting out the duties which a person owes society.<sup>43</sup> What sets criminal law apart from other types of law that seek social control is the use of criminal sanctions against the offender.<sup>44</sup>

There are four objectives of punishment:<sup>45</sup> deterrence,<sup>46</sup> rehabilitation,<sup>47</sup> retribution<sup>48</sup> and incapacitation.<sup>49</sup>

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<sup>36</sup> This includes explicitly setting out what constitutes criminal behaviour, therefore safeguarding conduct that is not harmful, as well as clearly designating conduct that is considered an offence. American Law Institute's Model Penal Code (Proposed Original Draft, Art. I 1.02(I). Cf. Walker, *The Aims of a Penal System.*) in Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 1.

<sup>37</sup> Murdoch, Henry. *Murdoch's Dictionary of Irish Law*. 4<sup>th</sup> ed. Dublin: Tottell Publishing Ltd, 2006, p 280.

<sup>38</sup> American Law Institute's Model Penal Code (Proposed Original Draft, Art. I 1.02(I). Cf. Walker, *The Aims of a Penal System.*) in Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 1; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 8.

<sup>39</sup> Murdoch, Henry. *Murdoch's Dictionary of Irish Law*. 4th ed. Dublin: Tottell Publishing Ltd, 2006, p 280; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 8.

<sup>40</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 19; Ni Choileain, Cecelia. *Criminal Law*. Dublin: Thompson Round Hall, 2006, p 1; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 8.

<sup>41</sup> This includes identifying the difference between serious and minor offences. American Law Institute's Model Penal Code (Proposed Original Draft, Art. I 1.02(I). Cf. Walker, *The Aims of a Penal System.*) in Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 1; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 10.

<sup>42</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 3.

<sup>43</sup> Card, Richard. *Introduction to Criminal Law*. 11<sup>th</sup> ed. London, Edinburgh: Butterworths, 1988, p 1.

<sup>44</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, pp 19-20; Ni Choileain, Cecelia. *Criminal Law*. Dublin: Thompson Round Hall, 2006, p 1; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 8.

<sup>45</sup> Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 4; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 10.

<sup>46</sup> Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 4; Walsh, Kathleen Moore and Conor Hanly. *Irish Criminal Law*. Dublin: Gill & Macmillan, 2005, p 10.

<sup>47</sup> Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 4.

<sup>48</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 19.

<sup>49</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 20.

## **Deterrence**

Deterrence can either be individual, to prevent the offender from committing another crime, or general, to send a message to the rest of society that criminal behaviour is unacceptable and will be punished by the State.<sup>50</sup> Proportionality of the punishment is not necessarily taken into consideration when attempting to deter the criminal and the public from committing a certain act,<sup>51</sup> which may result in criminals developing new ways of operating undetected and evading punishment.<sup>52</sup>

## **Rehabilitation**

The goal of rehabilitation<sup>53</sup> is to make the criminal a law-abiding, useful member of society,<sup>54</sup> recognising that criminals are human beings with rights, and have problems that need to be addressed,<sup>55</sup> while at the same time benefiting society in general.<sup>56</sup>

## **Retribution**

Retribution is the proportional<sup>57</sup> punishment of a criminal because it is deserved, in addition to restoring balance to society after a member breached the social contract by breaking the law.<sup>58</sup> Retribution is criticised for not taking other factors that influenced

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<sup>50</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 22; Meyer, Joe. "Reflections on Some Theories of Punishment." *Journal of Criminal Law, Criminology and Police Science*. Vol 9, 1968, pp 596-597.

<sup>51</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, pp 22-23; O'Malley, Thomas. *Sentencing Law and Practice*. 2<sup>nd</sup> ed. Dublin: Thomson Round Hall, 2006, p 34.

<sup>52</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 35; Meyer, Joe. "Reflections on Some Theories of Punishment." *Journal of Criminal Law, Criminology and Police Science*. Vol 9, 1968, p 597.

<sup>53</sup> There are two difficulties with rehabilitation: 1) it requires significant State support and resources; and 2) the punishment may not have much of a connection with the crime, but rather is what the court believes would most benefit the criminal. O'Malley, Thomas. *Sentencing Law and Practice*. 2<sup>nd</sup> ed. Dublin: Thomson Round Hall, 2006, p 38.

<sup>54</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 23; Meyer, Joe. "Reflections on Some Theories of Punishment." *Journal of Criminal Law, Criminology and Police Science*. Vol 9, 1968, p 597; O'Malley, Thomas. *Sentencing Law and Practice*. 2<sup>nd</sup> ed. Dublin: Thomson Round Hall, 2006, p 38.

<sup>55</sup> O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 38.

<sup>56</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 23; O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 38.

<sup>57</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 22; O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 32.

<sup>58</sup> O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 32.

the offender's decision to commit the crime into account when imposing a punishment.<sup>59</sup>

### **Incapacitation**

The aim of incapacitation<sup>60</sup> is to prevent the offender from causing any additional harm<sup>61</sup> – at least during the period of the punishment itself<sup>62</sup> – consequently protecting the public from that person.<sup>63</sup> It takes the position that the only way to guarantee that an offender does not commit a crime again is to physically remove the person from society and place him or her under the watch of the State.<sup>64</sup>

### **The relationship between the four objectives of national criminal law and transnational criminal law**

It is unclear whether the four objectives of national criminal law are genuinely applicable to transnational criminal law. There are two ways to consider the application of the objectives of national criminal law to transnational law, which depend on the approach the State adopts. First, States can adopt a State-centric approach, addressing the transnational crime only within the context of the State itself. Most States have adopted this approach thus far, and because the laws only concern the outcome of the crimes for the State itself, the four objectives of national criminal law are applicable.

Secondly, States can adopt a transnational cooperative approach, addressing the crime as a process taking place across several sovereign States. If such an approach is adopted, the objectives of national criminal law have the potential to change. As the objectives of punishment are driven by the interests of States, and transnational

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<sup>59</sup> O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 33.

<sup>60</sup> There are two points of criticism of incapacitation: 1) that the punishment may be disproportional to the crime, and may punish a person in a way that outweighs the severity of the crime committed; and 2) that incapacitation works under the assumption that the offender will commit a crime again, and it is very difficult to anticipate a person's future behaviour. Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 20; O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 42.

<sup>61</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 20; O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 41.

<sup>62</sup> Hanly, Conor. *An Introduction to Irish Criminal Law*. 2nd ed. Dublin: Gill & Macmillan, 2006, p 20; O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 41.

<sup>63</sup> O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 41; Smith, John Cyril and Brian Hogan. *Criminal Law*. 6th ed. London, Edinburgh: Butterworths, 1988, p 4.

<sup>64</sup> O'Malley, Thomas. *Sentencing Law and Practice*. 2nd ed. Dublin: Thomson Round Hall, 2006, p 41.

criminal law serves the purpose of criminalising an act that takes place across several States, punishing a person within a State may do little to curb the transnational crime.

### **1.3d Human rights**

#### **Origins and history of human rights**

There are two theories on the origin of the concept of human rights.<sup>65</sup> Some argue that human rights have a universal history rooted in various religions and philosophies of the world.<sup>66</sup> Others argue that human rights originated in the West and were only recently universalised.<sup>67</sup>

There are some early examples of an early version of human rights being mentioned in laws – although not on an international level. The Magna Carta of 1215 enshrined several principles which are currently considered to be under the umbrella of human rights, including the principle of equality before the law, a right to property and an element of religious freedom – despite the fact that such rights only extended to nobles.<sup>68</sup> The Magnus Lagaboters Landslov issued by King Magnus of Norway in 1275 promised equality before the law.<sup>69</sup>

The origins of modern human rights law is a result of the American and French revolutions of the late 18<sup>th</sup> century, a by-product of which is the implementation of laws that ensure that a States' citizens are guaranteed certain individual rights and liberties, protecting them from arbitrary State interference.<sup>70</sup> The two most influential documents from these revolutions were the Virginia Declaration of Rights of 1776 – which was later incorporated into the United States Constitution in 1791 – and the French Declaration of the Rights of Man and Citizen of 1789.<sup>71</sup> The Virginia Declaration of Rights included specific liberties that were to be protected from State

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<sup>65</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 14.

<sup>66</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 14. See Chun, Lin. "Human rights and democracy: the case for decoupling." *International Journal of Human Rights*, Vol 4, 2001, p 21; UNESCO (ed). *Human Rights: comments and interpretations*. New York: Columbia University Press/Westport, CT: Greenwood Press, 1949.

<sup>67</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 14. See Donnelly, Jack. *Human Rights in Theory and Practice*. Ithaca, NY: Cornell University Press, 1989, Part II.

<sup>68</sup> Smith, Rhona KM. *International Human Rights*. 3<sup>rd</sup> ed. Oxford: Oxford University Press, 2007, p 5.

<sup>69</sup> Lauren, Paul Gordon. *The Evolution of International Human Rights*. Philadelphia: University of Pennsylvania Press, 2003, p 13.

<sup>70</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 2.

<sup>71</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 2.

interference, including the freedom of the press, the freedom of religion and the right not to be deprived of freedom except by due process of law.<sup>72</sup> The French Declaration on the Rights of Man and Citizen stated that the preservation of the natural rights of man – liberty, property, security and resistance to oppression – was the aim of every political association.<sup>73</sup> The declaration also established other rights, such as equality before the law, freedom from arbitrary arrest, the presumption of innocence, freedom of expression and religion, the general freedom to do anything that did not harm others, and the right to property.<sup>74</sup> The rights asserted in both declarations were universal in theory, but restricted in practice to white male property-owners.<sup>75</sup>

The 19<sup>th</sup> century saw several developments in human rights, including the anti-slavery movement; the campaign for social and political rights of women; the development of the humanitarian laws of war; concern for religious and ethnic minorities; workers' and socialist movements; trade unions and political parties; and protests against racial discrimination and colonialism.<sup>76</sup> These developments were important because of their emphasis on social and economic rights, as well as their internationalism.<sup>77</sup>

Following World War I, the League of Nations was established, and although it was a political failure, the organisation and its Covenant did address questions of minorities, workers' rights, slavery, the rights of women and children, and the plight of refugees.<sup>78</sup> Furthermore, it laid the groundwork for the establishment of the United Nations (UN) and its focus on human rights. The role of the UN in establishing international human rights law is explored later in this chapter.

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<sup>72</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 23.

<sup>73</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 24.

<sup>74</sup> Freeman, Michael. *Human Rights*. Cambridge: Polity Press, 2002, p 24.

<sup>75</sup> Freeman, Michael. "The historical roots of human rights before the Second World War." in *The Essentials of Human Rights*, Rhona KM Smith and Christien van den Anker (eds). London: Hodder Arnold, 2005, 153.

<sup>76</sup> Freeman, Michael. "The historical roots of human rights before the Second World War." in *The Essentials of Human Rights*, Rhona KM Smith and Christien van den Anker (eds). London: Hodder Arnold, 2005, 153.

<sup>77</sup> Freeman, Michael. "The historical roots of human rights before the Second World War." in *The Essentials of Human Rights*, Rhona KM Smith and Christien van den Anker (eds). London: Hodder Arnold, 2005, 153.

<sup>78</sup> Freeman, Michael. "The historical roots of human rights before the Second World War." in *The Essentials of Human Rights*, Rhona KM Smith and Christien van den Anker (eds). London: Hodder Arnold, 2005, 153.



## **Evolution of human rights**

Human rights law has evolved from being strictly comprised of national laws and constitutions protecting primarily citizens from the abuse of State authority,<sup>79</sup> to a more universal and international concept including not only civil and political rights, but also economic, social, cultural and collective rights. While human rights traditionally were afforded to individuals through their home State's domestic legal system, human rights norms have shifted to granting individuals the protection and assistance of human rights on an international level.<sup>80</sup> International human rights are not merely agreed-upon standards, but are also significant because of commonalities of definitions of various rights.

Human rights law evolved from primarily negative obligations, which inform States what they may not do, to also include positive obligations, which stipulate what States must do and provide for its citizens.<sup>81</sup> The proliferation of human rights can occur via horizontal influence, or pressure from surrounding States with high levels of human rights protections; via vertical influence, or pressure from international law or organisations; or both simultaneously.<sup>82</sup>

There are different sources and categories of human rights.

## **Sources of human rights**

### *National human rights*

These principles, granting individuals freedom from certain actions of the State, are now found in most modern constitutions.<sup>83</sup> In other words, the State undertakes to respect human rights in order to regulate its own treatment of its citizens, putting it in the position of protecting individuals from itself. Human rights law imposes both positive and negative obligations on the State – informing States what they are not permitted to do (such as a prohibition on torture, or denying freedom of expression or

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<sup>79</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 1.

<sup>80</sup> Hudson, Barbara. "The rights of strangers: Policies, theories, philosophies." in *Human Trafficking*, Maggy Lee (ed). Devon: Willlan Publishing, 2007, p 215.

<sup>81</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 1.

<sup>82</sup> Steiner, Henry J and Philip Alston. *International Human Rights in Context: Law, Politics, Morals*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000, p 988.

<sup>83</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 6.

association), as well as what they are required to do (such as provide equal protection under the law and a minimum standard of living).<sup>84</sup> National human rights, such as voting, are generally, but not exclusively conferred on citizens, whereas universal human rights, such as the prohibition on torture, applies to everyone.<sup>85</sup>

### *International human rights*

International human rights law developed at the end of World War II.<sup>86</sup> Following the atrocities of the war, the UN was formed to ensure that such a devastating war, as well as the related violations of human rights, did not occur again. When States became members of the UN, particularly ratifying the UN Charter, they agreed to limit their own sovereignty by agreeing to adhere to certain international human rights.<sup>87</sup> This meant that all human beings, regardless of whether or not they were in the territory of their home State, are afforded certain human rights.

While individuals were traditionally only afforded rights and protections from their home State, human rights norms shifted to view individuals as single human beings, deserving of protection on an international level.<sup>88</sup> Individual human rights do not end at the limits of the State – this recognition places the individual as the ultimate subject of international law – and establishes the fact that the State is not superior to the individuals who comprise it.<sup>89</sup>

International human rights law is seen as a last resort – in circumstances when a State's national human rights protections fail to protect an individual, or in some cases where they are nonexistent.<sup>90</sup> Consequently, international human rights law

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<sup>84</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 1; Mahoney, Jack. *The Challenge of Human Rights*, Oxford: Blackwell Publishing, 2007, p 74.

<sup>85</sup> Hudson, Barbara. "The rights of strangers: Policies, theories, philosophies." in *Human Trafficking*, Maggy Lee (ed). Devon: Willan Publishing, 2007, p 215.

<sup>86</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 7.

<sup>87</sup> Although the United Nations Universal Declaration of Human Rights is commonly accepted as customary law, it was passed as a resolution, and therefore is not legally binding. Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 4.

<sup>88</sup> Cassese, Antonio. *International Law*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2005, p 376; Hudson, Barbara. "The rights of strangers: Policies, theories, philosophies." in *Human Trafficking*, Maggy Lee (ed). Devon: Willan Publishing, 2007, p 215.

<sup>89</sup> Lauterpacht, Hersch. *International Law and Human Rights (1950)* in Henry J. Steiner and Philip Alston, *International Human Rights in Context*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000, p 148.

<sup>90</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 1.

instruments have a dual aim: reinforcing the national protection of human rights, and providing international protection when the national system is inadequate.<sup>91</sup>

Moreover, international human rights law sometimes employs various monitoring mechanisms to oversee the implementation of the law amongst the States parties.<sup>92</sup> While this provides greater transparency and accountability,<sup>93</sup> their recommendations can be difficult to enforce.

### **Categories of human rights**

There are three categories of human rights: civil and political rights; economic, social and cultural rights; and collective rights.<sup>94</sup>

#### *Civil and political rights*

The early, basic concept of human rights – rooted in the national protection of individuals from the abusive authority of the State – was primarily concerned with the relationship between individuals and the State.<sup>95</sup> These rights were primarily “freedoms from” some element of State authority, rather than “rights to” something<sup>96</sup> – or, civil and political rights. Because of the nature of civil and political rights – freedom from arbitrary interference by the State – they are less costly to implement and are supported by a judicial system, unlike economic, social and cultural rights, which require States to implement such provisions with specific monitoring bodies and structures.<sup>97</sup> Examples of civil and political rights that pertain to criminals include the right to a fair trial and prohibitions on arbitrary arrest, detention or exile.<sup>98</sup> Those accused of a crime are also entitled to the rights of the accused under international law. This can include both traffickers and trafficked persons.

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<sup>91</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 1.

<sup>92</sup> Muntarhorn, Vitit. “Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised.” in *Migration and International Legal Norms*. Thomas Alexander Aleinkoff and Vincent Chetail (eds). Cambridge: Cambridge University Press, 2003, p 154.

<sup>93</sup> Muntarhorn, Vitit. “Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised.” in *Migration and International Legal Norms*. Thomas Alexander Aleinkoff and Vincent Chetail (eds). Cambridge: Cambridge University Press, 2003, p 154.

<sup>94</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 6.

<sup>95</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 6.

<sup>96</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 6.

<sup>97</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 41.

<sup>98</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 3.

### *Economic, social and cultural rights*

While civil and political rights limit the power of the State, economic and social rights require intervention from the State to ensure that individuals are afforded certain care and services.<sup>99</sup> For example, State involvement is needed to facilitate individuals' right to education and medical care. Economic and social rights provide individuals with their basic needs, such as the rights to work, a decent working wage, education, medical care, and food and housing. Cultural rights are the rights to participate in cultural life and practices, as well as scientific advancement and the right to protection of the moral and material interests resulting from one's scientific, literary or artistic production.<sup>100</sup> The difficulty with economic, social and cultural rights is the lack of enforceability and accountability for States.<sup>101</sup> Unlike civil and political rights, which exist from the moment of their adoption, economic, social and cultural rights require the State to take positive action in order to provide services or finances required for implementation.<sup>102</sup> Trafficked persons may be provided with a range of economic and social rights, including accommodation and medical care in a destination State.

### *Collective rights*

The most recent development in the categories of human rights is the emergence of collective, or solidarity rights. Unlike traditional individualistic rights, collective rights take into account the rights of entire groups of people.<sup>103</sup> Although collective rights are applied universally, they are most relevant to people in more impoverished parts of the world, ensuring that they are given equal access to global resources.<sup>104</sup> Examples of collective rights include the right to peace; the right to a healthy environment; the right to humanitarian relief; and the right to economic, political, social and cultural self-determination.<sup>105</sup>

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<sup>99</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 6.

<sup>100</sup> Baehr, Peter. *Human Rights: Universality in Practice*. London: Macmillan Press Ltd, 1999, p 3.

<sup>101</sup> Steiner, Henry J and Philip Alston. *International Human Rights in Context: Law, Politics, Morals*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000, p 248.

<sup>102</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, p 142; Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 41; Steiner, Henry J and Philip Alston. *International Human Rights in Context: Law, Politics, Morals*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000, p 248.

<sup>103</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 44.

<sup>104</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, pp 43-44.

<sup>105</sup> Davidson, Scott. *Human Rights*. Buckingham: Open University Press, 1993, p 44.

### 1.3e Origin, transit and destination States

For the purpose of this dissertation, States may be places of origin, transit or destination for trafficked persons. Origin States are the States of which trafficked persons are nationals or citizens, are typically in developing regions, and have a substantial lack of social and economic opportunities, high rates of emigration, and high rates of unemployment.<sup>106</sup> High rates of employment and labour shortages encourage both regular immigration and irregular immigration, such as human trafficking. Transit States are the States through which people are trafficked en route to their destination State. Destination States are the endpoints of the trafficking process, and the places to which people are trafficked. States become destinations for trafficked persons for several reasons. States in conflict and post-conflict situations may also become destination States to secure services during and after armed conflict. The trafficking process typically takes place throughout origin, transit and destination States, involving a chain of criminal offences in each State.<sup>107</sup> It is possible that a State can fit into two or even all three categories simultaneously.<sup>108</sup>

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<sup>106</sup>Friesendorf, Cornelius. "Pathologies of Security Governance: Efforts Against Human Trafficking in Europe." *Security Dialogue*, Vol 38, 2007, p 381; Inglis, Shelley Case. "Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework," *Buffalo Human Rights Law Review*, Vol 7, 2001, p 95.

<sup>107</sup> Konrad, Helen. "Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States." in *Trafficking and Women's Rights*, Christien L van den Anker and Jeroen Doomernik, eds. Hampshire: Palgrave Macmillan, 2006, p 121.

<sup>108</sup>Muntarbhorn, Vitit. "Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised." in *Migration and International Legal Norms*. Thomas Alexander Aleinkoff and Vincent Chetail (eds). Cambridge: Cambridge University Press, 2003, p 152. Piotrowicz, Ryszard. "European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers." *International Journal of Refugee Law*, Vol 14, 2002, p 264.

## CHAPTER 2: THEORIES

Utilising the methodology described in Chapter 1, Chapter 2 will develop the theories on models of human trafficking laws. This chapter also relies upon the definitions of criminal law and human rights set out in Chapter 1.

### 2.1 THEORIES

I developed criminal and human rights models of human trafficking for two reasons. First, the criminal and human rights approaches occur most frequently in the literature.<sup>109</sup> Secondly, although a labour theory<sup>110</sup> and a migration theory<sup>111</sup> have been put forward, these theories can be treated as subsets of the criminal and human rights models. For example, it is a criminal matter when labour or migration law is broken. It is a matter of human rights when a person is denied or granted the right to work or migrate.

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<sup>109</sup> See Amiel, Alexandra. "Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation." *Buffalo Human Rights Law Review*, Vol 12, 2006; Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007; Demleitner, Nora V. "The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution," in *Global Human Smuggling: Comparative Perspectives*, David Kyle and Rey Koslowski (eds). 2001, pp 265-266, 268-276; Fitzpatrick, Joan. "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." *Michigan Journal of International Law*, Vol 24, 2000; Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*, Vol 18, 2008; Inglis, Shelley Case. "Expanding International and National Protections Against Trafficking for Forced Labour Using a Human Rights Framework." *Buffalo Human Rights Law Review*, Vol 7, 2001; Kempadoo, Kamala. "From Moral Panic to Global Injustice: Changing Perspectives on Trafficking" in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005; Konrad, Helga. "Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States." in *Trafficking and Women's Rights*, Christien L van den Anker and Jeroen Doomernik, (eds). Hampshire: Palgrave Macmillan, 2006; Mattar, Mohamed Y. "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention." *Tulane Journal of International and Comparative Law*. Vol 14, 2006; Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" in *International Migration Law: Developing Paradigms and Key Challenges*, Ryschard Cholewinski et al, Ed. Cambridge: Cambridge University Press, 2007; Stumpf, Juliet and Bruce Friedman. "Advancing Civil Rights Through Immigration law: One Step Forward, Two Steps Back?" *Legislation and Public Policy*, Vol 6, 2002; et al.

<sup>110</sup> Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal*. Vol 25, 2007; Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*, Vol 40, 2004; Lee, Maggy. "Introduction: Understanding human trafficking." in Maggy Lee (ed). *Human Trafficking*, Devon: Willan Publishing, 2007; et al.

<sup>111</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007; Jagori. "Migration, Trafficking, and Sites of Work: Rights and Vulnerabilities" in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005; et al.

Human trafficking was first dealt with through criminalising offences in the human trafficking process through indirect criminal law. That evolved into naming human trafficking as a crime in its own right. In either case, human trafficking was dealt with in a criminal context, and States only responded to it as a crime. Only recently was there a recognition of the human rights of trafficked persons, which represents a fundamentally different approach – responding to human trafficking as a violation of human rights. The criminal and human rights models utilised in this dissertation underpin both of these approaches.

### **2.1a Criminal model**

The criminal model provides that those who breach criminal laws are viewed as criminals and are deserving of punishment. The criminal model also incorporates the rights of any person accused of a criminal offence.

Criminalising human trafficking and related offences such as breaches of prostitution, immigration and labour law allows States to maintain their sovereignty, protecting their borders and those who reside within them. Nagan and de Medeiros 2006 argue that human trafficking, like other crimes, poses a threat not only to individuals, but also to public order and civic freedom.<sup>112</sup> When crimes, such as human trafficking, morph from occasional, isolated, or random occurrences into a recognised institutional practice, it is necessary to consider the threat they pose to public order and society.<sup>113</sup>

The rationale of the criminal model is that human trafficking and its related offences pose a threat to the security and society of a State. Human trafficking must be criminalised in every State on both a national and transnational level, in order to ensure that there are no geographic regions in the world void of trafficking laws, which would facilitate the crime. Amiel 2006 states that the goal of the criminal model is to encourage as many States as possible to criminalise human trafficking in

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<sup>112</sup> Nagan, Winston P and Alvaro de Medeiros. “Old Poison in New Bottles: Trafficking and the Extinction of Respect.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 259.

<sup>113</sup> Nagan, Winston P and Alvaro de Medeiros. “Old Poison in New Bottles: Trafficking and the Extinction of Respect.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 259.

their national laws and to prosecute perpetrators.<sup>114</sup> Bravo 2007 states that the criminal model has been adopted continually by the international community<sup>115</sup> because the acts of trafficking violate domestic law; the link between trafficking and prostitution requires a criminal response; and trafficking often occurs in connection with other criminal activities.<sup>116</sup> Askola 2007 argues that it can be viewed as “commonsensical” as a result of the links between human trafficking and illegal activities such as irregular immigration and prostitution.<sup>117</sup> Bruch 2004 contends that an advantage of the criminal approach is that it offers the potential for the direct prosecution of traffickers and a tangible way of enforcing international.<sup>118</sup>

The criminal model may be effective in responding to breaches of law, but also contains elements that may be problematic. Bruch 2004 states that problems with the criminal approach include the debate surrounding how to respond to prostitution; the difficulty in identifying trafficking victims; and the fact that it does not contemplate holding the State responsible, either nationally or internationally.<sup>119</sup> Stumpf and Friedman 2002 contend that dealing with trafficked persons strictly as illegal immigrants allows those involved in the trafficking process to use such policies to gain control over those they traffic by telling them that they will be arrested or deported for entering or leaving a country illegally and undocumented.<sup>120</sup> Demleitner 2002 argues that adopting a strictly criminal approach would conflate criminal law with immigration law, not only punishing offenders, but also rewarding those who cooperate with criminal investigations by allowing them to remain in the State, even temporarily.<sup>121</sup> Mattar 2006 states that a criminal model could potentially make the

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<sup>114</sup> Amiel, Alexandra. “Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation.” *Buffalo Human Rights Law Review*, Vol 12, 2006, p 12.

<sup>115</sup> Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 224.

<sup>116</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*, Vol 40, 2004, p 17.

<sup>117</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 99.

<sup>118</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*, Vol 40, 2004, p 17.

<sup>119</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*, Vol 40, 2004, pp 17-18, 21.

<sup>120</sup> Stumpf, Juliet and Bruce Friedman. “Advancing Civil Rights Through Immigration law: One Step Forward, Two Steps Back?” *Legislation and Public Policy*, Vol 6, 2002, pp 151-152.

<sup>121</sup> Demleitner, Nora V. “Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?” *Emory Law Journal*, Vol 51, 2002, p 3027.



situation worse for trafficked persons, since their interests are not necessarily served by an intensified law enforcement response, and in the end, may do little to hinder human trafficking.<sup>122</sup>

### *Types of criminals*

The criminal model can be applied to identify two potential types of criminals: those involved with the organisation or facilitation of the trafficking process (the traffickers) and the trafficked person.

States that adopt the criminal model may criminalise traffickers and/or trafficked persons for breaching prostitution, immigration or labour laws, which existed before the adoption of laws directly criminalising human trafficking. Trafficked persons would always have been treated as criminals under such laws, which may explain why they still may be treated as criminals even with the existence of laws criminalising the act of human trafficking. Mattar 2006 states that trafficked persons may be treated as criminals and face deportation for committing the acts of illegal entry, falsification of travel documents, and prostitution.<sup>123</sup> Gallagher and Holmes 2008 argue that the criminalisation of trafficked persons is commonplace, even when it seems highly unlikely that the person was a willing participant in the illegal act.<sup>124</sup>

Trafficked persons may be the targets of criminal law in States for several reasons. Demleitner 2001 and Fitzpatrick 2004 argue that the natural tendency of migration and crime control officials is to pursue the least resistant and influential group in the trade – the trafficked persons, rather than the traffickers (who may be wealthy and dangerous) or the customers (who are likely to be citizens of the wealthy and powerful destination States).<sup>125</sup> Askola 2007, Fitzpatrick 2004, Gallagher and Holmes

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<sup>122</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, pp 99-100.

<sup>123</sup> Mattar, Mohamed Y. "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention." *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 366.

<sup>124</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*, Vol 18, 2008, p 331.

<sup>125</sup> Demleitner, Nora V. "The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution," in *Global Human Smuggling: Comparative Perspectives*, David Kyle and Rey Koslowski (eds). 2001, pp 265-266, 268-276; Fitzpatrick, Joan. "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." *Michigan Journal of International Law*, Vol 24, 2000, p 1154.

2008, Konrad 2006, Piotrowicz 2002 and Piotrowicz 2007 state that as a result, it is not unusual for trafficked persons to be arrested, detained in immigration or criminal facilities, punished for engaging in prostitution or violations of immigration or labour laws, and deported without regard to the potential harm they face from traffickers or a difficult situation in their origin State.<sup>126</sup> Askola 2007 contends that because trafficked persons are oftentimes engaged in some sort of illegal activity – such as prostitution or entering a State illegally– there has been a tendency to summarily expel trafficked persons prior to them having the opportunity to file a complaint, to assess whether it is safe to return to their origin State, or (in some cases) to apply for asylum.<sup>127</sup>

Mattar 2006 argues that while many States have implemented national human trafficking legislation, thereby potentially shifting the criminalisation from the trafficked person to the trafficker, some States still interpret human trafficking as mainly a crime against the State, as opposed to a threat to the security of a trafficked person.<sup>128</sup> As a result, States make the application of the principle of noncriminalisation contingent upon the trafficked person's willingness to cooperate with law enforcement officials in investigating and prosecuting the trafficking offence and testifying against those involved in the trafficking process.<sup>129</sup>

Human trafficking can be viewed as a crime against a State or a crime against an individual. Mattar 2002 contends that treating human trafficking as a crime against a

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<sup>126</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, p 19; Fitzpatrick, Joan. "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." *Michigan Journal of International Law*, Vol 24, 2000, p 1154; Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 331; Konrad, Helga. "Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States." in *Trafficking and Women's Rights*, Christien L van den Anker and Jeroen Doomernik, eds. Hampshire: Palgrave Macmillan, 2006, p 120; Piotrowicz, Ryszard. "European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers." *International Journal of Refugee Law*, Vol 14, 2002, p 264; Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 276.

<sup>127</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, p 19.

<sup>128</sup> Mattar, Mohamed Y. "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention." *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 382.

<sup>129</sup> Mattar, Mohamed Y. "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention." *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 382.

person, rather than a State, is the reason behind distinguishing between alien smuggling and human trafficking.<sup>130</sup> Alien smuggling is a crime against the State:<sup>131</sup> a direct infringement of a State's immigration laws. Human trafficking, on the other hand can be viewed as a crime against a State – also breaking immigration laws – but also as a crime against an individual.<sup>132</sup> This concept compares a smuggled person – which, because of his or her illegal immigration status, is viewed as a threat to State security – and a trafficked person, who is part of a criminal process. Ray 2006 argues that either way, States' concern over violations of immigration law is an issue of security.<sup>133</sup> Mattar 2002 states that whether or not a State grants trafficked persons the right to remain in the State contingent upon testifying against those involved in their trafficking process is an indication of how the State classifies the crime of human trafficking.<sup>134</sup>

### ***Direct or indirect human trafficking law***

A criminal model of human trafficking criminalises the acts of the human trafficking process either directly and/or indirectly. Direct criminalisation occurs where the act of human trafficking is specified as a criminal offence. Direct criminalisation only applies to traffickers, as trafficked persons are viewed as the victim of the crime. Indirect criminalisation occurs when a State uses existing criminal laws to prosecute traffickers and/or trafficked persons for issues surrounding human trafficking, such as prostitution, immigration and labour laws. For example, this includes trafficked persons who would have illegally crossed a border into a State, violating immigration

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<sup>130</sup> Mattar, Mohamed Y. "Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility" in *Stop Trafficking in Human Beings—Together It's Possible: Proceedings of the International Conference "21<sup>st</sup> Century Slavery—The Human Rights Dimension to Trafficking in Human Beings,*" 15-16 May, 2002, p 2.

<sup>131</sup> Mattar, Mohamed Y. "Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility" in *Stop Trafficking in Human Beings—Together It's Possible: Proceedings of the International Conference "21<sup>st</sup> Century Slavery—The Human Rights Dimension to Trafficking in Human Beings,*" 15-16 May, 2002, p 2.

<sup>132</sup> Mattar, Mohamed Y. "Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility" in *Stop Trafficking in Human Beings—Together It's Possible: Proceedings of the International Conference "21<sup>st</sup> Century Slavery—The Human Rights Dimension to Trafficking in Human Beings,*" 15-16 May, 2002, p 2. Mattar argues that human trafficking should be considered a crime against a person.

<sup>133</sup> Ray, Nilanjana. "Looking at Trafficking Through a New Lens." *Cardozo Journal of Law & Gender,* Vol 12, 2006, p 915.

<sup>134</sup> Mattar, Mohamed Y. "Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility" in *Stop Trafficking in Human Beings—Together It's Possible: Proceedings of the International Conference "21<sup>st</sup> Century Slavery—The Human Rights Dimension to Trafficking in Human Beings,*" 15-16 May, 2002, p 3.

law; traffickers who have transported people across borders illegally; and both traffickers and trafficked persons who have breached prostitution or labour laws. Applying the criminal model to human trafficking takes into account breaches of prostitution, labour and immigration legislation, in addition to criminal acts involved with the trafficking process, such as kidnapping or selling human beings, or the criminal act of trafficking itself.

Mattar 2006 states that prior to the 2000 Palermo Protocol – the most recent universal international treaty on human trafficking – most indirect human trafficking laws existed as part of a State’s Penal Code or Criminal Code, rather than as a separate comprehensive piece of legislation.<sup>135</sup> Furthermore, human trafficking was addressed primarily through indirect offences – such as the procurement of prostitution, kidnapping, abduction, illegal confinement, deprivation of liberty, and sexual slavery – rather than being recognised as a specific crime.<sup>136</sup>

### ***Punishment***

Punishment is what sets criminal law apart from other types of legal regulation, imposing sanctions on offenders. There are four commonly accepted objectives of punishment: deterrence, rehabilitation, retribution and incapacitation. When a person is convicted of human trafficking, or trafficking-related activities, he or she may receive a punishment meant to deter him or her from committing the crime again in the future. Furthermore, a person involved with the organisation or facilitation of the trafficking process may receive an exemplary sentence, in an attempt to convey the seriousness of the crime and deter other people from committing the act within that State’s jurisdiction.

It is more difficult to apply the objectives of punishment to a trafficked person convicted of violating immigration law by crossing a border illegally and remaining in a State’s territory, particularly because the trafficker may have forced his or her actions. Three of the objectives remain fairly straightforward: deterring the person

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<sup>135</sup> Mattar, Mohamed Y. “Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention.” *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 362.

<sup>136</sup> Mattar, Mohamed Y. “Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention.” *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 364.

from crossing and remaining within a border illegally; providing retribution for the crime committed; and incapacitating the trafficked person so they cannot violate the laws again. As explained in Chapter 1, rehabilitation in the criminal context entails punishing a criminal in order to make him or her a more useful member of society by addressing any problems he or she may have with the hope that he or she will not commit the crime again. In a human rights context, rehabilitation entails granting the trafficked person assistance to help him or her recover from the effects of the crime. There is a conflict with punishing trafficked persons: in order to prosecute those involved with the organisation or facilitation of the trafficking process, it is necessary to obtain testimony from the trafficked persons. In other words, the State potentially could be punishing the people integral to the prosecution of those involved with the organisation or facilitation of the trafficking process.

Chacon 2006 argues that when a strictly criminal approach is adopted, judges may refrain from issuing harsh sentences for human trafficking violations because in some States, trafficking sentences may be harsher than those for violations of labour laws.<sup>137</sup> Similarly, convictions made under immigration or labour laws do not carry with them the same stigma attached to convictions of human trafficking, which may also make judges reluctant to hand down such sentences.<sup>138</sup> Finally, this theory suggests that in cases of human trafficking that do not involve sexual exploitation, a conviction for a charge other than human trafficking may be issued, as sexual exploitation offences are viewed as being worse than those of labour-related exploitation.<sup>139</sup>

### **2.1b Human rights model**

The human rights model provides that people trafficked into a State's borders are viewed as victims of a crime<sup>140</sup> rather than criminal defendants, and are deserving of assistance and protection. The trafficked persons are granted human rights by the

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<sup>137</sup> Chacon, Jennifer M. "Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking." *Fordham Law Review*. Vol 74, 2006, p 3035.

<sup>138</sup> Chacon, Jennifer M. "Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking." *Fordham Law Review*. Vol 74, 2006, p 3035.

<sup>139</sup> Chacon, Jennifer M. "Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking." *Fordham Law Review*. Vol 74, 2006, p 3035.

<sup>140</sup> Mattar, Mohamed Y. "Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention." *Tulane Journal of International and Comparative Law*, Vol 14, 2006, p 377.

State, despite the fact that they are in and have entered the State illegally. States must adopt measures to ensure that trafficked persons are afforded their fundamental rights. This combines the protection of national and international human rights, as the trafficked person is outside his or her home State.

Smith and Mattar 2004 argue that the foundation of the human rights model shifts the notion of criminalisation from the trafficked persons to the traffickers through the decriminalisation and protection of the trafficked persons in conjunction with the criminalisation and prosecution of the traffickers.<sup>141</sup> Askola 2007 states that adopting a human rights model makes the trafficked person “visible” as a subject<sup>142</sup> and entitled to human rights in the destination State, despite the fact that they are illegal migrants.<sup>143</sup> Dauvergne 2008 contends that the human rights model also emphasises the point that people are victims of human trafficking, rather than focusing on laws broken that violate State sovereignty,<sup>144</sup> such as in the criminal model, which shifts the attention from a State’s right to control trafficked persons to their obligation to protect them.<sup>145</sup> However, Dauvergne 2008 argues that the “rights holders” in this scenario – the trafficked persons – are victims of a crime and may be reluctant to come forward.<sup>146</sup> Bravo 2007 states that the human rights model focuses on the trafficked person, requiring justice for the human rights that are legally recognised

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<sup>141</sup> Smith, Linda and Mohamed Mattar. “Creating International Consensus on Combating Trafficking in Persons: US Policy, the Role of the UN, and Global Responses and Challenges.” *The Fletcher Forum of World Affairs*. Vol 28, 2004, pp 1621-162.

<sup>142</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 133.

<sup>143</sup> Muntarbhorn, Vitit. “Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised.” in *Migration and International Legal Norms*. Thomas Alexander Aleinkoff and Vincent Chetail (eds). Cambridge: Cambridge University Press, 2003, p 164; Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al, (eds). Cambridge: Cambridge University Press, 2007, p 286.

<sup>144</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 73.

<sup>145</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, p 133; Muntarbhorn, Vitit. “Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised.” in *Migration and International Legal Norms*. Thomas Alexander Aleinkoff and Vincent Chetail (eds). Cambridge: Cambridge University Press, 2003, p 164.

<sup>146</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 73.

and protected, in addition to the protection of those rights and, through them, the trafficked person as the rights holder.<sup>147</sup>

Bruch 2004 argues that one advantage of adopting a human rights model is the ability to hold States accountable for how they treat their nationals and other individuals under their control.<sup>148</sup> This is necessary because of the widespread nature of trafficking and the evidence of government complicity.<sup>149</sup> Piotrowicz 2007 states that it does, however, lead to the question of whether those involved in the trafficking process owe human rights obligations towards those they traffic, or whether only the State owes such obligations.<sup>150</sup> Piotrowicz 2007 and Askola 2007 contend that most acts of human trafficking, however serious, are typically criminal activities carried out by private individuals and are not necessarily human rights violations on the part of the State.<sup>151</sup> When States adopt laws and policies with a human rights dimension, it both reflects that notion, as well as shapes it, in that it both criminalises human trafficking and attempts to address its prevention, in addition to acknowledging the human rights element of the issue, therefore addressing the rights and responsibilities of the State.<sup>152</sup>

### ***A unique set of rights***

General international human rights may have little benefit to trafficked persons because they are illegally in a foreign State<sup>153</sup> and have limited relevance to their

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<sup>147</sup> Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal*. Vol 25, 2007, p 231.

<sup>148</sup> Bruch, Elizabeth M. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 32.

<sup>149</sup> Bruch, Elizabeth M. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p32.

<sup>150</sup> Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al, Ed. Cambridge: Cambridge University Press, 2007, p 276.

<sup>151</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 136; Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" in *International Migration Law: Developing Paradigms and Key Challenges*. Ryszard Cholewinski et al (ed). Cambridge: Cambridge University Press, 2007, p 278.

<sup>152</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*, Portland: Hart Publishing, 2007, p 136; Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (ed). Cambridge: Cambridge University Press, 2007, p 278.

<sup>153</sup> King, Sarah. "Human Trafficking: Addressing the International Criminal Industry in the Backyard." *University of Miami International & Comparative Law Review*, Vol 15, 2008, p 378.

situation. Therefore a specific list of rights must be developed for trafficked persons who find themselves in foreign States in order to provide them with the appropriate protection and assistance. Human rights provisions for trafficked persons also must be this specific because they confer benefits upon non-national trafficked persons, providing the assistance and protection otherwise granted to citizens to those who are in a vulnerable position in the State.

Trafficked persons require a unique set of human rights for three reasons. First, the human rights model views trafficked persons as not only victims of a crime, but also victims of a crime in a foreign State, therefore exacerbating their vulnerability. Legal and regular migrants face numerous challenges adjusting to language and cultural differences outside of their home State. Trafficked persons must endure all of those hardships, in addition to being in the exceptionally vulnerable position of being the victim of a crime. Moreover, trafficked persons may not have the opportunity to come forward and seek assistance from law enforcement authorities for fear of getting caught and/or harmed by their traffickers, as a result of the nature of the crime of human trafficking.

Secondly, the concept of equality dictates that States have a positive obligation to provide trafficked persons with a unique set of rights to ensure that differences impacting trafficked persons because they are not citizens – such as their vulnerable position and illegal status – are dealt with through the provision of socio-economic rights. It also stipulates that trafficked persons require a basic set of rights – that States have an obligation to provide certain fundamental human rights to anyone within its territory, regardless of their migratory status.<sup>154</sup> The fundamental principle of equality is binding upon all States, regardless of whether they are party to specific international instruments, and a minimum standard of rights must be guaranteed to people everywhere in the world, whether they reside in a State legally or illegally. Equality is dealt with separately in terms of human trafficking because of the irregular migratory status of trafficked persons; equality must be provided to everyone within a State.

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<sup>154</sup> See the Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003, p 113.



Thirdly, human rights are becoming increasingly specialised for people in various situations, including those who are trafficked. With the advent of international human rights treaties, States began to become increasingly restrictive regarding how they are permitted to treat the people within their borders. Although human rights law began as very general protections from harm and abuse, they are now required to be increasingly specific, in order to provide the necessary protections and assistance for people in vulnerable positions. When people are trafficked into a State, their needs are different than other victims of crimes or regular or irregular migrants, and therefore require a unique set of protections and assistance from the State.

### ***Protections***

At the most basic level, States that adopt the human rights model of human trafficking must provide those trafficked into its territory with protection from immediate harm and abuse. When a person is trafficked to a destination State, they are in a particularly vulnerable position as the victim of a crime and an irregular migrant. As a result, States must ensure that they are safe, secure and protected from harm.

When a State adopts the human rights model to respond to human trafficking, the State views the trafficked person as a victim of a crime. The only relevant traditional civil and political right the State can grant from that position is freedom from slavery. States have both a negative obligation not to enslave people, and may have a positive obligation to ensure that private individuals do not enslave other private individuals. However, it is unlikely that the State is the entity conducting the trafficking.

Any other traditional civil and political rights for trafficked persons do not apply under the human rights model – such as protections for the accused – because that would take on the view of trafficked persons as criminals rather than victims, and are therefore included in the criminal model.

Askola 2007 argues that a primary goal of the human rights model is to protect trafficked persons from re-victimisation, which is largely tied in to a trafficked

person's right to remain in the destination State, either temporarily or permanently.<sup>155</sup> At the same time, while granting certain trafficked persons residence permits, it takes them out of circulation, but may lead to the recruitment of other people to be trafficked in their place.<sup>156</sup>

### *Assistance*

While existing universal economic and social rights do apply to trafficked persons, they are not specific enough to handle their special needs. First of all, once a State establishes that a person has been trafficked, the State, if applying a human rights model, will take action to meet that person's basic needs. In other words, the trafficked person will be provided with housing, food and medical care immediately. Following the most basic and essential rights, the State may also provide another level of assistance, in the form of employment training, education and psychological care. Along the same lines, the State would also facilitate the repatriation of the trafficked person, once that is a viable option. Although a State may assist in the provision of economic and social rights to a trafficked person, it is not an absolute necessity that it views the person as a victim.

Bruch 2004 argues that another advantage of adopting a human rights model is that it identifies victims as rights-holders and does not require them to be judged as "innocent" before the international community becomes involved.<sup>157</sup> Adopting a human rights model also emphasises the concept of universal inalienable human rights – that a person is entitled to the protection of those rights regardless of other factors,<sup>158</sup> such as whether he or she is in a State illegally. One weakness of the human rights approach is that it only offers a "snapshot," ignoring the actions that led to trafficking in the first place – the criminal and labour elements.<sup>159</sup> It also ignores

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<sup>155</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 140.

<sup>156</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 164.

<sup>157</sup> Bruch, Elizabeth M. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 32.

<sup>158</sup> Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 32.

<sup>159</sup> Bruch, Elizabeth M. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 32.

other rights abuses against the victims prior to being trafficked.<sup>160</sup> Moreover, Askola 2007 contends that many trafficked persons are unable to exercise the rights they may have on paper as a result of language barriers, unfamiliarity with legal systems, or out of fear of the consequences of their illegal status or retribution by their traffickers.<sup>161</sup>

## 2.2 INTERRELATIONSHIP BETWEEN THE MODELS

A State may adopt the criminal model or the human rights model, or a combination of both. The criminal model can be applied to human trafficking through either direct or indirect criminal law. If a criminal model is adopted through the use of direct human trafficking law, then the crime of human trafficking is recognised and defined in a State's national criminal law. As a result, it views trafficked persons as victims of a crime. If a State adopts a human rights model to provide assistance and protection for trafficked persons alongside a criminal model using direct law, it has the option of making the human rights provisions contingent upon the trafficked persons' participation in the criminal investigations. In fact, the adoption of the human rights model in those cases may be exclusively for the purpose of providing a witness to aid in the prosecution of traffickers.

If a State adopts a criminal model using indirect human trafficking law, it charges the traffickers and the trafficked persons with crimes relating to human trafficking, such as prostitution, immigration and labour offences. Adopting that approach, a State does not recognise human trafficking as a crime in and of itself, and therefore does not identify trafficked persons as victims of a crime. Rather, trafficked persons can be viewed as victims of other crimes, such as forced prostitution, and may be eligible for already-existing human rights provisions provided to such victims. If a State does not recognise human trafficking as a crime through direct criminal law, then it may argue that it does not need to provide assistance to victims of a crime that does not exist. States may adopt a policy of non-criminalisation of identified trafficked persons, as the crimes they may be charged with were ones in which they were compelled to participate. This would allow States to provide human rights provisions for trafficked persons without having to criminalise any of their actions relating to the trafficking

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<sup>160</sup> Bruch, Elizabeth M. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 32.

<sup>161</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, pp 150-151.

process.

At this stage, with international human trafficking law in existence for nearly a decade, States should be moving from using indirect human trafficking laws towards a direct human trafficking laws. This would include the shift from viewing a trafficked person as a criminal to a victim. The existing international and regional human trafficking laws require that States adopt direct criminal law in order to define and treat human trafficking as a crime in and of itself. While many States are willing to adopt direct human trafficking laws, many are reluctant to prosecute those offences and still elect to use existing indirect law, which was not the intention of the international and regional human trafficking laws.

The human rights model can be adopted once the trafficked person is removed from the criminal model. At that stage, it is up to the State to determine whether or not to provide human rights provisions for trafficked persons.

### **Granting human rights in exchange for assistance with investigations**

In many cases, trafficked persons are only granted human rights by the destination State when they cooperate with law enforcement authorities and participate in the investigation of their trafficker(s). This involves granting human rights for the purpose of facilitating the criminal model. The existing literature and case studies both reflect this concept.

Human rights provisions may be granted to trafficked persons as a function of their usefulness to the State as an instrument in the prosecution of those involved in the trafficking process.<sup>162</sup> In other words, the shift from a State viewing a trafficked person as a criminal to viewing him or her as a victim may be dependent upon whether the trafficked person has participated in the prosecution of their traffickers.<sup>163</sup>

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<sup>162</sup> Konrad, Helga. "Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States." in *Trafficking and Women's Rights*, Christien L van den Anker and Jeroen Doomernik (eds). Hampshire: Palgrave Macmillan, 2006, p 120; Piotrowicz, Ryszard. "Trafficking of human beings and their human rights in the migration context" p 282.

<sup>163</sup> Kempadoo, Kamala. "From Moral Panic to Global Injustice: Changing Perspectives on Trafficking" in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005, p xv.

Witness protection alone does not afford trafficked persons sufficient incentives and security to testify against their traffickers.<sup>164</sup> Trafficked persons are typically only accommodated insofar as they are able to assist with the prosecution process.<sup>165</sup> Oftentimes, the rights afforded to trafficked persons come under the umbrella of a temporary residence visa, granted in exchange for their participation in the investigation of their trafficker(s).<sup>166</sup> This represents an exception to migration rules as a means to achieve success at criminal trials.<sup>167</sup> It is, in fact, a collision between the purposes of immigration policy and the aims of law enforcement, which can undermine the residence permit scheme to keep the trafficked person (a victim of a crime) in the State for evidentiary purposes.<sup>168</sup> Trafficked persons who are treated humanely and given time to recover and get their lives in order may be more willing to both come forward with their case, and to trust and cooperate with police.<sup>169</sup> Considering the human rights model in this context shows both its scope and limitations: it may make sense from the point of view of prosecutions to grant trafficked persons human rights, but on the other hand, by States not doing so it may be trampling on the human rights of the trafficked person.<sup>170</sup> It also challenges the human rights model by posing the question of whether States only exercise their right to expel trafficked persons as illegal migrants if they do not prove to be useful in obtaining criminal prosecutions.<sup>171</sup>

Viewing a trafficked person as a tool to successfully prosecute traffickers limits the level and type of assistance afforded to them.<sup>172</sup> Furthermore, trafficked persons may

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<sup>164</sup> Friesendorf, Cornelius. "Pathologies of Security Governance: Efforts Against Human Trafficking in Europe." *Security Dialogue*, Vol 38, 2007, p 392.

<sup>165</sup> Goodey, Jo. "Migration, crime and victimhood." *Punishment Society*, Vol 5, 2003, p 424.

<sup>166</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 110.

<sup>167</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 110.

<sup>168</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 117.

<sup>169</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 115.

<sup>170</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 140.

<sup>171</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 141.

<sup>172</sup> Goodey, Jo. "Migration, crime and victimhood." *Punishment Society*, Vol 5, 2003, p 423.

have a very limited knowledge – if any at all – of those involved in their trafficking process.<sup>173</sup> A Council of Europe report on witness protection states:

*The use of witness protection in cases of human trafficking is seen as less effective [than in other cases], at least from a prosecutorial viewpoint. This is due to the fact that the illegal immigrants involved usually only have information on one or two traffickers and therefore their testimony is not sufficient to dismantle the criminal organisation.*<sup>174</sup>

It is also possible to characterise the granting of a temporary residence permit to a trafficked person as a bribe, which those representing the defence in the trial may use to discredit the witness.<sup>175</sup> Moreover, when trafficked persons do testify in court, but do little to denounce their alleged trafficker(s), police may make the distinction between those who have legitimately been trafficked, and those who are familiar with the process of obtaining a residence permit.<sup>176</sup>

In addition, many trafficked persons are not willing to testify out of fear for their own safety and that of their families.<sup>177</sup> Moreover, trafficked persons may refuse the assistance offered to them because they fear collusion between the State and their trafficker(s), or that they will be deported to their origin State.<sup>178</sup> Oftentimes law enforcement officials cannot provide trafficked persons with the level of protection they believe they require as a result of a lack of mandate, resources, or both.<sup>179</sup> Trafficked persons cannot be treated simply as organised crime informants – they require another model of criminal justice response that reflects their needs as victims of a crime primarily, and instruments to achieve a prosecution secondarily.<sup>180</sup>

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<sup>173</sup> Goodey, Jo. "Migration, crime and victimhood." *Punishment Society*, Vol 5, 2003, p 423.

<sup>174</sup> Council of Europe, *Recommendation R(96)8 on crime policy in Europe in a time of change*. Strasbourg: Council of Europe Publication, 1999, p 12.

<sup>175</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 111.

<sup>176</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 114.

<sup>177</sup> Askola, Heli. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*. Portland: Hart Publishing, 2007, p 109; Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 333; Goodey, Jo. "Migration, crime and victimhood." *Punishment Society*, Vol 5, 2003, p 424.

<sup>178</sup> Friesendorf, Cornelius. "Pathologies of Security Governance: Efforts Against Human Trafficking in Europe." *Security Dialogue*, Vol 38, 2007, p 393.

<sup>179</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 333.

<sup>180</sup> Goodey, Jo. "Migration, crime and victimhood." *Punishment Society*, Vol 5, 2003, p 428.

On one hand, a trafficked person should not be lured into cooperating with authorities with false promises of protection and assistance.<sup>181</sup> On the other hand, because of the importance of securing the prosecution of the trafficker(s), the State should do all within its power to provide protection for trafficked persons to make them amenable to testifying.<sup>182</sup> Along the same lines, States may also provide incentives to trafficked persons to cooperate with the investigations that go beyond the duration of the criminal proceedings, such as offering an extended residence permit in exchange for testimony.<sup>183</sup> Lastly, organising protection and assistance for trafficked persons is costly and difficult.<sup>184</sup> Even wealthier destination States are unlikely to provide such provisions for trafficked persons unless they see a positive correlation between the assistance and successful prosecutions of traffickers.<sup>185</sup>

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<sup>181</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 333.

<sup>182</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 333.

<sup>183</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 334.

<sup>184</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 330.

<sup>185</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 330.

### **CHAPTER 3: INTERNATIONAL HUMAN TRAFFICKING LAW PRE-MODERN HUMAN RIGHTS LAW, 1880s-1945**

Having developed two theoretical models in Chapter 2, Chapter 3 considers what role, if any, these theories play in early international human trafficking law. This chapter examines factors concerning the development of international human trafficking law, from the 1880s until 1945, in order to describe the international human trafficking law in existence prior to the adoption of modern human rights law, which arose after World War II. The motivation for the human trafficking conventions during this period was the protection of white women and children who were trafficked for the purpose of prostitution. These conventions contain some degree of protection, but do not contain modern human rights law.

#### **Human trafficking and customary law**

Although there is no customary law specifically pertaining to human trafficking, customary law on the prohibition of slavery potentially could extend to human trafficking. The significant number of treaties and customary international law has made the prohibition of slavery and the slave trade a legal obligation *erga omnes* – something of collective global interest that is in every State’s interest to protect.<sup>186</sup> However, while the prohibition on traditional forms of slavery is universally recognised, there has been inconsistency amongst States when applying that customary law to contemporary forms of slavery, such as human trafficking.<sup>187</sup> As a result, while it can be argued that human trafficking falls under the prohibition of slavery, there is nothing to say that States will adopt it as such.

#### **3.1 TRAFFICKING FOR PROSTITUTION OF WOMEN AND CHILDREN, 1880s-1919**

The question of white slavery – the precursor of human trafficking – became an issue in the late 19<sup>th</sup> century, following advances in transportation and technology, which resulted in increasing rates of migration.

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<sup>186</sup> Rassam, A Yasmine. “Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law.” *Virginia Journal of International Law*. Vol 39, 1999, p 306.

<sup>187</sup> Rassam, A Yasmine. “Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law.” *Virginia Journal of International Law*. Vol 39, 1999, p 311.



### **Advances in transportation and technology**

With industrialisation came the migration of people from rural to urban areas, particularly women.<sup>188</sup> Furthermore, technological advances of the 19<sup>th</sup> century – such as the invention of the steamboat, the telegraph and the opening of the Suez and Panama Canals – helped bring about the new and greater international mobility of labour in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, and made it possible for traffickers to react quickly to the growing demand for white female prostitutes worldwide,<sup>189</sup> using existing shipping routes and ports to facilitate transportation.<sup>190</sup>

The beginning of mass migration and technological developments is significant because despite having stronger or weaker periods of migration, it is a trend that has continued to the present. As the world becomes increasingly globalised and more technologically advanced, people become increasingly enabled and encouraged to migrate to places with better economic and social opportunities. This also means that as more people move legally, more will also migrate – or be forced to migrate – illegally. Advances in technology also make it easier and more efficient for those involved in the trafficking process to network and operate more efficiently.

The early wave of international laws against white slavery occurred at a time of new transatlantic migration, including increasing numbers of women from Southern and Eastern Europe.<sup>191</sup>

### **Perceived migratory patterns and behaviour**

The major migration trends in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries were from Europe to North America, and to a lesser extent, South America, in addition to labour migration within Europe itself – primarily of Southern and Eastern Europeans

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<sup>188</sup> deVries, Petra. “‘White Slaves’ in a Colonial Nation: The Dutch Campaign Against the Traffic of Women in the Early Twentieth Century.” *Social and Legal Studies*, Vol 14, 2005, p 41.

<sup>189</sup> Hyam, Ronald. *Empire and Sexuality*. pp 142-148, quoted in Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*, Vol 40, 2003, p 172.

<sup>190</sup> Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*, Vol 19, 2005, p 163.

<sup>191</sup> Wong, Diane. “The Rumour of Trafficking.” *International Institute for Asian Studies Newsletter*, 2006, p 11.

migrating to Northern and Western Europe.<sup>192</sup> While there was still some migration from Europe to colonies in Africa, this took place on a larger scale in the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>193</sup> At this stage, migration from Africa to Europe was more significant.<sup>194</sup>

It was impossible to estimate the number of women trafficked in the 19<sup>th</sup> and early 20<sup>th</sup> century – as it is today – or know the figures for specific destination States or regions. Although there was no shortage of reports of white slavery, the actual number of cases in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries was very small.<sup>195</sup> However, despite the actual destination of the trafficked women, the belief and suspicion at the time was that women were being trafficked from Europe to Africa, Asia and South America.<sup>196</sup>

Although women were in all likelihood being trafficked from Africa, Asia and South America to Europe, the perception and only concern of the time was over European women being trafficked within and outside of the continent. Consequently, the issue of non-white women being trafficked internally or to Europe was never raised. There were two perceived routes for the trafficking of European women.<sup>197</sup> The Western route was believed to go to South America, to cities such as Rio de Janeiro and Buenos Aires, while the Eastern route was perceived to lead to East Africa and Asia, with the final destinations being Shanghai, Hong Kong, Tientsin, Manila, Harbin in

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<sup>192</sup> Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed, London: Macmillan Press Ltd, 1998, pp 48-62.

<sup>193</sup> Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed London: Macmillan Press Ltd, 1998, p 52.

<sup>194</sup> Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed, London: Macmillan Press Ltd, 1998, p 58.

<sup>195</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 7; Doezema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*, Winter 2000, pp 25-26; Scully, Eileen. “Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons,” in *Global Human Smuggling*, David Kyle & Rey Koslowski (eds). 2001, p 87 in Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 216; Zalewski, Anna. “Migrants for Sale: The International Failure to Address Contemporary Human Trafficking.” *Suffolk Transnational Law Review*. Vol 29, 2005, p 115.

<sup>196</sup> Bertone, Andrea M. “Transnational Activism to Combat Trafficking in Persons.” *The Brown Journal of World Affairs*, Vol 10, 2004, p 10; Doezema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*, Winter 2000, pp 23-24; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 160.

<sup>197</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 172.

Manchuria and Nagasaki.<sup>198</sup> It was believed that most of the traffickers at the time came from Russia, Poland, Germany, Armenia and various parts of the Austro-Hungarian Empire,<sup>199</sup> while the trafficked women came from these States as well as Italy, Spain, France, Romania and Greece.<sup>200</sup> This concern over the trafficking of white women led to the development of the first interstate structures and treaties on the subject of human trafficking.

### 3.1a THE 1904 AGREEMENT

The 1904 Agreement is the earliest international human trafficking law, and was agreed upon by 12 European States<sup>201</sup> to protect women and girls from “the criminal traffic known as the ‘White Slave Traffic’” for the purpose of prostitution.<sup>202</sup>

#### The development of the 1904 Agreement

An unlikely coalition of Christian purity campaigners and early feminists in the 1880s brought the issue of “white slave traffic” to the attention of the British public and in turn to political and administrative officials.<sup>203</sup> The image of the movement of European women in need of rescue across national borders to colonies outside of Europe carried substantial emotive weight and prompted reaction from States.<sup>204</sup> A

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<sup>198</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 172; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*, Vol 19, 2005, p 163.

<sup>199</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 172.

<sup>200</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 172; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*, Vol 19, 2005, p 164.

<sup>201</sup> The Agreement was between: “His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the German Emperor, King of Prussia, in the name of the German Empire; His Majesty the King of the Belgians; His Majesty the King of Denmark; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of Italy; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and of the Algarves; His Majesty the Emperor of all the Russias; His Majesty the King of Sweden and Norway; and the Swiss Federal Council.”

<sup>202</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904.

<sup>203</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, pp 166-167.

<sup>204</sup> Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 215; Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*,

“white slave panic” erupted in Europe and the United States, resulting in the formation of organisations committed to its elimination, in addition to heavy representation of the issue of “white slavery” in media and popular culture of the time.<sup>205</sup>

The term “white slave traffic,” coined in the 1830s, was clearly an allusion to the anti-slavery rhetoric of the abolition movement that took place earlier in the 19<sup>th</sup> century.<sup>206</sup> At the time, the inclusion of the term “slavery” had a very specific meaning and prompted an emotive response when coupled with the notion of young, white women being forced into prostitution outside of Europe and North America.<sup>207</sup> Although at the time, the term “traffic” itself connoted only “improper dealings” or “prostitution,”<sup>208</sup> it carried with it the image of white women and girls being transported against their will from Europe to colonies.<sup>209</sup> The distinction was drawn between “trafficking” and “traditional” slavery – meaning men and women from outside of Europe and North America being enslaved in wealthier destination States in Europe and North America – because specifying that those “enslaved” where white women had a stronger, more emotional impact upon those in Europe and the United States who had the resources and power to take action on the matter.<sup>210</sup>

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Vol 18, 1994, p 167; Scully, Eileen. “Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons,” in *Global Human Smuggling*, David Kyle & Rey Koslowski (eds). 2001, p 86 in Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 216; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 161.

<sup>205</sup> Doezema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*. Vol 18, 2000, p 25.

<sup>206</sup> Fischer-Tine, Harald. “‘White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 167.

<sup>207</sup> Bertone, Andrea M. “Transnational Activism to Combat Trafficking in Persons.” *The Brown Journal of World Affairs*. Vol 10, 2004, p 10; Doezema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*. Vol 18, 2000, pp 23-24, 29; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 161.

<sup>208</sup> Oxford English Dictionary, 1933, p 2092-2093, in Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 161.

<sup>209</sup> Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 161.

<sup>210</sup> Bertone, Andrea M. “Transnational Activism to Combat Trafficking in Persons.” *The Brown Journal of World Affairs*. Vol 10, 2004, p 10; Doezema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*, Vol 18, 2000, p 27; Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 161.

Intergovernmental cooperation to deal with prostitution and white slavery in Europe occurred with a series of international conferences on white slavery, which commenced in 1885<sup>211</sup> with a conference organised by French authorities in Paris, and another in 1895.<sup>212</sup> In 1899, delegates from 12 States including Germany, France, Russia, Austria and the United States of America met in London as the Bureau for the Suppression of the White Slave Traffic, and defined “white slave traffic” as:

*the purchase and transfer from place to place of women and girls for immoral purposes, who are in the first place inveigled into a vile life by the promise of employment in a foreign country and, thereafter are practically prisoners, and who, if they really desire to escape from a life of shame cannot do so.*<sup>213</sup>

This led to another conference in Paris on 15 July 1902, at which time the 12 participants agreed on a set of guidelines for States parties, which was signed two years later as the 1904 Agreement.<sup>214</sup>

At a time of difficult economic conditions and increasing migration, the aim of the 1904 Agreement was to stop the sale of white women into prostitution in Europe,<sup>215</sup> as well as the abduction of European women for prostitution in South America, Africa or Asia.<sup>216</sup> In 1904, the president of the Austrian League for the Suppression of White Slavery recognised the international trafficking of women for the purpose of prostitution:

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<sup>211</sup> Pickup, Francine. “Deconstructing Trafficking.” *Millennium: Journal of International Studies*. Vol 27, 1998, p 1001.

<sup>212</sup> Long, Lynellyn D. “Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation.” *International Migration*. Vol 42, 2004, p 20.

<sup>213</sup> *The Shield*. [The Official Organ of the British Committee of the International Federation for the Abolition of State Regulation of Vice], July 1899, p 42 in Fischer-Tine, Harald. ““White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914.” *The Indian Economic and Social History Review*. Vol 40, 2003, p 172.

<sup>214</sup> Deflem, Mathieu. “Wild Beasts Without Nationality: The Uncertain Origins of Interpol, 1898-1910.” *Handbook of Transnational Crime and Justice*. Philip Reichel (ed). Thousand Oaks, CA: Sage Publications, 2005, p 282.

<sup>215</sup> Defeis, Elizabeth. “Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach.” *ILSA Journal of International & Comparative Law*. 2003-2004, p 485; Dunbar, Michelle OP. “The Past, Present, and Future of International Trafficking in Women for Prostitution.” *Buffalo Women’s Law Journal*. Vol 8, 1999, p 109.

<sup>216</sup> Doezeema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*. Vol 18, 2000, pp 23-24.

*There exists an international organisation which in many places of the earth has its general terminals; the export is so regulated that women of particular countries of origin are always sent to those centres where they are especially appreciated.*<sup>217</sup>

### **Scope of the 1904 Agreement**

Each State party was permitted to determine whether the agreement applied only within the European State itself, or also to their colonies or foreign possessions.<sup>218</sup> Of the 12 States, the French, Italian, Dutch and Russian governments declared that the Agreement would apply to all of their colonies immediately.<sup>219</sup> The British government denounced the Agreement for each of its colonies, and the German, Danish, Spanish and Portuguese governments reserved the right to make any decisions on the subject of their colonies.<sup>220</sup> The French government was given the responsibility of dealing with non-signatory States that wished to accede to the agreement,<sup>221</sup> and housing the deposited original copy of the agreement.<sup>222</sup>

### **Provisions of the 1904 Agreement**

Although described as “criminal traffic,” the 1904 Agreement did not require States parties to introduce national criminal laws criminalising this behaviour. Rather, it was primarily focused on preventing human trafficking from occurring through use of prevention and monitoring, and to offer some protection and assistance for trafficked persons. This was primarily accomplished by setting guidelines for participating States. For example, each State party agreed to establish a governmental department with responsibility for trafficking of women and girls,<sup>223</sup> as well as monitoring trafficking activities taking place at railway stations and ports of embarkation.<sup>224</sup> The States parties also agreed to seek declarations from women and girls of foreign nationality who are prostitutes, in order to determine their identity and civil status,

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<sup>217</sup> Schmitz, H. *Das internationale Verbrechen und seine Bekämpfung* [International criminality and its control]. Inaugural doctoral dissertation, University of Cologne, 1927, quoted in Deflem, Mathieu. “Wild Beasts Without Nationality: The Uncertain Origins of Interpol, 1898-1910.” *Handbook of Transnational Crime and Justice*. Philip Reichel (ed). Thousand Oaks, CA: Sage Publications, 2005, p 282.

<sup>218</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Procès-Verbal of Signature, Art 1.

<sup>219</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Procès-Verbal of Signature, Art 1.

<sup>220</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Procès-Verbal of Signature, Art 1.

<sup>221</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 7.

<sup>222</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 9.

<sup>223</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 1.

<sup>224</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 2.

and whether or not they have been trafficked or forced into prostitution.<sup>225</sup> Moreover, the States parties must also exercise supervision over agencies or offices engaged in finding employment for women or girls abroad.<sup>226</sup>

The 1904 Agreement contains a limited form of protection and states that victims of criminal traffic should be placed in temporary protective custody, and repatriated upon their request.<sup>227</sup> This may be because women were perceived as being in need of protection for two reasons: 1) because they were victims of abuse and a crime; and 2) because women were generally perceived as being vulnerable in their own right at the time.

### **3.1b THE 1910 CONVENTION**

The perceived continued impact of the trafficking of white women led to the adoption of a more potent structure than that offered by the 1904 Agreement. The 1910 Convention contained criminal law elements, unlike the 1904 Agreement. Similar to the 1904 Agreement, this convention also only applies to white women and girls<sup>228</sup> trafficked for the purpose of prostitution. The original signatories were Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, and Sweden.<sup>229</sup> The 1910 Convention stipulated that if any State party wanted the convention to come into force in one or more of its colonies, possessions or consular judicial districts, it must notify its intention to that effect by way of a declaration.<sup>230</sup> As was the case with the 1904 Agreement, the government of France was given the responsibility of dealing with non-signatory States that wished to accede to the convention,<sup>231</sup> and housing the deposited original copy of the convention.<sup>232</sup>

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<sup>225</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 3.

<sup>226</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 6.

<sup>227</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 3.

<sup>228</sup> The 1910 Convention refers to women under or over age as women or girls under or over 20 completed years of age. International Convention for the Suppression of the “White Slave Traffic,” 1910, Final Protocol, B.

<sup>229</sup> Bassiouni, M Cherif. “Enslavement as an International Crime.” *New York University Journal of International Law and Politics*. Vol 23, 1991, p 464. Subsequent States parties were Bulgaria, Chile, China, Colombia, Cuba, Czechoslovakia, Egypt, Estonia, Finland, the Irish Free State, Japan, Lithuania, Luxembourg, Monaco, Norway, Persia, Poland, Siam, Switzerland, Turkey, Uruguay and Yugoslavia.

<sup>230</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 11.

<sup>231</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 8.

<sup>232</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 9.

### **Provisions of the 1910 Convention**

The 1910 Convention contains the first direct criminal law provisions, first calling for the punishment of those who traffic women or girls into prostitution,<sup>233</sup> in addition to those who use fraud or other means of coercion to traffic women or girls over 20 years of age into prostitution.<sup>234</sup> Each State party must ensure that their legislation criminalises human trafficking offences, to take the necessary steps to implement such legislation, and to ensure that the offences are punished according to their gravity.<sup>235</sup> Also noteworthy is the fact that the convention specifies that it is irrelevant whether the offence was committed in more than one State – early recognition of the transnational nature of human trafficking.<sup>236</sup>

In addition, the final protocol to the 1910 Convention states that the provisions listed above are to be considered a minimum, and that States parties are free to punish other analogous offences, such as procuring women even where neither fraud nor compulsion have been exercised.<sup>237</sup> Lastly, the final protocol stipulates that a case of the detention of a woman or a girl in a brothel against her will cannot be dealt with in the 1910 Convention because it is governed exclusively by national legislation.<sup>238</sup>

### **3.2 THE LEAGUE OF NATIONS AND TRAFFICKING FOR PROSTITUTION OF WOMEN AND CHILDREN, 1919-1945**

Following the end of World War I and upon its establishment in 1920, the League of Nations perceived human trafficking to be such a serious matter that it assumed responsibility for the supervision of the execution of the existing agreements concerning human trafficking – a provision that is included in the League of Nations Covenant.<sup>239</sup> The League of Nations' work in the areas of human trafficking and slavery helped to shift the focus of international law from dealing strictly with the relationships between sovereign States, to the rights of individuals constituting a

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<sup>233</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 1.

<sup>234</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 2.

<sup>235</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Art 3.

<sup>236</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Arts 1 and 2.

<sup>237</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Final Protocol, A.

<sup>238</sup> International Convention for the Suppression of the “White Slave Traffic,” 1910, Final Protocol, D.

<sup>239</sup> League of Nations, *League of Nations Covenant*, 1920, Art 23, para 1(c) in Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 9.



legitimate part of international law.<sup>240</sup> The motivation for the human trafficking conventions during this period was the protection of white women and children who were trafficked into forced prostitution, along with the fact that more States had come into existence in general.

The 1910 Convention was adopted by the League of Nations as part of their mandate in 1920.<sup>241</sup> The mandate also required League of Nations member States to submit annual reports on their efforts to reduce trafficking.<sup>242</sup> In addition, the General Assembly of the League of Nations considered a prohibition on trafficking of women and girls to be part of customary international law.<sup>243</sup> During its relatively short existence, the League of Nations was responsible for three other attempts to address human trafficking: the 1921 Convention, the 1933 Convention and the 1937 Draft Convention.<sup>244</sup>

### 3.2a THE 1921 CONVENTION

The 1921 Convention added to the scope of the pre-existing conventions in two ways. First, it expanded the geographical scope of the treaties.<sup>245</sup> This was done over concern that European women were being abducted and trafficked for prostitution in South America, Africa and Asia,<sup>246</sup> which reflected the perceived migratory patterns at the time.<sup>247</sup> Secondly, it applied to women and children of both sexes trafficked for the purpose of prostitution.<sup>248</sup> The phrase “white slave traffic” does not appear in the 1921 Convention as an additional stipulation, suggesting that the document was the

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<sup>240</sup> Bales, Kevin and Peter T Robbins. “‘No One Shall Be Held in Slavery or Servitude’: A Critical Analysis of International Slavery Agreements and Concepts of Slavery.” *Human Rights Review*. January – March 2001, p 19.

<sup>241</sup> Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 171.

<sup>242</sup> Tambe, Aswini. “The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay.” *Gender and Society*. Vol 19, 2005, p 171.

<sup>243</sup> Yoshimi, Yoshiaki. *Comfort Women: Sexual Slavery in the Japanese Military During World War II*. New York: Columbia University Press, 2000, p 161.

<sup>244</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 9.

<sup>245</sup> The original signatories of the 1921 Convention were: Albania, Germany, Austria, Belgium, Brazil, the British Empire (with Canada, the Commonwealth of Australia, the Union of South Africa, New Zealand and India), Chile, China, Colombia, Costa Rica, Cuba, Estonia, Greece, Hungary, Italy, Japan, Latvia, Lithuania, Norway, the Netherlands, Persia, Poland (with Danzig), Portugal, Romania, Siam, Sweden, Switzerland and Czechoslovakia.

<sup>246</sup> Doezenia, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*. Vol 18, 2000, pp 23-24.

<sup>247</sup> See “Perceived migratory patterns and behaviour” at p 38.

<sup>248</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921, Art 2.

first step towards recognising the trafficking of women and children of all races. The convention also stipulated that all States parties were obliged to adhere to the provisions listed in the 1904 Agreement and 1910 Convention, regardless of whether they were a party to the previous two instruments.<sup>249</sup>

### **Provisions of the 1921 Convention**

The 1921 Convention did not add to the scope of the criminal law found in the 1910 Convention, but rather reiterated the importance for States to implement necessary criminal legislation to punish those who commit trafficking offences.<sup>250</sup>

Similar to the provision in the 1904 Agreement, the 1921 Convention required States parties to take legislative and administrative measures to supervise the employment agencies and offices that assisted women and children seeking employment abroad.<sup>251</sup> States parties were also required to adopt legislative and administrative measures in connection with immigration and emigration to monitor for human trafficking in women and children.<sup>252</sup> The requirement of States parties to supervise its employment agencies and migration are examples of indirect human trafficking provisions.

In order to ensure that the 1921 Convention was being implemented, the League of Nations established the Advisory Committee on the Traffic in Women and Children, which required States parties to submit reports periodically, and assumed responsibility of supervising the execution of the convention.<sup>253</sup> This was the first international oversight body dealing with human trafficking. Moreover, in 1927, the Council of the League of Nations commissioned a group of experts in the field of human trafficking to complete fact-finding missions in order to obtain further information on women and children being trafficked in selected States in Europe, the Middle East, and North and South America.<sup>254</sup> As the group of experts found it

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<sup>249</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921.

<sup>250</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921, Arts 2 and 3.

<sup>251</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921, Art 6.

<sup>252</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921, Art 7.

<sup>253</sup> Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 170.

<sup>254</sup> Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 170; Reanda, Laura. "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action." *Human Rights Quarterly*. Vol 13, 1991, p 208.

difficult to distinguish between trafficked persons and those working in the domestic prostitution industry, they concluded that the existence of licensed brothels was an incentive to traffic, both internationally and domestically.<sup>255</sup> This finding was reinforced by a study conducted by a subsequent group on conditions in Asia and the Far East in 1932.<sup>256</sup>

### **3.2b THE 1933 CONVENTION**

Similar to the 1921 Convention, the 1933 Convention was agreed upon by a group of States encompassing parts of Europe, North America, South America and Asia.<sup>257</sup> It also defines “country” in terms of the convention, as including the colonies, protectorates and territories of any of the States parties.<sup>258</sup> However, if a State party did not want the convention to apply to its colonies, protectorates or territories, it could inform the Secretary-General of the League of Nations of the decision.<sup>259</sup> Unlike the 1921 Convention, which applies to children of both sexes trafficked for prostitution, the 1933 Convention only applies to women and girls trafficked for prostitution, rather than including children of either gender.<sup>260</sup>

#### **Provisions of the 1933 Convention**

In addition to the criminal law provisions of the previous instruments, the 1933 Convention also requires States parties to punish those attempting or preparing to commit trafficking offences.<sup>261</sup> Similar to the 1921 Convention, the 1933 Convention

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<sup>255</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 170.

<sup>256</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 170; Reanda, Laura. “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action.” *Human Rights Quarterly*. Vol 13, 1991, p 208.

<sup>257</sup> The original signatories of the 1933 Convention were: His Majesty the King of the Albanians; the President of the German Reich; the Federal President of the Austrian Republic; His Majesty and the King of the Belgians; His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India; His Majesty the King of the Bulgarians; the President of the Republic of Chile; the President of the National Government of the Republic of China; the President of the Polish Republic, for the Free City of Danzig; the President of the Spanish Republic; the President of the French Republic; the President of the Hellenic Republic; His Serene Highness the Regent of the Kingdom of Hungary; the President of the Latvian Republic; the President of the Republic of Lithuania; His Serene Highness the Prince of Monaco; His Majesty the King of Norway; the President of the Republic of Panama; Her Majesty the Queen of the Netherlands; the President of the Polish Republic; the President of the Portuguese Republic; His Majesty the King of Sweden; the Swiss Federal Council; the President of the Czechoslovak Republic; His Majesty the King of Yugoslavia.

<sup>258</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933, Art 1.

<sup>259</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933, Art 10.

<sup>260</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933.

<sup>261</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933, Art 1.

also requires States parties to update their legislation existing at that time to reflect the international human trafficking laws, and ensure that offences are punished in accordance with their gravity.<sup>262</sup> Moreover, the States parties agreed to communicate and cooperate with each other in relation to any persons of either sex that have participated in the trafficking process, including sharing records of convictions, information about the offender, and/or particulars of any measures of refusal of admission or of expulsion applied to the offender.<sup>263</sup>

### **THE DRAFT “CONSOLIDATED CONVENTION” OF 1937**

Following the two fact-finding missions from the group of experts established by the League of Nations Council, and two conventions on human trafficking, the League of Nations drafted a convention in 1937 designed to consolidate the previous instruments and obtain international cooperation for the closure of brothels, and the prosecution and punishment of brothel owners and managers.<sup>264</sup> The Draft 1937 Convention was to be the first international law to regulate prostitution, as prostitution had always been a sovereign issue regulated by national laws.<sup>265</sup> The League of Nations, however, believed that prostitution was no longer a national matter,<sup>266</sup> as it underlies human trafficking – a transnational crime. The goals of the Draft 1937 Convention were to: 1) abolish any regulation of prostitution; 2) repress third parties profiting from prostitution; and 3) rehabilitate trafficked persons.<sup>267</sup> The Draft 1937 Convention was never opened for signature as a result of the outbreak of World War II.<sup>268</sup>

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<sup>262</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933, Art 2.

<sup>263</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933, Art 3(a) and (b).

<sup>264</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 171.

<sup>265</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 171.

<sup>266</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 171.

<sup>267</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 171.

<sup>268</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 171.

### 3.3 ANALYSIS OF THE PRE-HUMAN RIGHTS LAW TREATIES

#### A widening scope

There was an evolution of the scope of international human trafficking law, which occurred as the concept of human trafficking evolved. The first two treaties, the 1904 Agreement and the 1910 Convention only addressed trafficking of white women and girls for the purpose of prostitution.<sup>269</sup> The provisions in these treaties constituted discriminatory human rights – only offering protection to white females – and were clearly devised by powerful primarily-white European States to protect their own citizens. The fact that only the victimisation of white women alone was targeted may have undermined the effectiveness of these early conventions.<sup>270</sup>

The 1921 Convention expanded the scope to include white and non-white women and children of either gender trafficked for the purpose of prostitution.<sup>271</sup> The removal of the term “white” from the 1921 Convention is most likely the result of the widening geographical scope of the signatories, which included several States from Eastern Europe, Central and South America and Asia – the populations of which may have been considered to be non-white. As a result, being white was no longer a qualification for protection under this treaty. The 1933 Convention took a more restrictive approach by limiting its scope to women and girls trafficked for the purpose of prostitution.<sup>272</sup> The geographical scope expanded once again under the 1933 Convention, including additional States from Eastern Europe and Central America.

#### Motivation

The motivation for the early conventions was largely to protect white women and children from prostitution – particularly after being trafficked outside of Europe. In other words, these conventions were meant to protect white European women who were trafficked either within Europe or to colonies of the European States, but the

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<sup>269</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904; International Convention for the Suppression of the “White Slave Traffic,” 1910.

<sup>270</sup> Scully, Eileen. “Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons,” in *Global Human Smuggling*, David Kyle & Rey Koslowski (eds). 2001, pp 86-87 in Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 216.

<sup>271</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921, Art 2.

<sup>272</sup> International Convention for the Suppression of the Traffic in Women of Full Age, 1933.

protections were not reciprocal for non-white women trafficked anywhere. This also may explain the focus on prevention and monitoring – getting powerful European States to agree to supervise railway stations and ports, in addition to employment agencies in order to prevent white women from being trafficked.

The early conventions were also a response to the public campaigns against white slavery, primarily in the United Kingdom and the United States. At this stage, human trafficking was not viewed as a threat to State security as such, but rather an immoral act that must be stopped before claiming more women and children as its victim. Despite the fact that trafficking and enslavement of non-white women, men and children was likely occurring, it was not until the focus shifted to white women and children that international action took place.

### **3.4 CONCLUSIONS**

The primary focus of the early conventions was to criminalise and combat human trafficking, while the aim was to protect white women and children from prostitution. Apart from the 1904 Agreement, it is clear from the analysis of each of these instruments, that early international human trafficking law provided limited or no protection and assistance for trafficked persons. The 1904 Agreement does contain a few limited provisions, the aims of which were primarily prevention and monitoring. From the 1910 Convention onwards, each instrument criminalised the act of trafficking, rather than the trafficked persons, but provided no assistance or protection to trafficked persons. Punishments were discussed in the 1910, 1921 and 1933 Conventions, where it was stipulated that the type of punishment given to traffickers should match the gravity of the crime. Regardless of their original motivation, the early conventions set the stage for future international human trafficking laws by recognising the transferring of a person from one place to another for the purpose of forcing them into prostitution was a crime.

## **CHAPTER 4: INTERNATIONAL HUMAN TRAFFICKING LAW IN THE MODERN HUMAN RIGHTS LAW ERA, 1945-2005**

As explained in Chapter 3, the early international human trafficking conventions contained solely criminal law. Chapter 4 works from the hypothesis that the human rights model should play a greater role in international human trafficking law after World War II.

This chapter examines international human trafficking law following the development of modern human rights law, from the end of World War II to 2005. This is done in order to determine whether the introduction of human rights law has led to the adoption of a human rights model.

### **4.1 POSTWAR CONDITIONS LEADING TO INTERNATIONAL HUMAN TRAFFICKING LAW, 1945-1956**

#### **Perceived migratory patterns and behaviour**

There were three major trends in migration following World War II: 1) labour migration from the periphery of Europe<sup>273</sup> to Western Europe; 2) migration of colonial workers to the former colonial powers; and 3) permanent migration to North America and Australia from Europe and later from Asia and Latin America.<sup>274</sup> Two additional trends were the mass movements of European refugees at the end of World War II, and the return migration of former colonists to their origin States, upon gaining their independence.<sup>275</sup>

#### **A new focus on human rights**

After the white slavery scare dissipated in the mid 20<sup>th</sup> century, international interest in the topic of human trafficking subsided, and international attention turned to other areas of concern.<sup>276</sup> The end of World War II sparked the beginning of the

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<sup>273</sup> Primarily the Mediterranean area, Ireland and Finland. Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed. London: Macmillan Press Ltd, 1998, p 68.

<sup>274</sup> Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed. London: Macmillan Press Ltd, 1998, pp 67-68.

<sup>275</sup> Castles, Stephen and Mark J Miller. *The Age of Migration: International Population Movements in the Modern World*. 2<sup>nd</sup> ed. London: Macmillan Press Ltd, 1998, p 68.

<sup>276</sup> Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 11.

development of universal and regional human rights law. This began with the founding of the United Nations (UN), which has as one of its aims ending violations of human rights.<sup>277</sup> As discussed in Chapter 1, human rights serve the purpose of protecting individuals from arbitrary interference from a State. That is also applied on an international and regional level, ensuring that people are granted human rights universally, regardless of location and citizenship. Furthermore, the issue of human trafficking and forced prostitution arose during World War II when the Germans and Japanese forced thousands of women to work in brothels.<sup>278</sup> These widespread human rights abuses of World War II had implications on human rights granted to trafficked persons.

#### **4.1a AMENDMENTS TO THE 1904 AGREEMENT, 1910 CONVENTION, 1921 CONVENTION AND 1933 CONVENTION, 1947 AND 1949**

In 1947, a protocol was passed to amend the conventions passed under the League of Nations – the 1921 Convention and the 1933 Convention.<sup>279</sup> The purpose of the protocol was to transfer the authority over the conventions from the dissolved League of Nations to the UN.<sup>280</sup> The rest of the protocol is procedural and does not alter the substantive content of the original conventions.

The protocol had eight signatories,<sup>281</sup> and 43 States parties<sup>282</sup> that ratified the protocol between 1947 and 1993. These States parties represented another increase in the number of States and their geographical scope – evidence that there may have been greater numbers of people being trafficked, and/or more States involved that were willing to adopt laws and deal with the issue.

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<sup>277</sup> United Nations Charter, 1945, Preamble.

<sup>278</sup> Tiefenbrun, Susan W. “Sex Sells but Drugs Don’t Talk: Trafficking of Women Sex Workers.” *Thomas Jefferson Law Review*. Vol 23, 2000-2001, p 213.

<sup>279</sup> United Nations Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, Concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic of Women of Full Age, Concluded at Geneva on 11 October 1933. 12 Nov 1947, 53 UNTS.

<sup>280</sup> United Nations Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, Concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic of Women of Full Age, Concluded at Geneva on 11 October 1933. 12 Nov 1947, 53 UNTS.

<sup>281</sup> Brazil, Denmark, Greece, Iran (Islamic Republic of), Luxembourg, Netherlands, Nicaragua and Norway.

<sup>282</sup> Afghanistan, Albania, Australia, Austria, Belgium, Brazil, Canada, China, Côte d’Ivoire, Cuba, Czech Republic, Denmark, Egypt, Finland, Germany, Greece, Hungary, India, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Lebanon, Luxembourg, Malta, Mexico, Myanmar, Netherlands, Nicaragua, Niger, Norway, Pakistan, Poland, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, South Africa, Sweden, Syrian Arab Republic, Turkey and Yugoslavia.



A second protocol was passed in 1949 to amend the 1904 Agreement and 1910 Convention.<sup>283</sup> Similar to the 1947 Protocol, the rest of this protocol is procedural and transferred certain oversight functions from the Government of the French Republic to the UN, but did not alter the content of the original conventions.<sup>284</sup>

#### **4.1b 1949 CONVENTION**

Although the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others specifically mentions trafficking in the title, the focus of the convention is on prostitution. The 1949 Convention does not add much to the previous human trafficking conventions. Human trafficking is only criminalised in the cases of sexual exploitation. The people addressed in the convention are victims in two ways: as prostitutes and trafficked persons. Although the Preamble mentions the previously-existing human trafficking instruments with respect to the suppression of traffic in women and children, gender is not mentioned again in the convention.<sup>285</sup> Rather, any reference to those trafficked is with the gender-neutral term of “persons.”

#### **The development of the 1949 Convention**

In 1946, the UN assumed responsibility for continuing the work of the League of Nations in the area of human trafficking through its Economic and Social Council (ECOSOC) and approved recommendations to draft a new human trafficking convention.<sup>286</sup> This included creating the Commission on the Status of Women.<sup>287</sup> The Council informed the Secretary-General of a new, comprehensive convention on human trafficking, which would embody the substance of the Draft 1937 Convention

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<sup>283</sup> United Nations Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, Signed at Paris on 4 May 1910. 4 May 1949.

<sup>284</sup> United Nations Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, Signed at Paris on 4 May 1910. 4 May 1949.

<sup>285</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Preamble.

<sup>286</sup> Reanda, Laura. “Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action.” *Human Rights Quarterly*. Vol 13, 1991, p 209.

<sup>287</sup> Pilkerton, Christopher M. “Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia.” *Michigan Journal of Gender and Law*. Vol 6, 1999-2000, p 232.

that was never opened to signature.<sup>288</sup> The 1949 Convention was drafted through the work of the Council and the Commission on the Status of Women, including various initiatives and a study to establish legislative practices.<sup>289</sup>

### **White slavery to human trafficking**

Although there were varying perceptions of what “white slave traffic” specifically entailed, the consensus was reached that it meant the procurement, through force, deception or drugs, of a white woman or girl, against her will, for the purpose of prostitution.<sup>290</sup> Eventually, as the international law on human trafficking became broader in scope, first including children of both sexes, and later people of all races and genders, the more neutral term of “human trafficking” was universally adopted, with the 1949 Convention being the first international treaty to eschew the term “white slave traffic.”<sup>291</sup> This was mainly due to the fact that the term “human trafficking” represented a process with several elements and levels, while “white slavery” remained confined to a more specific concept, involving white women and children trafficked for prostitution. According to this term, a person may be a slave, but may not have been trafficked. Similarly, a person may have been trafficked, but did not end up enslaved. While slavery is an issue of status, human trafficking is a process or a phase of a process. This shift from the use of “white slave traffic” to “human trafficking” was not simply a change in term, but a change in context as well – human trafficking was recognised as something that could happen to anyone, regardless of gender, race or national origin, and was not necessarily related to sexual exploitation.

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<sup>288</sup> Reanda, Laura. “Prostitution as a Human Rights Question: Problems and Prospects of United NationsAction.” *Human Rights Quarterly*. Vol 13, 1991, p 209.

<sup>289</sup> Pilkerton, Christopher M. “Traffic Jam: Recommendations for Civil and Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia.” *Michigan Journal of Gender and Law*. Vol 6, 1999-2000, p 232.

<sup>290</sup> Doezeema, Jo. “Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women.” *Gender Issues*. Vol 18, 2000, p 25.

<sup>291</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

## **Criminal law**

The 1949 Convention criminalises trafficking for sexual exploitation and prostitution only – it is not a general convention applying to all types of human trafficking.<sup>292</sup> Consent of either trafficked persons or prostitutes is irrelevant.<sup>293</sup> In terms of trafficking, the convention requires the States parties to punish anyone who “procures, entices or leads away” another person for the purpose of prostitution,<sup>294</sup> or exploits another person via prostitution.<sup>295</sup> The convention also criminalises various elements of prostitution.<sup>296</sup> Specific criminal procedural provisions are also included.<sup>297</sup>

## **Human rights**

Although human rights provisions do exist in the 1949 Convention, they are minimal in nature, and general in terms of the specific protections and assistance that must be granted to prostitutes and/or trafficked persons. In terms of human rights, the convention encourages States parties to provide services for rehabilitation and social adjustment of the trafficked persons and prostitutes.<sup>298</sup> In addition, States parties must provide temporary care and maintenance to trafficked persons while arrangements are being made for their repatriation.<sup>299</sup> The convention also stipulates specific provisions for repatriation, including when trafficked persons cannot pay for the repatriation themselves.<sup>300</sup>

Aside from one reference that States parties must “encourage” measures of prevention of prostitution and rehabilitation and social adjustment for those involved with

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<sup>292</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 1 and 2.

<sup>293</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 1(1) and (2).

<sup>294</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 1(1).

<sup>295</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 1(2).

<sup>296</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 3, 4 and 6.

<sup>297</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 7, 8, 9, 10, 11, 12, 13, 14, and 15.

<sup>298</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 16.

<sup>299</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 19.

<sup>300</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 18 and 19.

prostitution,<sup>301</sup> the language in the remaining human rights provisions is as strong as in the criminal provisions, specifying that States parties “undertake” the various provisions.<sup>302</sup> This means that for the most part, both the criminal and human rights provisions were viewed as mandatory and crucial for the convention, rather than making the criminal provisions mandatory and the human rights provisions optional.

### **Prevention and monitoring**

The 1949 Convention encourages States parties to take measures to prevent prostitution.<sup>303</sup> In addition, States parties must take declarations from non-citizens who work as prostitutes in order to establish their nationality, identity and civil status, and why they left their origin State.<sup>304</sup> This information must then be shared with the authorities in the prostitutes’ origin States.<sup>305</sup> States parties must also monitor employment agencies to ensure they are not involved in the trafficking process or expose their clients – particularly women and children – to prostitution.<sup>306</sup> There is no mechanism of international oversight provided in the convention.

### **The 1959 UN Report**

In 1959, the UN commissioned a study<sup>307</sup> on human trafficking and prostitution to gauge the impact of the 1949 Convention.<sup>308</sup> The study revealed that there was actually a very low percentage of foreign prostitutes in most States, and credited three factors for this development.<sup>309</sup> First, many States had adopted the provisions of the 1949 Convention into their national law, which may have thwarted some human

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<sup>301</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 16.

<sup>302</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Arts 17 and 19.

<sup>303</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 16.

<sup>304</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 18.

<sup>305</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 18.

<sup>306</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, Art 20.

<sup>307</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*. UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959.

<sup>308</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, pp 174-175.

<sup>309</sup> Demleitner, Nora. “Forced Prostitution: Naming an International Offense.” *Fordham International Law Journal*. Vol 18, 1994, p 175.

trafficking operations.<sup>310</sup> Second, the study claimed that a higher standard of living and societal status for women reduced the risk of being trafficked.<sup>311</sup> Lastly, the report stated that following the perceived closure of brothels throughout the world, international human trafficking had lost one of its major incentives.<sup>312</sup>

Despite apparent success, the study found that human trafficking and forced prostitution still took place, and that any efforts to combat trafficking must also include a strategy to regulate prostitution.<sup>313</sup> In addition, the study suggested that such action should be supplemented by other efforts to maintain public order, such as the prevention of venereal disease, ending forced prostitution, preventing prostitution in general, and rehabilitating persons engaged in prostitution.<sup>314</sup> In order to deter potential future offenders, the study suggested implementing harsher punishments for brothel owners, including high fines, repressive measures, confiscation of direct profits, and the closure of brothels regardless of whether it also carried out legitimate activities.<sup>315</sup> Moreover, prostitutes should not be imprisoned, but rehabilitated if they chose.<sup>316</sup> Lastly, the study listed the social and economic measures required to

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<sup>310</sup>UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>311</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>312</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>313</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>314</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>315</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>316</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

improve the overall situation of women, in order to prevent them from ending up in prostitution.<sup>317</sup>

## **4.2 HUMAN TRAFFICKING, 1957-2005**

The international and regional legal response to human trafficking has greatly evolved over the 50-year period of 1957 to 2005. With changing patterns of migration, there were new human trafficking routes, and origin and destination States. The development of universal and regional human rights law led to the adoption of new international law on human trafficking, with a greater focus on human rights than in the past. Transnational organised crime, which is oftentimes responsible for human trafficking, became an international security concern of States. Once human trafficking returned to the international agenda, there was a greater accommodation of human rights in international human trafficking law.

### **Migratory patterns and behaviour**

There were four general waves of human trafficking in the direction of the European Union (EU) and the United States of America in the 1990s.<sup>318</sup> The first wave started in 1992 and involved Asian women, primarily from the Philippines and Thailand.<sup>319</sup> The second wave started in 1993 and consisted of South American women, most of whom originated in the Dominican Republic and Colombia.<sup>320</sup> Another wave commenced in 1993, with people coming primarily from Africa, particularly Ghana and Nigeria.<sup>321</sup> The fourth wave started in 1994 and has continued ever since, and consists of Eastern European nationals, from origin States such as Hungary, Poland, the Czech Republic, Russia, Romania, Albania, Ukraine and Latvia.<sup>322</sup>

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<sup>317</sup> UN Department of International Economic and Social Affairs. *Study on the Traffic in Persons and Prostitution*, UN Doc ST/SOA/SD/8, UN Sales No 59.IV.5, 1959; Demleitner, Nora. "Forced Prostitution: Naming an International Offense." *Fordham International Law Journal*. Vol 18, 1994, p 175.

<sup>318</sup> Van Impe, Kristof. "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking." *International Migration*. Special Issue, 2000, p 114.

<sup>319</sup> Van Impe, Kristof. "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking." *International Migration*. Special Issue, 2000, p 114.

<sup>320</sup> Van Impe, Kristof. "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking." *International Migration*. Special Issue, 2000, p 114.

<sup>321</sup> Van Impe, Kristof. "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking." *International Migration*. Special Issue, 2000, p 114.

<sup>322</sup> Van Impe, Kristof. "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking." *International Migration*. Special Issue, 2000, p 114.

The UN Office on Drugs and Crime (UNODC) identified three major trans-regional human trafficking flows between 2003 and 2007: 1) from Latin America (South America, Central America and the Caribbean) mainly to North America, Europe and, episodically, the Middle East; 2) from South Asia to the Middle East and, episodically, to Europe and Southern Africa; and 3) from Europe and Central Asia to Western and Central Europe, the Middle East and North America.<sup>323</sup> There was also significant inter-regional trafficking within Europe, potentially as a result of geographical proximity and language linkages.<sup>324</sup>

While the perceived direction of the movement of the trafficked persons has switched from movement from North America and Europe to South America, Africa and Asia to the exact opposite, the rhetoric and discourse surrounding the issue of human trafficking is largely the same as it was during the first anti-white slavery campaigns which began in the 1880s.<sup>325</sup> Similar to the advances in technology and the increase in migration seen at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries, the advances made nearly 100 years later also led to a perceived, if not actual, increase in human trafficking.

### **Development of universal and regional human rights law**

Between 1949 and 2000, no human trafficking-specific international legal instruments were adopted. However, beginning in 1948, international human rights laws were adopted, starting with the UN Universal Declaration of Human Rights in 1948,<sup>326</sup> which is nonbinding, and has been the subject of debate regarding its status as potential customary law.<sup>327</sup> In 1950, the Council of Europe adopted the European Convention on Human Rights (ECHR), as a regional human rights treaty to strengthen

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<sup>323</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 63.

<sup>324</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 68.

<sup>325</sup> Doezema, Jo. "Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women." *Gender Issues*. Vol 18, 2000, p 24.

<sup>326</sup> United Nations Universal Declaration of Human Rights, 1948.

<sup>327</sup> There has not been an agreement as to whether the Universal Declaration of Human Rights is customary law. Those opposed to that notion argue that many States have not adhered to its principles, and neither governments nor courts have accepted it as having obligatory force. Those who view the Universal Declaration as customary law cite its incorporation into many national constitutions and laws and references in United Nations resolutions. For more information, see Steiner, Henry J and Philip Alston. *International Human Rights in Context*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2000, pp 227-231.

the 1948 UN Universal Declaration of Human Rights.<sup>328</sup> The International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966, but both are general in nature and neither specifically mentions human trafficking. As trafficked people are in positions that deprive them of many basic human rights, several of the civil and political, and economic, social and cultural rights mentioned in the ICCPR and ICESCR also apply to trafficked persons. Examples of such rights in the early human rights conventions that apply to trafficked persons include the rights not to be held in slavery or servitude,<sup>329</sup> freedom of movement,<sup>330</sup> favourable work conditions,<sup>331</sup> and an adequate standard of living.<sup>332</sup>

However, two more specific conventions on women and children do address human trafficking. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) stipulates that States parties must take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution in women.<sup>333</sup> The 1989 Convention on the Rights of the Child (CRC) adds that States parties must take all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form.<sup>334</sup>

### **Influence of the movement for women's rights**

Following a nearly 50-year absence from a trafficking-specific convention, human trafficking once again became an issue of concern in the 1980s and 1990s.<sup>335</sup> The

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<sup>328</sup> European Convention on Human Rights, 1950.

<sup>329</sup> United Nations Universal Declaration of Human Rights, 1948; European Convention on Human Rights, 1950, Art 4; United Nations International Covenant on Civil and Political Rights, 1966, Art 8.

<sup>330</sup> United Nations Universal Declaration of Human Rights, 1948, Art 13; European Convention on Human Rights, 1950, Art 2; United Nations International Covenant on Civil and Political Rights, 1966, Art 12.

<sup>331</sup> United Nations Universal Declaration of Human Rights, 1948, Art 23; United Nations International Covenant on Economic, Social and Cultural Rights, 1966, Art 7.

<sup>332</sup> United Nations Universal Declaration of Human Rights, 1948, Art 25; United Nations International Covenant on Economic, Social and Cultural Rights, 1966, Art 11.

<sup>333</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art 6.

<sup>334</sup> United Nations Convention on the Rights of the Child, 1990, Art 15. The Convention on the Rights of the Child has 193 States parties, making it one of the most widely accepted international human rights instruments.

<sup>335</sup> Wong, Diane. "The Rumour of Trafficking." *International Institute for Asian Studies Newsletter*. Vol 42, 2006, p 11.



issue first resurfaced in a report of the UN Working Group on Contemporary Forms of Slavery in 1978.<sup>336</sup> It was brought to the forefront once again as a result of the strengthening women's movement and the spread of AIDS.<sup>337</sup> This included concern over issues relating to human trafficking, such as sex tourism, and mail-order bride arrangements.<sup>338</sup> Human trafficking appeared in the final documents from two world conferences on women: first, explicitly linked to prostitution at the 1980 Copenhagen Conference and under the rubric of "women victims of trafficking and involuntary prostitution" at the 1985 Nairobi Conference.<sup>339</sup>

The movement against violence against women in the 1980s and 1990s was another important step towards the re-emergence of human trafficking as an international human rights issue.<sup>340</sup> While women's movements of the 1980s and 1990s from Western destination States and developing States differed in context and issues, violence against women emerged as a common position around which women's groups from throughout the world could collaborate.<sup>341</sup> Through the campaign on violence against women, human trafficking emerged as another issue that would ignite global collaboration amongst women's groups.<sup>342</sup>

#### **4.2a Transnational organised crime**

As the 1990s saw further globalisation and advances in technology, transnational organised crime flourished – significantly advancing in size, sophistication, and degree of transnational activity and cooperation.<sup>343</sup> Transnational organised criminal

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<sup>336</sup> Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal*. Vol 25, 2007, p 223.

<sup>337</sup> Wijers, M and L Lapchew. "Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour, and Prostitution." *Foundation Against Trafficking in Women, Global Alliance Against Traffic in Women*, 1999 in Long, Lynellyn D. "Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation." *International Migration*. Vol 42, 2004, p 20.

<sup>338</sup> Ray, Nilanjana. "Looking at Trafficking Through a New Lens." *Cardozo Journal of Law & Gender*. Vol 12, 2006, p 912.

<sup>339</sup> Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 12.

<sup>340</sup> Bertone, Andrea M. "Transnational Activism to Combat Trafficking in Persons." *The Brown Journal of World Affairs*. Vol 10, 2004. p 12.

<sup>341</sup> Bertone, Andrea M. "Transnational Activism to Combat Trafficking in Persons." *The Brown Journal of World Affairs*. Vol 10, 2004. p 12.

<sup>342</sup> Bertone, Andrea M. "Transnational Activism to Combat Trafficking in Persons." *The Brown Journal of World Affairs*. Vol 10, 2004, p 12.

<sup>343</sup> Guymon, CarrieLyn Donigan. "International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention." *Berkeley Journal of International Law*. Vol 18, 2000, p 53.

groups were using the same tactics and technological advances as legitimate multinational corporations, and were able to increase productivity and international operations.<sup>344</sup> World leaders such as Bill Clinton and Boris Yeltsin recognised the threat posed to State sovereignty and security by transnational organised criminal groups.<sup>345</sup> However, the problem of transnational organised crime could not be tackled by the traditional categorisation of law enforcement and organised crime as a strictly domestic matter – even bilateral or regional legal arrangements could create geographic loopholes.<sup>346</sup> As a result, the UN recognised the necessity to tackle organised crime that had a transnational impact and drafted the Convention Against Transnational Organised Crime in 2000.<sup>347</sup>

#### **4.2b Human trafficking returns to the international agenda**

Although each of the aforementioned trends occurred consecutively over a short period of time, it can be argued that like the initial concern over human trafficking in the late 19<sup>th</sup> century, the issue was once again being racialised, or “whitened.”<sup>348</sup> The end of the Cold War and the opening of the markets in Eastern Europe coincided with the upsurge in concern over human trafficking.<sup>349</sup> Western European States may have been concerned that the fall of the Berlin Wall would lead to an increase in the number of trafficked persons from Eastern Europe.<sup>350</sup> As a result, human trafficking

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<sup>344</sup> Guymon, CarrieLyn Donigan. “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention.” *Berkeley Journal of International Law*. Vol 18, 2000, p 54.

<sup>345</sup> Guymon, CarrieLyn Donigan. “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention.” *Berkeley Journal of International Law*. Vol 18, 2000, p 54.

<sup>346</sup> Guymon, CarrieLyn Donigan. “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention.” *Berkeley Journal of International Law*. Vol 18, 2000, pp 54-55.

<sup>347</sup> For further information on the conditions leading up to the 2000 UN Convention, see Buckwalter, Jane Rae (ed). *International Perspectives on Organized Crime*. 1990; Guymon, CarrieLyn Donigan. “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention.” *Berkeley Journal of International Law*. Vol 18, 2000; Kerry, John. *The New War: The Web of Crimes that Threatens America’s Security*. New York: Simon and Schuster, 1997; Williams, Phil and Ernesto U Savona (eds). *The United Nations and Transnational Organized Crime*. London: Frank Cass & Co, 1996.

<sup>348</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 74.

<sup>349</sup> Amiel, Alexandra. “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation.” *Buffalo Human Rights Law Review*. Vol 12, 2006, p 5; Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 74.

<sup>350</sup> Amiel, Alexandra. “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation.” *Buffalo Human Rights Law Review*. Vol 12, 2006, p 5; Bertone, Andrea M. “Transnational Activism to Combat Trafficking in Persons.”

returned to prominence most likely because of the emergence of white women and children as victims, thus triggering a similar “moral panic” that preceded the 1904 Agreement,<sup>351</sup> particularly in the post-World War II and post-Cold War era of human rights law.<sup>352</sup> This occurred despite the fact that a large number of non-white women were also being trafficked.

The 1980s and early 1990s saw the formation of various working groups and proposed courses of action to handle the problem of human trafficking.<sup>353</sup> In 1994 the UN General Assembly adopted a resolution on the “traffic of women and girls which condemns illicit and clandestine movements of persons across national and international borders.”<sup>354</sup> The issue of human trafficking was also on the agenda at the 1995 Fourth World Conference on Women in Beijing, and the Platform of Action added forced marriage and labour to the list of forms of trafficking and slavery.<sup>355</sup> NGOs also began to pay attention to the issue of human trafficking. For example, in 1994, the 11<sup>th</sup> International Organisation for Migration (IOM) Seminar on the theme of “Global Human Trafficking” took place.<sup>356</sup>

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*The Brown Journal of World Affairs*. Vol 10, 2004, p 13; Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 223; Cao, Lan. “The Transnational and Sub-National in Global Crimes,” *Berkeley Journal of International Law*. Vol 22, 2004, p 64; Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 74; Friesendorf, Cornelius. “Pathologies of Security Governance: Efforts Against Human Trafficking in Europe.” *Security Dialogue*. Vol 38, p 382; Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*. Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 276; Shelly, Louise. “Human trafficking as a form of transnational crime.” in *Human Trafficking*, Maggy Lee (ed). Devon: Willan Publishing, 2007, p 117; Surtees, Rebecca. “Traffickers and Trafficking in Southern and Eastern Europe.” *European Journal of Criminology*. Vol 5, 2008, p 40; Wong, Diane. “The Rumour of Trafficking.” *International Institute for Asian Studies Newsletter*. Vol 42, 2006, p 11.

<sup>351</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 74.

<sup>352</sup> Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 223.

<sup>353</sup> United Nations Resolution 49/166 of the General Assembly, 1994 in Long, Lynell D.

“Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation.” *International Migration*. Vol 42, 2004, p 20.

<sup>354</sup> United Nations Resolution 49/166 of the General Assembly, 1994 in Long, Lynell D.

“Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation.” *International Migration*. Vol 42, 2004, p 20.

<sup>355</sup> Long, Lynell D. “Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation.” *International Migration*. Vol 42, 2004, p 20.

<sup>356</sup> Wong, Diane. “The Rumour of Trafficking.” *International Institute for Asian Studies Newsletter*. Vol 42, 2006, p 11.

In 1996, the UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, commissioned a global research project on human trafficking to assess the parameters of the problem.<sup>357</sup> It was at this stage that a shift took place in the definition of human trafficking: Coomaraswamy advised that the processes of recruitment and transportation be delinked from coercion in the sex trade – in other words, to consider human trafficking and prostitution separately.<sup>358</sup> Sexual exploitation was now viewed as one, but not the only, type of human trafficking, along with forced labour.<sup>359</sup>

In 1998, human trafficking was mentioned in the Rome Statute of the International Criminal Court (ICC) as a crime against humanity, when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>360</sup> “Enslavement” was listed as a crime against humanity, later defined as “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.”<sup>361</sup>

### **Why human trafficking re-emerged as an issue**

The re-emergence of human trafficking on the international agenda is most likely a result of State sovereignty and security issues, rather than human rights concerns.<sup>362</sup> The States’ focus shifted to internal or transnational threats, like organised crime, or people illegally within its borders. As human trafficking is involved with both transnational organised crime and aspects of illegal migration, it became a target of international, regional and national laws. This was the impetus behind the creation of the 2000 UN Convention, which dealt with human trafficking as a branch of

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<sup>357</sup> Kempadoo, Kamala. “From Moral Panic to Global Injustice: Changing Perspectives on Trafficking” in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005, p xii.

<sup>358</sup> Kempadoo, Kamala. “From Moral Panic to Global Injustice: Changing Perspectives on Trafficking” in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005, p xii.

<sup>359</sup> Kempadoo, Kamala. “From Moral Panic to Global Injustice: Changing Perspectives on Trafficking” in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005, p xii.

<sup>360</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, 1998, Art 7.

<sup>361</sup> Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, 1998, Art 7(2)(c).

<sup>362</sup> Gallagher, Anne. “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis.” *Human Rights Quarterly*. Vol 23, 2001, p 976; Ray, Nilanjana. “Looking at Trafficking Through a New Lens.” *Cardozo Journal of Law & Gender*. Vol 12, 2006, p 915.

organised crime. In other words, human trafficking was brought onto the international agenda in the context of criminal law, not human rights.

Nowadays, as an increasing number of people are migrating, wealthy destination States are decreasing opportunities for legal immigration.<sup>363</sup> As migration increases, so does human trafficking; therefore the destination States are concerned that human trafficking will interfere with regular migration and allow those involved in the trafficking process to circumvent national immigration restrictions.<sup>364</sup> In addition, mounting evidence linking human trafficking to organised crime generated a stronger international response to the issue.<sup>365</sup>

In addition to the issues surrounding State security, human rights concerns also led to the re-emergence of human trafficking as an issue. At the 1994 IOM seminar, a paper entitled “Multinational Cooperation to Combat Trafficking in Migrants and the Role of International Organisations”<sup>366</sup> introduced a new model of threats to Europe’s borders: trafficking, illegal immigration and organized crime.<sup>367</sup> The 1993 World Conference on Human Rights also called for the elimination of human trafficking,<sup>368</sup> while the 1995 Fourth World Conference on Women in Beijing, and the Platform of Action added forced marriage and labour to the list of forms of trafficking and slavery.<sup>369</sup> In 1996, the UN Commission on the Status of Women (CSW) brought the issue of trafficking in women to the attention of the ECOSOC, as well as drafting resolutions focusing on the human rights of women and violence against migrant workers.<sup>370</sup> The 1990s also saw the emergence of several other women’s and

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<sup>363</sup> Gallagher, Anne. “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis.” *Human Rights Quarterly*. Vol 23, 2001, p 976-977.

<sup>364</sup> Gallagher, Anne. “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis.” *Human Rights Quarterly*. Vol 23, 2001, p 976.

<sup>365</sup> Gallagher, Anne. “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis.” *Human Rights Quarterly*. Vol 23, 2001, p 977.

<sup>366</sup> Widgren, Jonas. “Multinational Cooperation to Combat Trafficking in Migrants and the Role of International Organisations.” Paper presented to 11<sup>th</sup> IOM Seminar on International Responses to Trafficking in Migrants and Safeguarding Migrant Rights. Geneva, 26-28 October 1994.

<sup>367</sup> Wong, Diane. “The Rumour of Trafficking.” *International Institute for Asian Studies Newsletter*. Vol 42, 2006, p 11.

<sup>368</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 12.

<sup>369</sup> Long, Lynellyn D. “Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation.” *International Migration*. Vol 42, 2004, p 20.

<sup>370</sup> McSherry, Bernadette and Susan Kneebone. “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights.” *The International Journal of Human Rights*. Vol 12, 2008, p 70.

transnational issues on the international political agenda in addition to human trafficking, such as female genital mutilation, women and development and sex tourism.<sup>371</sup>

Argentina's concern over trafficking of children and its dissatisfaction with the slow progress of an additional protocol to the CRC to address child prostitution and pornography provided an impetus for the 2000 Palermo Protocol.<sup>372</sup> Argentina proposed the adoption of a new convention that would deal with the issue from both a criminal and a human rights perspective, which was part of the larger issue of transnational organised crime.<sup>373</sup> At the same time Argentina proposed this new convention at the 1997 session of the UN Commission on Crime Prevention and Criminal Justice, other institutions in Europe had decided to address the issue of human trafficking, and US President Bill Clinton had issued a memorandum<sup>374</sup> on the measures to be taken by the US government to combat human trafficking.<sup>375</sup> In 1998, the UN General Assembly established the intergovernmental Ad Hoc Committee on the Elaboration of a Convention Against Transnational Crime to develop an international strategy to address transnational organised crime, including human trafficking, which resulted in the 2000 UN Convention Against Transnational Organised Crime.<sup>376</sup>

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<sup>371</sup> Bertone, Andrea M. "Transnational Activism to Combat Trafficking in Persons." *The Brown Journal of World Affairs*. Vol 10, 2004, p 13.

<sup>372</sup> Gallagher, Anne. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis." *Human Rights Quarterly*. Vol 23, 2001, p 982.

<sup>373</sup> Gallagher, Anne. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis." *Human Rights Quarterly*. Vol 23, 2001, p 982. See also Defeis, Elizabeth. "Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach." *ILSA Journal of International & Comparative Law*. 2003-2004, p 485; Dunbar, Michelle OP. "The Past, Present, and Future of International Trafficking in Women for Prostitution." *Buffalo Women's Law Journal*. Vol 8, 1999, p 487.

<sup>374</sup> Clinton, William J. "Memorandum for the Secretary of State, the Attorney General, the Administrator of the agency for International Development, the Director of the United States Information Agency, March 11, 1998, Subject: Steps to Combat Violence Against Women and Trafficking in Women and Girls," reprinted in *Transnational Organized Crime*. Vol 3, 1997, p 214.

<sup>375</sup> Gallagher, Anne. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis." *Human Rights Quarterly*. Vol 23, 2001, p 982.

<sup>376</sup> Gallagher, Anna Marie. "Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination." *Georgetown Immigration Law Journal*. Vol 19, 2004, p 101.

Prior to the definition in the 2000 Palermo Protocol, a definition of “trafficking in women” the UN Special Rapporteur on Violence Against Women, defined human trafficking as:

*All acts involved in the recruitment and/or transportation of a woman within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.*<sup>377</sup>

#### **4.2c Accommodation of human rights in international human trafficking law**

Following the development of international human rights law in the second half of the 20<sup>th</sup> century, international human trafficking law once again became an issue dealt with in specific conventions. As international human trafficking law evolved, there emerged a distinct shift from conventions dealing solely with the trafficking of white women for prostitution to far more encompassing international treaties that dealt with all types of trafficking, including men and women. It was not until 2000 – nearly a century after the first international agreement on human trafficking – that a treaty that regulated every aspect of human trafficking was passed. The next wave of human trafficking conventions marked the shift from a nearly exclusively criminal-based approach to a wider incorporation of human rights, alongside criminal law provisions. Furthermore, the conventions became more gender-neutral – although until 2005<sup>378</sup> there had always been an emphasis on the trafficking of women and children – and the element of “whiteness” was eliminated.<sup>379</sup>

One explanation<sup>380</sup> as to why international law on human trafficking has established human trafficking as a human rights violation is that human rights obligations may be owed horizontally as well as vertically:<sup>381</sup> in other words, the State may owe responsibility under human rights conventions for acts of private individuals against each other. The Explanatory Report of the 2005 Council of Europe Convention

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<sup>377</sup> McSherry, Bernadette and Susan Kneebone. “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights.” *The International Journal of Human Rights*. Vol 12, 2008, p 70.

<sup>378</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

<sup>379</sup> International Convention for the Suppression of the Traffic in Women and Children, 1921.

<sup>380</sup> Provided in the Explanatory Report of the 2005 Council of Europe Convention, CM(2005)32 Addendum 2 final, 3 May 2005.

<sup>381</sup> Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 279.

considers horizontal application in the context of the ECHR and comes to the following conclusion:

*“[T]he case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognised the liability of contracting States for acts committed by individuals or groups of individuals when these States failed to take appropriate measures of protection.”*<sup>382</sup>

The issue is the extent to which States have taken appropriate measures of protection from human trafficking, including, for example, enacting appropriate legislation.<sup>383</sup> This still falls under the category of vertical application because it establishes the liability of the State for failure to ensure protection.<sup>384</sup> A breach of human rights through a horizontal application occurs when the State fails to secure the rights or freedoms which have been guaranteed.<sup>385</sup> This means that it is the failure of the State to enact positive measures to ensure the protection of trafficked persons that classifies it as a human rights violation – not the criminal act of the trafficker.<sup>386</sup>

### **Transnational criminal law and human rights**

Transnational criminal laws are law enforcement instruments, as opposed to human rights instruments, and their primary purpose is the effective suppression of crime.<sup>387</sup> States parties of these conventions have created instruments<sup>388</sup> designed to target and eliminate a transnational crime that a number of States have deemed to be a threat to their sovereignty and security.

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<sup>382</sup> Explanatory Report of the 2005 Council of Europe Convention, CM(2005)32 Addendum 2 final, 3 May 2005 in Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 279.

<sup>383</sup> Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 280.

<sup>384</sup> Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 280.

<sup>385</sup> Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 280.

<sup>386</sup> Piotrowicz, Ryszard. “Trafficking of human beings and their human rights in the migration context” in *International Migration Law: Developing Paradigms and Key Challenges*, Ryszard Cholewinski et al (eds). Cambridge: Cambridge University Press, 2007, p 281.

<sup>387</sup> Boister, Neil. “Human Rights Protections in the Suppression Conventions.” *Human Rights Law Review*. Vol 2, 2002, p 216.

<sup>388</sup> Boister, Neil. “Human Rights Protections in the Suppression Conventions.” *Human Rights Law Review*. Vol 2, 2002, p 217.



The inherent weakness of transnational criminal law is that its implementation tends to be State-centric.<sup>389</sup> In other words, transnational criminal laws – or issue-based suppression conventions – do not always provide safeguards or human rights provisions for the individuals who are the victims of the crimes penalised.<sup>390</sup> In terms of human rights, there are several drawbacks to transnational criminal law. First, it is concerned with the welfare of State rather than individual rights. Secondly, if individuals benefit from transnational criminal law, it is only incidentally from a State's use of the transnational criminal law's provisions to protect its own sovereign interests. Thirdly, States have no standing to enforce the provisions of the conventions on their own,<sup>391</sup> and finally, perpetrators, and the victims of transnational crimes, such as trafficked persons, who may not be citizens of the State. If transnational criminal law relies upon the existing human rights framework in States parties to provide necessary safeguards for its citizens, it may prove to be problematic, as many States may not have sufficient national laws protecting human rights.<sup>392</sup>

States may be wary of accepting transnational criminal laws, with which their existing human rights obligations or constitutional provisions may not permit them to comply.<sup>393</sup> This is not as much of a problem if the human rights in question are considered *jus cogens*, as that will put an absolute limit on the transnational criminal law.<sup>394</sup> However if the human rights in question are not considered *jus cogens*, the provision in the later treaty prevails.<sup>395</sup> As explained in Chapter 2, trafficked persons require a special set of human rights, which is also a factor, because oftentimes the more general human rights treaties do not contain provisions specific enough for their unique needs. This is because general human rights treaties may have little benefit to

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<sup>389</sup> Bassiouni, Cherif. "An Appraisal of the Growth and Developing Trends of International Criminal Law." *Revue Internationale de Droit Penal*. Vol 45, 1974, p 427.

<sup>390</sup> Bassiouni, Cherif. "An Appraisal of the Growth and Developing Trends of International Criminal Law." *Revue Internationale de Droit Penal*. Vol 45, 1974, p 427.

<sup>391</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 203.

<sup>392</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 212.

<sup>393</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 217.

<sup>394</sup> In terms of Articles 53 and 64 of the Vienna Convention on the Law of Treaties, 1969. Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 218.

<sup>395</sup> Found in Article 3 of the Vienna Convention on the Law of Treaties, 1969. Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 219.

trafficked persons because they are in a State illegally, and therefore have little relevance to their situation. As a result, transnational criminal laws in development will most likely add little to the scope of human rights already addressed internationally, regionally and nationally.<sup>396</sup>

#### **4.2d THE 2000 UN CONVENTION**

Although not a human trafficking-specific convention, the 2000 UN Convention is worth examining because it contains several applicable provisions regarding transnational crime, and is the convention which led to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Framework conventions, such as the 2000 UN Convention, are typically supplemented with protocols on specific issues or topics of relevance, which go into greater detail about the scope of the obligations of the States parties of the convention.<sup>397</sup>

The 2000 UN Convention stipulates that a crime is transnational in nature if it is committed in more than one State.<sup>398</sup> The convention adopts this approach and provides three situations when it takes place: 1) if it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;<sup>399</sup> 2) if it is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State;<sup>400</sup> or 3) if it is committed in one State but has substantial effects in another State.<sup>401</sup> However, unlike national criminal law, which stipulates specific punishments for offenders, transnational criminal law instructs States parties to adopt national legislation that criminalises and as a result, punishes certain acts. When States adopt transnational legal instruments, they are agreeing to implement national laws that meet at least a certain minimum standard, to ensure that certain acts are criminalised by all States parties, therefore creating transnational criminal law.

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<sup>396</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 217.

<sup>397</sup> Fitzpatrick, Joan. "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." *Michigan Journal of International Law*. Vol 24, p 1148.

<sup>398</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 3(2)(a).

<sup>399</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 3(2)(b).

<sup>400</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 3(2)(c).

<sup>401</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 3(2)(d).

The 2000 UN Convention made the important development of defining several terms associated with human trafficking. For instance, the term “organised criminal group” is defined as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”<sup>402</sup> Organised criminal groups pertain to human trafficking because of the inherent link between human trafficking and organised crime. “Serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”<sup>403</sup> Serious crime pertains to human trafficking, as it falls under that category of offences. “Structured group” is defined as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”<sup>404</sup> Structured groups pertain to human trafficking because the process of human trafficking may not take place under the category of organised crime, but is unlikely to involve a single person, and therefore may involve a structured group.

### **Criminal law**

The 2000 UN Convention criminalises the participation in an organised criminal group.<sup>405</sup> Although it does not specifically mention human trafficking, the 2000 UN Convention does require States parties to adopt legislation that criminalises the participation in a criminal group that may take part in human trafficking offences. The 2000 UN Convention also requires States parties to provide sanctions for the offences related to transnational organised crime, and to ensure that the prosecution of those offenders is done so to maximise the effectiveness of law enforcement measures.<sup>406</sup>

The 2000 UN Convention contains several references to the rights of the accused, including the rights of the defence,<sup>407</sup> and guaranteeing fair treatment during all the stages of extradition, according to the national law of the State in the territory of

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<sup>402</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 2 (a).

<sup>403</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 2 (b).

<sup>404</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 2 (c).

<sup>405</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 5.

<sup>406</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 11.

<sup>407</sup> United Nations Convention Against Transnational Organised Crime, 2000, Arts 11(3) and 24(2).

which the accused is present.<sup>408</sup> These are, however, only references and rely upon existing laws in place internationally and nationally. Under the 2000 UN Convention, the traffickers are the ones who would benefit from the inclusion of these rights.

### **Human rights**

In terms of human rights, the 2000 UN Convention provides for the protection of witnesses in criminal proceedings who give testimony concerning offences related to transnational organised crime.<sup>409</sup> This pertains to human trafficking because trafficked persons may testify against their traffickers, but may be unwilling or unable to do so for fear of retribution or retaliation from the trafficker.

Furthermore, the 2000 UN Convention provides assistance and protection for victims,<sup>410</sup> which would apply to trafficked persons. This applies in particular in cases of threat of retaliation or intimidation<sup>411</sup> – which may occur when dealing with trafficked persons. States parties must also establish procedures to provide access to compensation and restitution for victims of organised crimes.<sup>412</sup> Lastly, States parties must enable the views and concerns of victims to be presented and considered at appropriate stages of the criminal proceedings against offenders in a manner that is not prejudicial to the rights of the defence.<sup>413</sup> This would allow trafficked persons to seek compensation from their traffickers, as well as have their views and concerns represented in court.

The 2000 UN Convention makes progress in terms of transnational criminal laws dealing with human rights. It includes a number of provisions on defence rights and fair treatment that demonstrate the need to address individual human rights in transnational criminal law.<sup>414</sup> However, in other cases, only particularly invasive

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<sup>408</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 16(13).

<sup>409</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 24.

<sup>410</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 25.

<sup>411</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 25(1).

<sup>412</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 25(2).

<sup>413</sup> United Nations Convention Against Transnational Organised Crime, 2000, Art 25(3).

<sup>414</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 213.

provisions are coupled with recognition of their human rights impact, and those protections are not always compulsory.<sup>415</sup>

#### 4.2e THE 2000 PALERMO PROTOCOL

The 2000 Palermo Protocol is one of three protocols to the 2000 UN Convention created to deal with specific types of organised crime. The two remaining protocols address the smuggling of migrants, and the illicit manufacturing and trafficking of firearms. While the 2000 UN Convention was a mechanism to deal with organised crime generally, each of the three protocols addresses specific concerns of States with regards to their sovereignty, security and a particular organised crime.<sup>416</sup>

The inclusion of human trafficking in a protocol of the 2000 UN Convention marked a shift in how the UN dealt with trafficking. While the early 20<sup>th</sup> century approach focused on the international sex trade, by 2000 this was no longer the case and human trafficking was placed under the heading of international criminal activity.<sup>417</sup> By defining human trafficking in the 2000 UN Convention and 2000 Palermo Protocol as a problem of transnational organised crime rather than a migration or human rights issue, it was agreed internationally that human trafficking should be dealt with using criminal law.<sup>418</sup> States adopted the 2000 UN Convention and 2000 Palermo Protocol in a relatively short period of time because they perceived the crime of human trafficking to be a threat to their sovereignty and security.<sup>419</sup> Considering human trafficking under the umbrella of transnational organised crime, trafficked persons were constructed as both an agent, as well as a victim of a crime, with an emphasis on exploitation.<sup>420</sup>

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<sup>415</sup> Boister, Neil. "Human Rights Protections in the Suppression Conventions." *Human Rights Law Review*. Vol 2, 2002, p 213.

<sup>416</sup> Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal*. Vol 25, 2007, pp 224-225.

<sup>417</sup> Kempadoo, Kamala. "From Moral Panic to Global Injustice: Changing Perspectives on Trafficking" in *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights*. Kamala Kempadoo (ed). London: Paradigm Publishers, 2005, p xiii; Shelly, Louise. "Human trafficking as a form of transnational crime." in *Human Trafficking*, Maggy Lee (ed). Devon: Willan Publishing, 2007, p 117.

<sup>418</sup> Shelly, Louise. "Human trafficking as a form of transnational crime." in *Human Trafficking*, Maggy Lee (ed). Devon: Willan Publishing, 2007, p 117.

<sup>419</sup> Bravo, Karen E. "Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade." *Boston University International Law Journal*. Vol 25, 2007, p 224.

<sup>420</sup> McSherry, Bernadette and Susan Kneebone. "Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights." *The International Journal of Human Rights*. Vol 12, 2008, p 83.

While the human trafficking referred to in the 2000 Palermo Protocol is “especially” that of women and children, by making that specification, it also encompasses trafficking in men, for whom human rights are also mandatory. This definition of human trafficking also broadens the scope of human trafficking addressed in international law to include trafficking for purposes other than sexual exploitation, such as forced labour, and for the removal of organs. Furthermore, the 2000 Palermo Protocol is the first international legal instrument to provide a more extensive list of human rights, notwithstanding the fact that they are not all mandatory, as is the case with the criminal law provisions.

### **The development of the 2000 Palermo Protocol**

The process of drafting and adopting both the 2000 UN Convention and the 2000 Palermo Protocol occurred in a relatively short period of time. The 2000 Palermo Protocol was drafted by an ad hoc committee comprised of State delegates involved in the UN crime control programme, which is not an area in which human rights groups or migration or refugee bodies have typically participated.<sup>421</sup> However, for this particular protocol, there was substantial involvement of human rights NGOs and IGOs, including the United Nations High Commissioner for Refugees (UNHCR) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), which were able to mobilise and influence the drafting of the 2000 Palermo Protocol towards the inclusion of human rights provisions.<sup>422</sup>

The NGOs and IGOs divided into human rights/women’s rights and crime control/migration control factions, though it is worth noting that the human rights and women’s rights coalition managed to interact with and influence the crime and migration control group and participate in the drafting process.<sup>423</sup> The involvement of the OHCHR and the anti-trafficking NGOs in the drafting process of the 2000

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<sup>421</sup> Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1150.

<sup>422</sup> Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1150.

<sup>423</sup> Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1150.

Palermo Protocol created a new identity for trafficked persons as victims of severe human rights abuses, rather than as criminals or illegal immigrants.<sup>424</sup> This shift in identity may have been largely symbolic because it is up to individual States to implement and enforce national laws – including both criminal and human rights provisions.<sup>425</sup> Despite the successes of the human rights organisations in the drafting process, the 2000 Palermo Protocol remains primarily a treaty on criminal law and migration control, as most of the human rights provisions are nonbinding.<sup>426</sup>

The most controversial aspect of the drafting of the 2000 Palermo Protocol, however, was the issue of consent, and whether non-forced adult prostitution should be included in the definition.<sup>427</sup> One side argued that a requirement of coercion would legitimise prostitution, taking the view that any prostitution is a human rights violation.<sup>428</sup> The opposing side believed that the inclusion of non-forced prostitution would blur the line between human trafficking and smuggling.<sup>429</sup> Eventually a compromise was reached in the form of the final definition appearing in the 2000 Palermo Protocol.

The adoption of the 2000 UN Convention and the 2000 Palermo Protocol directly reflects the notion that globalising conditions promote human trafficking, and that

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<sup>424</sup> Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1151.

<sup>425</sup> Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1151.

<sup>426</sup> Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 227; Fitzpatrick, Joan. “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking.” *Michigan Journal of International Law*. Vol 24, p 1151.

<sup>427</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 13; Defeis, Elizabeth. “Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach.” *ILSA Journal of International & Comparative Law*. 2003-2004, p 485; Dunbar, Michelle OP. “The Past, Present, and Future of International Trafficking in Women for Prostitution.” *Buffalo Women’s Law Journal*. Vol 8, 1999, p 488; McSherry, Bernadette and Susan Kneebone. “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights.” *The International Journal of Human Rights*. Vol 12, 2008, p 71.

<sup>428</sup> McSherry, Bernadette and Susan Kneebone. “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights.” *The International Journal of Human Rights*. Vol 12, 2008, p 71.

<sup>429</sup> McSherry, Bernadette and Susan Kneebone. “Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights.” *The International Journal of Human Rights*. Vol 12, 2008, p 71.

migration law evasion represents a threat to State sovereignty.<sup>430</sup> New technology and globalisation help the process of human trafficking, making it, along with smuggling, very coordinated and well-resourced.<sup>431</sup> States recognised this, and were motivated by the potential violation sovereignty posed by this increasing vehicle of illegal migration. The motivation of State sovereignty and security behind the 2000 Palermo Protocol produced two effects. First, it had an impact on the wording of the protocol itself, which had stronger language in the criminal law elements than in the human rights provisions. Secondly, it has affected the enforcement of the protocol, the main faculty with which to ensure that the protocol's criminal law elements are implemented.

As the international human trafficking treaties prior to the 2000 Palermo Protocol were primarily focused on criminal law rather than human rights, human rights did not enter the dialogue until they were addressed and considered in devising protection strategies in destination States.<sup>432</sup> Furthermore, during the drafting process of the 2000 Palermo Protocol, NGOs maintained that the protocol should include the right of trafficked persons to remain in the destination State.<sup>433</sup> This position was not supported by governments of destination States that believed that this right would encourage illegal migration.<sup>434</sup>

The 2000 Palermo Protocol can be viewed as having a stronger connection to criminal law than human rights simply because it is a protocol to a convention focused on crime.<sup>435</sup> A State must become a party to the convention itself in order to become a

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<sup>430</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 71.

<sup>431</sup> Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. New York: Cambridge Press: 2008, p 71.

<sup>432</sup> Gallagher, Anna Marie. "Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination." *Georgetown Immigration Law Journal*. Vol 19, 2004, p 103.

<sup>433</sup> Gallagher, Anna Marie. "Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination." *Georgetown Immigration Law Journal*. Vol 19, 2004, p 103.

<sup>434</sup> Gallagher, Anna Marie. "Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination." *Georgetown Immigration Law Journal*. Vol 19, 2004, p 103.

<sup>435</sup> Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 16; Srikantiah, Jayashri. "Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law." *Boston University Law Review*. Vol 78, 2007, p 168.



party to the protocol, and agree to adopt all of its criminal provisions, paying particular attention to organised crime.<sup>436</sup> In this convention and protocol, human trafficking is treated as a component of organised crime.<sup>437</sup> To ensure that the 2000 Palermo Protocol did not interfere with States' internal affairs – managing the issue of internally trafficked persons – the treaty only applies to transnational trafficking cases.<sup>438</sup>

### **Criminal law**

The 2000 Palermo Protocol requires all States parties to criminalise trafficking and its related offences,<sup>439</sup> including attempting to traffic,<sup>440</sup> participating as an accomplice,<sup>441</sup> and organising or directing trafficking<sup>442</sup> while participating in organised criminal gangs. This indicates a shift from the previous international human trafficking laws, which broadly require States parties to criminalise human trafficking, to criminalising more specific features of the trafficking process.

### **Human rights**

Most of the civil and political human rights granted to trafficked persons by the 2000 Palermo Protocol fall under the category of freedom of movement, and are temporary. States parties must allow trafficked persons to remain in the State for at least 30 days, during a “recovery and reflection period” to give them the opportunity to recover and escape influence of traffickers, make an informed decision on cooperating with authorities, and to receive assistance.<sup>443</sup> States parties must also ensure that trafficked persons have access to information on relevant judicial and administrative

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<sup>436</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 16.

<sup>437</sup> Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 16.

<sup>438</sup> King, Sarah. “Human Trafficking: Addressing the International Criminal Industry in the Backyard.” *University of Miami International & Comparative Law Review*. Vol 15, 2008, p 377.

<sup>439</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 5(1) and (2).

<sup>440</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 5(2)(a).

<sup>441</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 5(2)(b).

<sup>442</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 5(2)(c).

<sup>443</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 13. In United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 7, “States shall consider” permitting trafficked persons to remain in its territory, either permanently or temporarily, in appropriate cases.

proceedings in a language which they can understand; free legal aid or assistance; and the right to compensation from the traffickers.<sup>444</sup> Lastly, the origin States of trafficked persons must facilitate and accept their timely return, taking into account their rights, safety and dignity.<sup>445</sup> In addition, the Protocol protects the private lives of the trafficked people, not allowing the State to make public their identity or personal data.<sup>446</sup>

The 2000 Palermo Protocol also requires States parties to consider adopting economic and social human rights provisions. However, unlike the criminal aspect or the civil and political rights, the economic and social rights are only suggestions, not requirements for States parties, using the language “States shall consider” or “shall endeavour.”<sup>447</sup> Specific provisions include providing secure accommodation,<sup>448</sup> psychological, medical and material assistance,<sup>449</sup> counselling and information, particularly in relation to legal matters, in a language they understand,<sup>450</sup> legal assistance,<sup>451</sup> and employment, educational and training opportunities.<sup>452</sup>

### **Prevention and monitoring**

The 2000 Palermo Protocol also includes provisions for the prevention of human trafficking.<sup>453</sup> Methods of prevention include policies and programmes to prevent and combat trafficking, enabling migration to take place legally whenever possible, and

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<sup>444</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(2)(b) and 6(6); 2005 Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 15.

<sup>445</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 8; Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 16(1); United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 8.

<sup>446</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(1); 2005 Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 11.

<sup>447</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6.

<sup>448</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3)(a).

<sup>449</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3)(c).

<sup>450</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3)(b).

<sup>451</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(2)(b).

<sup>452</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3)(d).

<sup>453</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Chapter III.

working in conjunction with NGOs and other elements of civil society to prevent trafficking.<sup>454</sup> In addition, States parties must also adopt measures that discourage the demand for trafficked persons,<sup>455</sup> strengthen border controls to prevent trafficking,<sup>456</sup> and ensure that identity documents are secure, controlled,<sup>457</sup> legitimate and valid.<sup>458</sup> The 2000 Palermo Protocol does not contain provisions for an international oversight body on human trafficking.

In 2002, the UNHCR issued Principles and Guidelines on Human Rights and Trafficking, providing recommendations for adopting the 2000 Palermo Protocol, particularly in the area of human rights.<sup>459</sup> The document went into detail regarding how trafficked persons should be treated in destination States, as well as discussing criminal elements of human trafficking.<sup>460</sup>

### **A new development – UN.GIFT**

In 2007, the UN Global Initiative to Fight Human Trafficking (UN.GIFT) was formed with the aim of providing a framework for States to cooperate to address human trafficking.<sup>461</sup> Part of the UNODC, UN.GIFT aims to consolidate and coordinate the global fight against human trafficking.<sup>462</sup> The mission of UN.GIFT is to increase the knowledge and awareness of human trafficking; promote effective rights-based

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<sup>454</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 5; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 9.

<sup>455</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 6; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 9(5).

<sup>456</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 7; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 11.

<sup>457</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 8; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 12.

<sup>458</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 9; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 13.

<sup>459</sup> United Nations High Commission for Human Rights. "Principles and Guidelines on Human Rights and Trafficking." E/2002/68/Add.1, 2002.

<sup>460</sup> United Nations High Commission for Human Rights. "Principles and Guidelines on Human Rights and Trafficking." E/2002/68/Add.1, 2002.

<sup>461</sup> King, Sarah. "Human Trafficking: Addressing the International Criminal Industry in the Backyard." *University of Miami International & Comparative Law Review*. Vol 15, 2008, p 375.

<sup>462</sup> United Nations Global Initiative to Fight Human Trafficking. "About UN.GIFT." <http://www.ungift.org/ungift/en/about/index.html>. Last accessed 13 October 2008.

responses; build capacity of State and non-State actors; and foster partnerships for joint action against human trafficking.<sup>463</sup>

#### 4.2f EUROPEAN UNION MEASURES

Each of the case studies examined in this dissertation – with the exception of Norway – are member States of the EU. As a result, the national laws of the member States are influenced by binding measures issued by the EU.

The EU responds to human trafficking as both in the context of organised crime and immigration control.<sup>464</sup> Working in conjunction with the UN and Council of Europe, the EU works within the framework of both the 2000 Palermo Protocol and the 2005 Council of Europe Convention.<sup>465</sup> In 1996, the European Parliament recommended initiating measures to combat human trafficking.<sup>466</sup> In a resolution of May 2000, the European Parliament called for a clear and concise definition of human trafficking, as well as a legal framework to respond to human trafficking at the European level including both criminal law and human rights elements.<sup>467</sup> This came into fruition with the 2002 Council Framework Decision,<sup>468</sup> and later the 2004 Council Directive, both explained below.<sup>469</sup> These are the two most important EU measures on human trafficking because they are binding upon the member States.<sup>470</sup> In addition, the Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union was adopted by the Justice and Home Affairs

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<sup>463</sup> United Nations Global Initiative to Fight Human Trafficking. “About UN.GIFT.” <http://www.ungift.org/ungift/en/about/index.html>. Last accessed 13 October 2008.

<sup>464</sup> European Parliament. “Freedom, Security and Justice: An Agenda for Europe. Trafficking in Human Beings.” [http://www.europarl.europa.eu/compar/libe/elsj/zoom\\_in/41\\_en.htm#top](http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/41_en.htm#top). Last accessed 8 September 2009.

<sup>465</sup> European Parliament. “Freedom, Security and Justice: An Agenda for Europe. Trafficking in Human Beings.” [http://www.europarl.europa.eu/compar/libe/elsj/zoom\\_in/41\\_en.htm#top](http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/41_en.htm#top). Last accessed 8 September 2009.

<sup>466</sup> European Parliament. “Freedom, Security and Justice: An Agenda for Europe. Trafficking in Human Beings.” [http://www.europarl.europa.eu/compar/libe/elsj/zoom\\_in/41\\_en.htm#top](http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/41_en.htm#top). Last accessed 8 September 2009.

<sup>467</sup> European Parliament. “Freedom, Security and Justice: An Agenda for Europe. Trafficking in Human Beings.” [http://www.europarl.europa.eu/compar/libe/elsj/zoom\\_in/41\\_en.htm#top](http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/41_en.htm#top). Last accessed 8 September 2009.

<sup>468</sup> This Council Framework Decision replaces the Council Joint Action 97/154/JHA, 1997 which discussed combating human trafficking and sexual exploitation of children.

<sup>469</sup> European Parliament. “Freedom, Security and Justice: An Agenda for Europe. Trafficking in Human Beings.” [http://www.europarl.europa.eu/compar/libe/elsj/zoom\\_in/41\\_en.htm#top](http://www.europarl.europa.eu/compar/libe/elsj/zoom_in/41_en.htm#top). Last accessed 8 September 2009.

<sup>470</sup> This includes each of the case studies in this dissertation, with the exception of Norway.

Council in 2002, providing proposals for measures to combat both human trafficking and illegal immigration into the EU.<sup>471</sup>

### **2002 Council Framework Decision**

The 2002 Council Framework Decision takes a criminal approach to combating human trafficking and establishes the minimum requirements for States to adopt in order to achieve the objectives on a European level.<sup>472</sup> It requires member States to “take measures” to criminalise human trafficking<sup>473</sup> and provide appropriate punishments for such offences, including a maximum penalty of a prison sentence of at least eight years.<sup>474</sup> It also includes provisions that require States to criminalise human trafficking by legal persons<sup>475</sup> and establish jurisdiction over human trafficking offences.<sup>476</sup> The 2002 Decision contains an article titled “Protection of and assistance to victims,” which contains extremely limited human rights provisions. It states that investigations into or prosecutions of human trafficking offences shall not be dependent on the accusation made by a trafficked person,<sup>477</sup> and stipulates that trafficked children should be considered particularly vulnerable, and appropriate assistance should be granted to the child and his or her family.<sup>478</sup>

In 2009, the Council drafted a new framework decision, intended to replace the 2002 Decision, and aiming to improve the existing human trafficking instruments. The new framework decision will include a strengthening of the punishments for trafficking offenders, granting special treatment to trafficked persons in criminal proceedings including non-punishment of those who bear the consequences of criminal activities, and a higher standard of protection and assistance to trafficked persons.<sup>479</sup>

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<sup>471</sup> European Union. “Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union.” (2002/C 142/02) 28 February 2002.

<sup>472</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Preamble (7).

<sup>473</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 1.

<sup>474</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 3.

<sup>475</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 4 and 5.

<sup>476</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 6.

<sup>477</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 7(1).

<sup>478</sup> Council Framework Decision 2002/629/JHA, 19 July 2002, Art 7(2) and (3).

<sup>479</sup> European Union Justice and Home Affairs Council. “Background: Justice and Home Affairs Council.” Luxembourg, 6 April 2009, p 3-4.

## **2004 Council Directive**

The 2004 Council Directive stipulates the conditions under which trafficked persons are permitted to obtain a temporary residence permit in exchange for their participation in criminal human trafficking proceedings.<sup>480</sup> It does, however, state that States are permitted to adopt or maintain more favourable provisions for trafficked persons – in other words, provisions that would not require their participation in investigations.<sup>481</sup> The Directive states that third-country nationals trafficked into the EU should be given a reflection period to allow them to make an informed decision as to whether or not to cooperate with authorities, during which time they shall receive assistance and protection.<sup>482</sup> Once that period is over, if the trafficked person meets a set of criteria, including cooperation with authorities and severing all ties with his or her trafficker, he or she may be granted a temporary residence permit and receive assistance and protection while under the residence permit.<sup>483</sup> The residence permit may only be renewed if the trafficked person meets the aforementioned criteria,<sup>484</sup> and may be withdrawn at any stage if the criteria fail to be met.<sup>485</sup>

## **4.2g THE 2005 COUNCIL OF EUROPE CONVENTION**

Each of the six case studies examined in this dissertation are member States of the Council of Europe. Every case study State has signed the 2005 Council of Europe Convention, but Ireland and Luxembourg have yet to ratify.

### **The development of the 2005 Council of Europe Convention**

The impetus for the 2005 Council of Europe Convention began in the 1990s,<sup>486</sup> but was only acted upon by a recommendation of the Committee of Ministers in 2000, which encouraged the member States to focus on the prevention of human trafficking, the protection of trafficked persons, and the prosecution of perpetrators.<sup>487</sup> The

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<sup>480</sup> Council Directive 2004/81/EC, 29 April 2004, Art 1. Ireland is not bound by this Directive.

<sup>481</sup> Council Directive 2004/81/EC, 29 April 2004, Art 4.

<sup>482</sup> Council Directive 2004/81/EC, 29 April 2004, Art 6.

<sup>483</sup> Council Directive 2004/81/EC, 29 April 2004, Art 8.

<sup>484</sup> Council Directive 2004/81/EC, 29 April 2004, Art 13.

<sup>485</sup> Council Directive 2004/81/EC, 29 April 2004, Art 14.

<sup>486</sup> It must be noted, however, that the European Convention on Human Rights of 1950 was also its predecessor in terms of a regional human rights instrument.

<sup>487</sup> Council of Europe Committee Ministers, *Recommendation of the Committee of Ministers to the Member States on Action Against Trafficking in Human Beings for the Purpose of Exploitation*, 710<sup>th</sup>

Explanatory Report to the convention states that legislative activities alone are not sufficient and that “prevention and assistance to victims” must be included.<sup>488</sup>

Criticism of the narrow scope of the 2000 Palermo Protocol was what prompted the Council of Europe to adopt a broader approach in its convention,<sup>489</sup> which does not require the transnational component, or an organised criminal group, and as a result, expanded the protection afforded to trafficked persons.<sup>490</sup> In both the 2000 Palermo Protocol and the 2005 Council of Europe Convention, States may have been concerned with organised criminal groups’ participation in human trafficking as a specific threat to State sovereignty. In addition to strengthening the human rights of previous human trafficking conventions, the 2005 Council of Europe Convention also recognises the important role of civil society in combating human trafficking,<sup>491</sup> as neither State nor non-State actors can solve the problem without the cooperation of the other.<sup>492</sup>

### **Aim of the 2005 Council of Europe Convention**

The aim of the 2005 Council of Europe Convention is to enhance the 2000 Palermo Protocol, particularly in terms of placing the human rights provisions on a level equal to the criminal aspect.<sup>493</sup> Although the convention applies to all forms of human trafficking – national or transnational<sup>494</sup> – for the purpose of this dissertation, it is examined in a transnational context. The convention puts human rights first in the document, makes them mandatory rather than discretionary, and also uses the same

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session, Document No R(2000) 11, 19 May 2000 in Sembacher, Anke, “The Council of Europe Convention on Action Against Trafficking in Human Beings.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 436.

<sup>488</sup> Council of Europe. *Explanatory Report on the Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May, 2005, CETS, p 197 in Sembacher, Anke. “The Council of Europe Convention on Action Against Trafficking in Human Beings.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 438.

<sup>489</sup> Feingold, David A. “Human Trafficking.” *Foreign Policy*. Vol 150, 2005, p 28 in Sembacher, Anke. “The Council of Europe Convention on Action Against Trafficking in Human Beings.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 440.

<sup>490</sup> Amiel, Alexandra. “Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation.” *Buffalo Human Rights Law Review*. Vol 12, 2006, pp 28-29; Sembacher, Anke. “The Council of Europe Convention on Action Against Trafficking in Human Beings.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 440.

<sup>491</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 5.

<sup>492</sup> Sembacher, Anke. “The Council of Europe Convention on Action Against Trafficking in Human Beings.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 444.

<sup>493</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

<sup>494</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 2.

language for both human rights and criminal provisions, specifying that States parties “shall” adopt or take certain measures in both circumstances.<sup>495</sup> This convention is also very specific in the individual provisions for trafficked persons than any of the previous instruments, both in terms of criminal law and human rights. Moreover, the 2005 Council of Europe Convention stipulates that all the actions and initiatives against human trafficking must be non-discriminatory, and take gender equality and a child-rights approach into account.<sup>496</sup> The 2005 Council of Europe Convention is stronger on civil and political, as well as economic and social rights than the 2000 Palermo Protocol. This occurred because it was easier to come to consensus within Europe, and a smaller number of States had to agree on the provisions than on the international 2000 Palermo Protocol.

### **Criminal law**

Reinforcing the 1949 Convention and the 2000 Palermo Protocol, the 2005 Council of Europe Convention also criminalises participation in the process of human trafficking,<sup>497</sup> including the acts relating to travel or identity documents,<sup>498</sup> as well as establishing corporate liability.<sup>499</sup> In order to reinforce the seriousness of the crime of human trafficking, the 2005 Council of Europe Convention provides more specific guidelines for States parties to adopt legislation that provides effective, proportionate and dissuasive sanctions for criminal trafficking offences, as well as other more stringent action against offenders.<sup>500</sup> The Convention specifies that States parties must enact legislation that confiscates and deprives the offenders of any instrumentalities and proceeds of the criminal offences,<sup>501</sup> and enable the temporary or permanent closure of any establishment used to carry out human trafficking.<sup>502</sup>

States parties must also ensure that the following circumstances are regarded as aggravating circumstances: the offence deliberately or by gross negligence endangered the life of the victim;<sup>503</sup> the offence was committed against a child;<sup>504</sup> the

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<sup>495</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

<sup>496</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

<sup>497</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 18.

<sup>498</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 20.

<sup>499</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 22.

<sup>500</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 23(1).

<sup>501</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 23(3).

<sup>502</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 23(4).

<sup>503</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 24(a).



offence was committed by a public official in the performance of his/her duties;<sup>505</sup> or the offence was committed within the framework of a criminal organisation.<sup>506</sup> States parties must take into consideration previous convictions when determining the penalty for traffickers.<sup>507</sup> Lastly, the Convention stipulates that States parties must provide for the opportunity of not imposing penalties on trafficked people, once they are identified as such, for their involvement in unlawful activities to the extent that they have been compelled to do so.<sup>508</sup>

In addition to criminalising the process of trafficking itself, the 2005 Council of Europe Convention goes a step further and suggests that States parties adopt legislation and other measures to criminalise the exploitation of a person with the knowledge that he or she has been trafficked.<sup>509</sup> States parties must also criminalise offences related to travel or identity documents, including forging a document;<sup>510</sup> procuring or providing a document;<sup>511</sup> or retaining, removing, concealing, damaging or destroying a document of another person.<sup>512</sup> The Convention also stipulates that States parties must provide for the possibility of not imposing penalties on victims for illegal activities as a result of them being forced to do so.<sup>513</sup>

The 2005 Council of Europe Convention addresses further elements relating to the investigations and prosecutions;<sup>514</sup> the protection of victims, witnesses and collaborators;<sup>515</sup> and in terms of the investigations, the convention stipulates that States parties must ensure that investigations are not dependent upon a report or accusation made by a victim, when the offence is committed at least in part in its territory.<sup>516</sup> Furthermore, a trafficked person may make a complaint in their origin

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<sup>504</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 24(b).

<sup>505</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 24(c).

<sup>506</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 24(d).

<sup>507</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 25.

<sup>508</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 26.

<sup>509</sup> In Council of Europe Convention on Action against Trafficking in Human Beings it says that States “shall consider” adopting measures criminalizing the use of trafficked persons. Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 19.

<sup>510</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 20(a).

<sup>511</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 20(b).

<sup>512</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 20(c).

<sup>513</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 26.

<sup>514</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 27

<sup>515</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28.

<sup>516</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 27(1).

State, the competent authorities of which must inform the authorities in the State in which the crime was committed.<sup>517</sup>

### **Human rights**

Given the human rights-based approach of the 2005 Council of Europe Convention described in the Preamble,<sup>518</sup> the convention encompasses all human rights elements in the 1949 Convention and the 2000 Palermo Protocol, making them mandatory, and then adding to the scope of the assistance and protection States parties are obliged to provide for trafficked persons. The 2005 Council of Europe Convention is the only of these three conventions to define “victim,” and does so as “any natural person who is subject to trafficking in human beings.”<sup>519</sup> States parties must ensure that the relevant authorities are trained in identifying and subsequently helping trafficked persons, and that once identified, they are treated as victims of a crime and provided with the necessary assistance.<sup>520</sup> States parties must also ensure that NGOs or other groups aimed at tackling human trafficking or promoting human rights may assist and/or support trafficked persons with their criminal investigations, with their consent.<sup>521</sup>

Moreover, States parties should also ensure that the trafficked persons are safe and protected;<sup>522</sup> that there is cooperation to provide services with NGOs and elements of civil society,<sup>523</sup> and that assistance to trafficked persons is not conditional on his or her willingness to act as a witness,<sup>524</sup> and is given on a consensual and informed basis.<sup>525</sup> States parties are also obligated to provide protection from retaliation or intimidation during and after investigation and prosecution of the perpetrators for victims;<sup>526</sup> those who report offences or cooperate with investigations;<sup>527</sup> witnesses

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<sup>517</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 27(2).

<sup>518</sup> The Preamble of the Council of Europe Convention states: “Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;... Considering that respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives...” Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

<sup>519</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 4(e).

<sup>520</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 10.

<sup>521</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 27(3).

<sup>522</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(2).

<sup>523</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(5).

<sup>524</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(6).

<sup>525</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(7).

<sup>526</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28(1)(a).

<sup>527</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28(1)(b).

who give testimony;<sup>528</sup> family members of the aforementioned persons;<sup>529</sup> and members of groups or NGOs involved with the investigation.<sup>530</sup>

The 2005 Council of Europe Convention also contains elements pertaining to freedom of movement, such as a provision for a renewable residence permit for trafficked persons, in addition to the rights and protections afforded to trafficked persons in the 2000 Palermo Protocol, including a recovery and reflection period, compensation and legal redress, and the repatriation of trafficked persons.<sup>531</sup> The convention requires States parties to issue a renewable residence permit to trafficked persons if the competent authority considers it necessary for them to remain in the State in their personal situation,<sup>532</sup> and/or if remaining in the State is necessary for the purpose of conducting the investigation or criminal proceedings.<sup>533</sup>

Furthermore, the 2005 Council of Europe Convention provides the same economic and social rights as those set out in the 2000 Palermo Protocol to assist trafficked persons in their physical, psychological and social recovery, with the addition of translation and interpretation services,<sup>534</sup> and ensuring standards of living capable of ensuring the subsistence of trafficked persons, including material assistance.<sup>535</sup> However, unlike in the 2000 Palermo Protocol, in which the economic and social rights assistance is suggested, States parties are obliged to provide certain assistance and protection under the 2005 Council of Europe Convention.<sup>536</sup>

### **Monitoring mechanism**

The 2005 Council of Europe Convention also created a body that will monitor human trafficking from, in and to the States parties.<sup>537</sup> This is significant as it is the first convention that provides international oversight by an international body since the 1921 Convention under the League of Nations. The purpose of the Group of Experts

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<sup>528</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28(1)(c).

<sup>529</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28(1)(d).

<sup>530</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 28(4).

<sup>531</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 14.

<sup>532</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 14(1)(a).

<sup>533</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 14(1)(b).

<sup>534</sup> “When appropriate.” Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(1)(c).

<sup>535</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(1)(a).

<sup>536</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12.

<sup>537</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 36.

on Action Against Trafficking in Human Beings (GRETA) is to monitor the implementation of the convention.<sup>538</sup> GRETA was scheduled to be in operation within one year of the 2005 Council of Europe Convention's entry into force, which was on 1 February 2008.<sup>539</sup> The members of GRETA were elected in February 2009 by the Committee of the Parties, consisting of the representatives on the Committee of Ministers of the Council of Europe of the member States parties to the Convention and representatives of the Parties to the Convention, which are not members of the Council of Europe.<sup>540</sup>

GRETA may require States parties to submit a questionnaire to evaluate their implementation of the 2005 Council of Europe Convention, in addition to conducting visits to the States parties and requesting information from civil society groups.<sup>541</sup> GRETA will present its evaluations of States in a report, which will make suggestions to States on how to handle implementation problems – the final draft of which will be made available to the public.<sup>542</sup> However, there is no requirement for States parties to submit reports to GRETA, nor is there any provision in the convention that individuals or organisations may submit complaints to GRETA for a violation of the Convention.<sup>543</sup>

GRETA is modelled on the powers of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which was established under European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Torture Convention).<sup>544</sup> The Torture Convention, however, went into far greater detail about the nature of the powers of

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<sup>538</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 36(1).

<sup>539</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 36(4).

<sup>540</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 37; Council of Europe Action Against Trafficking in Human Beings, [http://www.coe.int/t/dghl/monitoring/trafficking/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp). Last accessed 24 April 2009.

<sup>541</sup> Amiel, Alexandra. "Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation." *Buffalo Human Rights Law Review*. Vol 12, 2006, p 52.

<sup>542</sup> Amiel, Alexandra. "Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation." *Buffalo Human Rights Law Review*. Vol 12, 2006, pp 52-53.

<sup>543</sup> Amiel, Alexandra. "Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation." *Buffalo Human Rights Law Review*. Vol 12, 2006, p 53.

<sup>544</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987, Art 1.

the CPT than the 2005 Council of Europe Convention did for GRETA. This may have been because States parties would not have agreed to a monitoring mechanism with similar powers as the CPT, which may have impeded the adoption the 2005 Council of Europe Convention. Regardless of the reasons behind it, the provisions for creating GRETA are far less rigid, leaving it open to going in the same direction as the CPT, or operating as a less powerful body. In a similar manner as the CPT,<sup>545</sup> GRETA has the potential to develop standards in States parties through their questionnaires, reports, and in particular, their visits to the States.

### **4.3 ANALYSIS OF MODERN HUMAN RIGHTS LAW ERA TREATIES**

#### **A widening scope**

While the 1949 Convention states in the Preamble that it draws upon the previously-existing laws on the suppression of traffic in women and children, when referring to those trafficked, it uses the gender neutral term “persons,” rather than specifying women and/or children exclusively.<sup>546</sup> However, the 1949 Convention continues to address human trafficking for the purpose of prostitution only.<sup>547</sup> The 2000 Palermo Protocol applies to adult men, women and children as well, but specifically mentions women and children as groups particularly vulnerable to trafficking.<sup>548</sup> It is also the first convention to address all forms of trafficking, including labour exploitation and the removal of organs, rather than trafficking solely for the purpose of prostitution. The 2005 Council of Europe Convention is the first international human trafficking law that applies equally to men, women and children.<sup>549</sup> Similar to the 2000 Palermo Protocol, it applies to every type of human trafficking.<sup>550</sup>

In addition to the widening in scope, the international human trafficking treaties also went into increasingly greater detail of both criminal and human rights provisions. While the early treaties were vague and primarily suggestive, beginning with the 1949

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<sup>545</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. <http://www.cpt.coe.int/en/default.htm>. Last accessed 11 May 2009.

<sup>546</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Other, 1949.

<sup>547</sup> United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Other, 1949.

<sup>548</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.

<sup>549</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

<sup>550</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

Convention, the conventions became progressively more detailed. The 2000 Palermo Protocol contains the first universally accepted definition of human trafficking, as well as detailing human rights provisions for the first time. The 2005 Council of Europe Convention is the most detailed by far, in terms of both criminal and human rights provisions.

Lastly, the post-human rights law international human trafficking laws indicate a shift from treaties that were primarily regional in nature, to those that are more universal. While the earliest conventions were adopted by a relatively small group of wealthy and powerful States and eventually expanded to include the League of Nations, beginning with the 1949 Convention, the newer treaties reflect the notion that human trafficking was a global, rather than a regional problem.

### **Motivation**

The motivation for each of the modern human rights law era treaties differs slightly, although the inclusion of human rights is a common tie. The 1949 Convention picked up where the Draft 1937 Convention and the League of Nations left off and incorporated the relatively new concept of human rights. The 2000 UN Convention, which produced the 2000 Palermo Protocol was drafted in response to what States perceived to be a threat to security from transnational organised crime. The Council of Europe saw the opportunity to expand the human rights scope of the 2000 Palermo Protocol, and did so in 2005 with their convention.

Race may have also indirectly played a role in the re-emergence of human trafficking as an issue in the 1990s, prior to the adoption of the 2000 Palermo Protocol. At the time, the primary focus was on women trafficked from Eastern Europe to Western Europe for the purpose of sexual exploitation, following the end of the Cold War and the opening of borders in Europe. The focus was yet again on white women – this time from Eastern as opposed to Western Europe during, for example, the “white slave panic” of the early 20<sup>th</sup> century – and it brought the issue of human trafficking to the forefront once more, after decades of reports of trafficking of Africans and

Asians.<sup>551</sup> This indicates that the interests of wealthy and powerful States in Western Europe and North America may dictate the human trafficking agenda for the rest of the world, regardless of the realities of the situation.

### **Expansion of human rights**

The most notable progression throughout the later conventions is the evolution from an almost exclusive focus on criminal law to a greater account taken of human rights. Although the 1904 Agreement mentioned certain elements of human rights, including temporarily entrusting trafficked persons to public or private charitable organisations, it is not until the 1949 Convention that human rights in any form surface again. The 1949 Convention does contain articles on human rights, but the main focus is still criminalising human trafficking for the purpose of sexual exploitation. The 2000 Palermo Protocol does a more thorough job of addressing both criminal and human rights elements, but the articles addressing the direct criminalisation of human trafficking made it compulsory for States parties to implement such national laws, while the economic and social human rights provisions were weak, and remained essentially suggestions as a result of the wording, “States shall consider” or “States shall endeavour.”<sup>552</sup> As the 2005 Council of Europe Convention aimed to enhance the 2000 Palermo Protocol, it did so by strengthening the human rights provisions, making them also compulsory, and positioning them earlier in the convention than the criminal provisions. Also noteworthy is the fact that each of the conventions, with the exceptions of the 1921 Convention and 1933 Convention, describe trafficked persons as “victims” – a key element of the human rights model.<sup>553</sup>

In each of the conventions that address human rights, particularly the 2000 Palermo Protocol and the 2005 Council of Europe Convention, the guidelines for

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<sup>551</sup> See Bravo, Karen E. “Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade.” *Boston University International Law Journal*. Vol 25, 2007, p 221 and Bruch, Elizabeth. “Models Wanted: The Search for an Effective Response to Human Trafficking.” *Stanford Journal of International Law*. Vol 40, 2004, p 3.

<sup>552</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6.

<sup>553</sup> International Agreement for the Suppression of the “White Slave Traffic,” 1904, Art 2; International Convention for the Suppression of the “White Slave Traffic,” 1910, Final Protocol, C; United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Other, 1949, Art 16; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Preamble; Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Preamble.

implementing national human rights laws were more detailed than those for criminal laws. As explained in the human rights model in Chapter 2, a unique set of human rights is required for trafficked persons. As a result, the human rights provisions in the conventions required more explanation and detail than the criminal provisions, which essentially stated that States parties must adopt direct criminal human trafficking laws.

#### **4.4 CONCLUSION**

##### **Application of the models**

As stated in Chapter 3, the early international human trafficking instruments adopted the criminal model. Following the development of modern human rights law, there was a general shift from international treaties based on criminal law, to treaties that accommodate some human rights provisions. Regardless of the effectiveness of the human rights provisions, or the motivation behind their adoption, the treaties in the second half of the 20th century represented a clear transition from treating human trafficking primarily as a criminal offence, to also considering it a violation of human rights.

As discussed in the previous section, the scope of human rights law did expand considerably, particularly in the 2000 Palermo Protocol and 2005 Council of Europe Convention. First, the 2000 Palermo Protocol is part of a convention on transnational organised crime, which clearly has a criminal motivation. The inclusion of the human rights provisions in the 2000 Palermo Protocol was a result of lobbying from NGOs and human rights groups, and in all likelihood, may not have been included otherwise, under a convention dealing with transnational organised crime. Secondly, while the 2000 Palermo Protocol is primarily criminal and contains limited mandatory human rights as a means to facilitate its criminal provisions, the 2005 Council of Europe Convention adopts aspects of both models, including both mandatory criminal and human rights provisions.

There is a distinct difference between the two most recent instruments: the 2005 Council of Europe Convention is more detailed and stronger in its human rights provisions than the 2000 Palermo Protocol. One explanation for this is that the 2005 Council of Europe Convention is regional international law, while the 2000 Palermo



Protocol is universal. Europe has a strong tradition of human rights law since the end of World War II, as evidenced by the existence of the ECHR, and a compulsory court – the European Court of Human Rights. Moreover, it may be easier to get a smaller group of States to agree to be bound by the obligations in a law, such as the 2005 Council of Europe Convention.

Although both applying to Europe, the 2004 Council Directive and the 2005 Council of Europe Convention present two different views on the conditions under which trafficked persons should be granted assistance and protection. While the 2004 Council Directive indicates that States may adopt more favourable measures, its primary objective is ensuring that States grant human rights provisions to trafficked persons if and when they cooperate with authorities.<sup>554</sup> The 2005 Council of Europe Convention stipulates that States must adopt legislative or other measures to ensure that assistance to trafficked persons is not made conditional on their willingness to act as a witness in criminal proceedings.<sup>555</sup>

The most recent wave of international human trafficking instruments present States with competing laws. This occurs on a universal versus regional level when considering the differences in human rights provisions in the 2000 Palermo Protocol and the 2005 Council of Europe Convention. Furthermore, the differences in the stipulations of human rights provisions in the 2004 Council Directive and the 2005 Council of Europe Convention is problematic because it creates different obligations for States that are members of both organisations. In both cases, the competing laws are detrimental only in terms of the human rights provisions, the adoption of which is more discretionary than the criminal elements of the laws. The Council of Europe has adopted the most and strongest elements of the human rights model, followed by the EU and the UN, which only require States to adopt conditional and limited forms of human rights provisions.

It is also important to note that another potential motivation for the inclusion of human rights provisions in these recent instruments is to provide that assistance and protection to trafficked persons in exchange for their cooperation in the investigation

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<sup>554</sup> Council Directive 2004/81/EC, 29 April 2004.

<sup>555</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(6).

of their trafficker(s). If that were the case, then the reason behind adopting aspects of the human rights model would be for the purpose of assisting the criminal investigation. As a result, the most recent instruments adopt a criminal model featuring human rights primarily as a means to facilitate criminal human trafficking investigations. The 2005 Council of Europe Convention removes that condition and therefore represents a stronger adoption of the human rights model, but only on a regional level.

## CHAPTER 5: CASE STUDIES

While Chapter 3 concluded that the early international human trafficking laws adopted the criminal model, and Chapter 4 concluded that the human rights model was integrated following World War II, Chapter 5 determines the extent to which States are reflecting the international position of having both criminal and human rights elements in their human trafficking laws and policies.

This chapter examines six destination States' human trafficking laws and policies by applying a set of indicators and analysing them, to determine whether the State employs a criminal model, a human rights model, or elements of both models.

### 5.1 CASE STUDY SELECTION, INDICATORS, APPLICATION AND ANALYSIS

#### Case study selection

I chose to focus on States that are signatories to the 2005 Council of Europe Convention for two reasons. First, it is estimated that hundreds of thousands of people are trafficked to the continent of Europe every year.<sup>556</sup> Secondly, the Council of Europe adopted the most current and comprehensive international human trafficking law.

I classified each Council of Europe member State as an origin, transit or destination State, or a combination of any of the three by using information in the 2008 United States Department of State Trafficking in Persons Report (see Table 1).<sup>557</sup>

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<sup>556</sup> Europol, "Trafficking in Human Beings in the European Union: A Europol Perspective." February 2008. Available at [http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Trafficking\\_in\\_human\\_beings\\_2008.pdf](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Trafficking_in_human_beings_2008.pdf). Last accessed 11 May 2009; The International Organisation for Migration estimates that 200,000 people are trafficking within Europe. International Organisation for Migration, "Eastern Europe – Research Shows Significant Figures on Human Trafficking," 16 February 2007. Available at [http://iom.ramdisk.net/iom/artikel.php?menu\\_id=10&artikel\\_id=499&history\\_back=true](http://iom.ramdisk.net/iom/artikel.php?menu_id=10&artikel_id=499&history_back=true). Last accessed 11 May 2009; Ursula Smartt estimates that 400,000 people are trafficked into European Union Member States each year. Smartt, Ursula, "Human Trafficking: Simply a European Problem?" *European Journal of Crime, Criminal Law and Criminal Justice*. Vol 11, 2003 p 165.

<sup>557</sup> United States Department of State, "Trafficking in Persons Report 2008." June 2008.

I chose to examine case studies that were solely destination States and not also transit States in order to determine how States who are only on the receiving end of the trafficking process deal with trafficked persons in the State. While transit States are also on the receiving end of the trafficking process, they also have respond to people being trafficked through – and not just into – the State.

**Table 1**

Origin/Destination	Transit/Destination	Origin/Transit/Destination	Destination
Armenia	Austria	Bosnia and Herzegovina	Cyprus
Latvia	Belgium	Bulgaria	France
	Denmark	Croatia	Ireland
	Finland	Czech Republic	Luxembourg
	Germany	Hungary	Malta
	Greece	Lithuania	Norway
	Italy	Macedonia	
	The Netherlands	Poland	
	Portugal	Romania	
	Spain	Russia	
	Sweden	Serbia	
	Switzerland	Slovak Republic	
	Turkey	Slovenia	
	United Kingdom	Ukraine	

Once classified, I decided to focus exclusively on these six destination States for three reasons. First, destination States bear the greatest legal responsibility for responding to human trafficking because they are the locations in which the majority of profits are made and the majority of exploitation takes place.<sup>558</sup> As a result, the evidence of human trafficking and exploitation – critical to any prosecution – would be primarily available in destination States.<sup>559</sup> Destination States are therefore required to

<sup>558</sup> Gallagher, Anne and Paul Holmes. “Developing an Effective Criminal Justice Response to Human Trafficking.” *International Criminal Justice Review*. Vol 18, 2008 p 321.

<sup>559</sup> Gallagher, Anne and Paul Holmes. “Developing an Effective Criminal Justice Response to Human Trafficking.” *International Criminal Justice Review*. Vol 18, 2008 p 321.

implement human rights provisions to respond to persons trafficked to inside their borders, in the form of identification, protection and assistance for trafficked persons. Secondly, it is more difficult for economically disadvantaged origin States to do much more than investigate and prosecute low-level brokers and transporters.<sup>560</sup> Although this does not limit their responsibility from taking all possible action, the burden lies more heavily upon destination States to develop effective criminal justice responses, as it will have a wider impact on global human trafficking.<sup>561</sup> Thirdly, destination States are particularly significant in the process of victim identification, which, by its nature, is an ex post facto exercise – only becoming apparent once the exploitation has taken place.<sup>562</sup>

Aside from classification purposes, I did not use the United States Department of State Trafficking in Persons Report for information on or ratings of the case studies. There is potential for the report's rankings to be politically motivated; however, only their classifications of States as places of origin, transit or destination for trafficked persons, as well as naming the origin States for each of the destination States discussed were utilised. In addition, the report is referenced on the UNHCR Web site,<sup>563</sup> and the UNODC's report does not provide information on whether a State is one of origin, transit or destination.<sup>564</sup>

## **Indicators**

The purpose of the indicators is to ask questions to ascertain information from States to indicate whether each State has adopted a criminal or human rights model.

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<sup>560</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 321.

<sup>561</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 321.

<sup>562</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 329.

<sup>563</sup> For example, <http://www.unhcr.org/refworld/country,,,FRA,4562d8b62,4a4214bbc,0.html>. Last accessed 26 August 2009.

<sup>564</sup> See [http://www.unodc.org/documents/human-trafficking/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf). Last accessed 26 August 2009.

**Table 2**

<b>HUMAN TRAFFICKING POLICY AND LEGISLATION OF DESTINATION STATES</b>	
Has the State ratified international human trafficking instruments?	Yes/No – Which?
Does direct human trafficking legislation exist?	Yes/No
Does indirect human trafficking legislation exist?	Yes/No – Types?
Which ministry(ies) deal(s) with human trafficking?	
How many prosecutions have been made under trafficking legislation?	Direct?/Indirect?
How many convictions have been made under trafficking legislation?	Direct?/Indirect?
What is the length and nature of the sentences for those charged with trafficking offences?	
What assistance, if any, does the State offer to a trafficked person?	
Is there governmental funding for assistance of trafficked persons?	Yes/No – From where?
Does the State grant permission for the trafficked person to remain in the State?	Yes/No – How long?

### ***International human trafficking laws***

States' ratification of international human trafficking laws indicates that they take the issue seriously, by agreeing to be bound by legal obligations and limiting their sovereignty. It is also important to consider whether States have ratified the early human trafficking conventions and/or the more recent instruments. The early conventions (from 1904 to 1949) predate modern human rights law and require States to adopt a criminal model, while the more recent conventions (2000-2005) incorporate the human rights model at varying levels. Another objective of such instruments is to harmonise the national laws of its States parties by requiring States to implement certain minimum rights of human trafficking legislation. It is then important to examine how, if at all, States have put the instruments into practice.

It has been duly noted that Ireland and Luxembourg have not ratified each recent international human trafficking treaty, which creates a discrepancy amongst the case studies in terms of their international legal obligations. If a State has not yet ratified certain conventions, it is possible that they are in a transition process in terms of their laws and policies and may not ratify until their practices are in line with the international standard.

### ***Direct human trafficking law***

When States implement direct human trafficking laws it indicates that they take the issue seriously enough to enact laws on their own accord, or following their ratification of an international law. Direct human trafficking law is aimed at criminalising traffickers. It can exist either through the passing of a specific trafficking criminal law, or by amending an existing criminal law.<sup>565</sup> In either case, whether the direct human trafficking law criminalises all aspects of human trafficking as the crime has been defined by existing international instruments must be taken into consideration.<sup>566</sup>

### ***Indirect human trafficking law***

Indirect human trafficking law is comprised of prostitution, immigration or labour laws that may be violated during the human trafficking process, or criminal laws that deal with elements of human trafficking, such as falsification of documents or abduction. The existence of indirect human trafficking laws strengthens a State's approach to human trafficking, ensuring that any related crimes are criminalised.<sup>567</sup> Some States may more readily apply indirect human trafficking laws, as they are typically more established and familiar than relatively new human trafficking-specific direct laws.<sup>568</sup>

### ***Governmental ministry***

It is also beneficial to note which governmental ministry is responsible for combating human trafficking, in order to determine if the State views the issue as one of immigration, criminal justice or human rights. For example, placing the ministry of the interior in charge of anti-human trafficking efforts indicates a dominant criminal approach.<sup>569</sup>

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<sup>565</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 322.

<sup>566</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 322.

<sup>567</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 322.

<sup>568</sup> Gallagher, Anne and Paul Holmes. "Developing an Effective Criminal Justice Response to Human Trafficking." *International Criminal Justice Review*. Vol 18, 2008 p 322.

<sup>569</sup> Friesendorf, Cornelius. "Pathologies of Security Governance: Efforts Against Human Trafficking in Europe." *Security Dialogue*. Vol 38, p 392.

### ***Criminal policies: prosecutions, convictions and sentences***

Even if laws criminalising human trafficking exist, in order to determine the extent of enforcement, it is necessary to look at the number of prosecutions and convictions of trafficking offences in the State. The length and nature of the sentences given to those guilty of trafficking offences is also a sign of how serious a crime human trafficking is in the eyes of the State. Sentences must be dissuasive and proportionate to the gravity of the offence.<sup>570</sup> It must be noted, however, that States may be slow and/or law to prosecute all areas, not just human trafficking.

### ***Human rights policies: assistance and protection for trafficked persons***

In terms of human rights, it must first be noted whether or not the State provides assistance and/or protection to trafficked persons, and if so, what kind. This provides a means to measure if and how a State has adopted a human rights model. Next, where the funding to assist trafficked persons comes from – either directly from the government or indirectly through NGOs – must be taken into consideration. Lastly, it is important to take into account whether or not States grant permission for the trafficked person to remain in the State. If permission is granted, it is necessary to consider how long the trafficked persons are permitted to stay, as well as whether there are any conditions that must be fulfilled in order to receive the permission. This provides insight into how a State treats people trafficked into its territory, particularly whether it allows them to eventually become lawful members of society.

### **Application of indicators to case studies**

To obtain the information for each case study, I contacted the relevant governmental ministry and State agencies. To counterbalance that information, I obtained the opinions of NGOs and referred to reports by IGOs. I gathered this information over the past year. The agencies and organisations I contacted in each case study provided me with information varying in length and detail. One example of this is the level of funding each State provides for combating human trafficking: while some States did not provide any information, Norway provided specific figures.

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<sup>570</sup> Gallagher, Anne and Paul Holmes. “Developing an Effective Criminal Justice Response to Human Trafficking.” *International Criminal Justice Review*. Vol 18, 2008 p 322.



I also analysed each destination State's compliance with international legal obligations. Finally, I took the information collected from applying the indicators in order to determine where each destination State falls in relation to the models, and made recommendations for establishing and implementing trafficking laws and policies.

### **Analysis**

I then analysed each case study, taking into account the government's policy and the views of the NGOs and IGOs, in order to determine the approach to human trafficking adopted by the State.

It must be noted that NGOs and IGOs have specific agendas which may surface in their reports and policy stances. However, in the context of this dissertation, I am examining the information garnered from NGOs in a specific State in order to attempt to obtain a more complete picture of the how human trafficking is handled in a State. By including the views of NGOs and IGOs, I am not merely relying upon the information provided to me by the State, which also may be skewed, stating that it is in full compliance with all international obligations, for example.

## **5.2 CYPRUS**

### **5.2a INTRODUCTION**

Cyprus, with a population of 792,600,<sup>571</sup> is primarily a destination State for women trafficked for the purpose of sexual exploitation.<sup>572</sup> A large number of the women are trafficked to Cyprus from the Philippines, Russia, Moldova, Hungary, Ukraine, Greece, Vietnam, Uzbekistan and the Dominican Republic, with smaller numbers coming from Colombia, Romania, Belarus, Bulgaria and the United Kingdom.<sup>573</sup>

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<sup>571</sup> July 2008 estimate. Central Intelligence Agency. "The World Factbook." <https://www.cia.gov/library/publications/the-world-factbook/geos/cy.html>. Last accessed 12 March 2009.

<sup>572</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 103.

<sup>573</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 103.

In 2004, the Cypriot Police identified 66 trafficked persons in Cyprus.<sup>574</sup> There were 42 identified trafficked persons in 2005; 81 in 2006; 54 in 2007; and 50 in 2008 up until 31 October 2008.<sup>575</sup>

A majority of the women trafficked to Cyprus for sexual exploitation enter on a so-called “artiste” work permit, which is believed to be used by cabaret owners for the purpose of facilitating prostitution.<sup>576</sup> The three-month “artiste” or “entertainment” visa allows a person to work in the cabaret industry, including bars and nightclubs, and can be renewed for a further three months, with a further permit possible after spending three months outside of Cyprus.<sup>577</sup> The permit is typically sought by the cabaret owners for the women.<sup>578</sup>

## **5.2b LEGISLATION AND GOVERNMENT**

### **International human trafficking treaties**

Cyprus has ratified every international human trafficking treaty.

### **Direct human trafficking legislation**

The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law was passed in Cyprus on 13 July 2007, replacing the Law on Combating of Trafficking in Persons and Sexual Exploitation of Children, 2000. This law is more comprehensive than the 2000 law, influenced by the 2000 Palermo Protocol and 2005 Council of Europe Convention. The law uses the definition of human trafficking from the 2000 Palermo Protocol and 2005 Council of Europe Convention.

### **Indirect human trafficking legislation**

The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007 criminalises sexual exploitation and forced prostitution through threats,

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<sup>574</sup> Superman, Rita – Head Office of Combating Human Trafficking. E-mail correspondence. 19 December 2008.

<sup>575</sup> Superman, Rita – Head Office of Combating Human Trafficking. E-mail correspondence. 19 December 2008.

<sup>576</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 2.

<sup>577</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 8.

<sup>578</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 8.

coercion, wilful misconduct or fraud, and abuse of power.<sup>579</sup> The law also criminalises owning and maintaining a brothel<sup>580</sup> and child pornography.<sup>581</sup>

The Protection of Workers who are Posted to Carry out Temporary Work Within Cyprus in Accordance with the Framework of the Transnational Provision of Services Law, 2002 provides guidelines for treatment of posted temporary workers. This includes minimum working conditions and pay.<sup>582</sup>

## **Ministry**

The Ministry of the Interior is responsible for anti-trafficking efforts in Cyprus.

## **5.2c CRIMINAL LAW**

### **Criminal law provisions**

The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007 criminalises human trafficking of adults and children<sup>583</sup> for the purposes of sexual exploitation,<sup>584</sup> forced labour<sup>585</sup> and the removal of organs.<sup>586</sup> The provisions of the law apply in cases where the infraction occurred within Cyprus, or where the acts are transnational in nature.<sup>587</sup> The law lists endangering the life of the victim,<sup>588</sup> trafficking by public officials,<sup>589</sup> or within the framework of a criminal

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<sup>579</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 9.

<sup>580</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 14.

<sup>581</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 11.

<sup>582</sup> Protection of Workers who are posted to carry out temporary work within the Republic in accordance with the framework of the Transnational Provision of Services Law, 2002.

<sup>583</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 6.

<sup>584</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 9.

<sup>585</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 8.

<sup>586</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 7.

<sup>587</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 4.

<sup>588</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 12.

<sup>589</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 15.

organisation.<sup>590</sup> The law stipulates that those convicted of human trafficking offences may not avail of the following defences: not being aware the trafficked person was a child; that the trafficked person consented to any part of the process or provided the trafficker with compensation; and that the State where the trafficking took place, in whole or in part, does not criminalise human trafficking.<sup>591</sup> It also states that trafficked persons are entitled to compensation from their traffickers.<sup>592</sup>

### **Length and nature of sentences**

Those convicted of human trafficking are liable to up to five years' imprisonment or a fine of €16,600.00.<sup>593</sup>

### **Prosecutions and convictions**

Statistics for human trafficking prosecutions and convictions began in 2004, when the Office of Combating Human Trafficking was established.<sup>594</sup> These figures are not only for human trafficking, but also for offences related to or potentially involved in the human trafficking process, such as sexual exploitation, procuring sexual services, living on the earnings of prostitution, and maintaining a brothel.<sup>595</sup>

**Table 3**<sup>596</sup>

<b>Year</b>	<b>Number of prosecutions</b>	<b>Number of convictions</b>
2004	91	20
2005	47	16
2006	58	14
2007	54	7
2008	46	2

<sup>590</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 12(d).

<sup>591</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 16.

<sup>592</sup> The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 22.

<sup>593</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Arts 5-27.

<sup>594</sup> Superman, Rita – Head Office of Combating Human Trafficking. E-mail correspondence. 19 December 2008.

<sup>595</sup> Superman, Rita – Head Office of Combating Human Trafficking. E-mail correspondence. 19 December 2008.

<sup>596</sup> From 1 January 2008 to 31 October 2008.

## 5.2d HUMAN RIGHTS

### Human rights provisions

The Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007 contains human rights provisions, including ensuring the safety and protection of the trafficked persons,<sup>597</sup> the right to repatriation,<sup>598</sup> and the right to compensation from the State.<sup>599</sup>

Trafficked persons are provided with information in a language that is understandable to them regarding the social welfare benefits available to them, where they can go for assistance, the procedure of filing criminal charges against his or her trafficker, and the conditions under which they can receive such assistance.<sup>600</sup>

Trafficked persons who are issued a temporary residence permit are entitled to legal assistance; emergency medical care; care and psychological support if the person is pregnant, disabled and/or is the victim of a crime; security and protection from the police; translation and interpretation services; protection of personal data; and access to training programmes offered by the State or NGOs.<sup>601</sup> The services are provided by the State's Social Welfare Services, but may also be delegated to NGOs in appropriate situations.<sup>602</sup> In addition, they will be given access to employment and vocational training.<sup>603</sup> If a trafficked child is unaccompanied, he or she is placed in the care of the Social Welfare Services.<sup>604</sup> A trafficked child is entitled to education in Cyprus, in addition to the benefits given to adults.<sup>605</sup>

In addition, the law stipulates that trafficked persons cannot be tried as criminals for crimes committed during the trafficking process, such as illegal entry or residence, or illegal employment.<sup>606</sup>

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<sup>597</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 41.

<sup>598</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 44.

<sup>599</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 23.

<sup>600</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 29.

<sup>601</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 34.

<sup>602</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 34.

<sup>603</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 35.

<sup>604</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 36.

<sup>605</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 36.

<sup>606</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 42.

### **State assistance**

Six residential facilities,<sup>607</sup> with a total of 25 beds<sup>608</sup> were made available for trafficked persons in Cyprus in 2005 and 2006. In 2004, a total of 10 trafficked women were sheltered in Cyprus, with 41 women sheltered in 2005 and 85 sheltered in 2006.<sup>609</sup>

At least one of the government-run shelters for trafficked persons has been in operation since November 2007.<sup>610</sup> As of July 2008, the shelter had provided assistance to 43 women by offering short-term accommodation and support in finding housing and employment.<sup>611</sup> The services of social workers are offered to the women while they are in the shelter and afterwards.<sup>612</sup>

### **State funding**

The State funds shelters for trafficked persons offering the services of social workers.<sup>613</sup>

### **Permission to remain in the State**

Trafficked persons are granted a reflection period of one month to allow them to escape the influence of their traffickers and decide whether they want to cooperate with law enforcement authorities.<sup>614</sup> During this time, the trafficked person is entitled to protection and assistance provided by the State.<sup>615</sup> The reflection period may be

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<sup>607</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 244.

<sup>608</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 244.

<sup>609</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 244.

<sup>610</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008." 12 December 2008, p 9.

<sup>611</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008." 12 December 2008, p 9.

<sup>612</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008." 12 December 2008, p 10.

<sup>613</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008." 12 December 2008, p 9.

<sup>614</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 30.

<sup>615</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 30.

revoked if an immigration officer believes that the person has actively and voluntarily re-established ties with his or her traffickers.<sup>616</sup>

Upon the expiry of the reflection period, a trafficked person may apply for a temporary residence permit of at least six months, provided that he or she has shown a clear willingness to cooperate with law enforcement officials and has severed ties with his or her trafficker(s).<sup>617</sup> The temporary residence permit may be revoked if the trafficked person re-establishes ties with his or her trafficker(s); if their cooperation in the investigation of their trafficker(s) is deemed fraudulent; if he or she decides to stop participating; if the authorities decide to stop the investigation; or if the public safety and interest is at risk.<sup>618</sup>

Unaccompanied trafficked children are granted residence permits renewable for as long as it takes to repatriate the child to his or her origin State, provided there is someone to care for him or her in residence in the State.<sup>619</sup>

## **5.2e VIEWS OF IGOs AND NGOs**

The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, noted a 2008 report that despite the national and international legal developments in Cyprus in terms of human trafficking, Cyprus is still largely associated with trafficking, particularly for sexual exploitation.<sup>620</sup> The Mediterranean Institute of Gender Studies (MIGS), a Cypriot NGO, views the 2007 human trafficking law as “good” but lacking a gender focus, addressing women as a vulnerable group, or dealing with the demand for sexual services.<sup>621</sup> Another Cypriot NGO, Apanemi, said that there is an absolute lack of political will to target trafficking.<sup>622</sup> The Cypriot NGO Anti-Human Trafficking Cyprus (ATC)

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<sup>616</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 30.

<sup>617</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 32.

<sup>618</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Art 33.

<sup>619</sup> Combating of Trafficking and Exploitation of Persons and Protection of Victims Law, 2007, Arts 37 and 39.

<sup>620</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 2.

<sup>621</sup> Anti-Human Trafficking Cyprus. E-mail correspondence. 6 February 2009; Mediterranean Institute of Gender Studies. E-mail correspondence with Christina Kaili and Josie Christodoulou. 20 November 2008; Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 10.

<sup>622</sup> Apanemi. E-mail correspondence with Julia Kalimeri. 23 January 2009.

acknowledges that legislation is in place, but stated that it is not being enforced properly, if at all.<sup>623</sup> For example, a police hotline to report human trafficking exists, but is only open from 8am until 2pm.<sup>624</sup>

In addition, ATC believes that trafficked persons are still treated more or less as criminals, rather than victims.<sup>625</sup> In terms of what still needs to be done, ATC recommends more legislation and enforcement of the laws; improvement in speed and efficiency of the justice system in courts and sentencing; educational and awareness-raising programmes; controlling the demand for trafficked persons; shutting down establishments which exploit trafficked persons and confiscating their assets; stricter and longer imprisonment terms for traffickers and “employers;” greater funding of NGOs; and improved social services for help and care for trafficked persons.<sup>626</sup>

The Commissioner, MIGS and other Cypriot NGOs also call for the abolition of the “artiste” visa entirely.<sup>627</sup> The Commissioner and the Committee on the Elimination of Discrimination against Women expressed concern that the “artiste” work permit is still in use, despite widespread international criticism, and difficulty for law enforcement authorities to effectively combat trafficking.<sup>628</sup> The Commissioner reported that a paradox exists, as the Cypriot government has made legislative efforts to fight trafficking, continuing to issue the “artiste” work permits could be perceived as contradicting the measures taken against trafficking, or at least rendering them ineffective.<sup>629</sup> MIGS estimates that 2,000 foreign women enter Cyprus every year with “artiste” work permits.<sup>630</sup> ATC pointed to an incident where the Cypriot Government stated in October and November 2008 that the “artiste” visa was going to

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<sup>623</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>624</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>625</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>626</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>627</sup> Committee on the Elimination of Discrimination against Women, “Concluding comments of the Committee on the Elimination of Discrimination against Women.” 30 May 2006, p 5; Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 10.

<sup>628</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 2.

<sup>629</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights of the Council of Europe, Following his Visit to the Republic of Cyprus on 7-10 July 2008.” 12 December 2008, p 11.

<sup>630</sup> Mediterranean Institute of Gender Studies. “Mapping the realities of trafficking in women for the purpose of sexual exploitation in Cyprus.” October 2007, p 8.



be abolished as of 1 November 2008.<sup>631</sup> However, the visas continued to be issued months after that date.<sup>632</sup> Once this was discovered, the Cypriot Government set 1 February 2009 as the date to abolish the visa.<sup>633</sup> At this stage it is too early to tell if these visas continue to be issued.<sup>634</sup>

## **5.2f ANALYSIS**

Cyprus is taking the issue of human trafficking seriously by ratifying every international human trafficking law. Furthermore, Cyprus enacted comprehensive direct human trafficking legislation in 2007, which replaced an outdated law that did not comply with international standards, which indicates that it is committed to upholding its international legal obligations. Not only does the 2007 law criminalise human trafficking, it also contains human rights provisions, although they are contingent upon the trafficked person's cooperation with law enforcement authorities. This is significant because the 2005 Council of Europe Convention – which contains the strongest human rights provisions – requires that States implement laws *or* policies to provide assistance and protection for trafficked persons. Including human rights provisions in legislation is noteworthy because unlike governmental policies, which can be altered relatively easily, it is far more difficult to change a law once it is in place. In other words, policies may come and go in accordance with a State's financial situation, but it takes more time and effort to amend existing legislation, which therefore make the human rights provisions more resilient and permanent.

### **Criminal**

The fact that the Ministry of the Interior is responsible for anti-trafficking efforts in Cyprus indicates that the State regards human trafficking as an issue of to be dealt with through policing, immigration and security measures. The number of prosecutions and convictions provided by the Cypriot Police contain figures not only for human trafficking, but also related offences – primarily related to prostitution. A law criminalising human trafficking has been in existence in Cyprus since 2000, and therefore it is odd that the classification of crimes did not start at that time, making it difficult to assess the extent of human trafficking.

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<sup>631</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>632</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>633</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

<sup>634</sup> Anti-Human Trafficking Cyprus, E-mail correspondence, 6 February 2009.

The State may be reluctant to use human trafficking laws in prosecutions, so as not to reflect poorly upon the State, and essentially admit to a trafficking problem. By citing other crimes, such as procuring prostitution or operating a brothel, those responsible for the crimes can still be tried, but without the State admitting to human trafficking within its borders. This could be another reason why States such as Cyprus amalgamate statistics for prosecutions and convictions made under human trafficking laws with those for related offences.

### **Human rights**

While it does appear that some of the human rights provisions in the legislation are being put into practice, it is problematic that the human rights provision in Cyprus are contingent upon whether trafficked persons participate in the investigation of their trafficker(s). This indicates that the human rights provisions are only included as a means to facilitate the criminal law provisions. However, Cyprus has at least taken a first step by providing residence facilities for trafficked persons with other social services. It is unclear whether the number of trafficked persons assisted is proportional with the number of trafficked persons in Cyprus, but the existence of the government-run shelters are at least one sign that the provisions in the legislation are being implemented.

### **Conclusion**

Despite Cyprus' willingness to adopt international and national human trafficking law, the fact that the "artiste" visa still exists demonstrates the contradiction between their stated trafficking policy, and actual practice. The "artiste" visa constitutes neither direct nor indirect human trafficking law. As part of Cyprus' immigration policy, not only does it not attempt to prevent human trafficking, but actually facilitates it by permitting cabaret owners to obtain visas for their workers, which may include trafficked persons. As the Commissioner and NGOs have stated, this is counterproductive for a State that has purposefully implemented comprehensive laws criminalising human trafficking on both a national and international level.

The major issue in Cyprus is whether there is a discrepancy between the laws in place, and whether these laws are being put into practice, both in terms of enforcement of

the criminal law and providing the human rights provisions. The fact that Cyprus has included human rights provisions in the direct human trafficking law reaffirms its commitment to providing rights to trafficked persons in theory. It is, however, troubling that the human rights provisions included in the law are conditional upon the trafficked person's cooperation with law enforcement authorities. This is in breach of the 2005 Council of Europe Convention, which requires that States provide legislative or other measures to ensure that the provision of human rights to trafficked persons is not conditional upon their willingness to act as a witness.<sup>635</sup>

Although the legal provisions are in place, suggesting that Cyprus has adopted the criminal model with elements of the human rights model, two pieces of evidence must be taken into consideration. First, comments from NGOs paint a different picture of the implementation of the human trafficking laws in Cyprus, suggesting that many of the provisions exist in name only. Secondly, the existence of the "artiste" visa contradicts Cyprus' attempt to implement both a criminal and human rights model by facilitating trafficking into the State.

## **5.3 FRANCE**

### **5.3a INTRODUCTION**

France, with a population of 64 million<sup>636</sup> is a destination State for people trafficked for sexual exploitation and forced labour.<sup>637</sup> Most of the women trafficked for sexual exploitation come from Romania, Bulgaria, Nigeria, Cameroon and other nations in Eastern Europe and Africa, with smaller numbers from South America and Asia.<sup>638</sup> Most of the men trafficked to France for sexual exploitation come from Bulgaria and Romania.

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<sup>635</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(6).

<sup>636</sup> July 2008 estimate. Central Intelligence Agency. "The World Factbook." <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html>. Last accessed 12 March 2009.

<sup>637</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 119.

<sup>638</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 119.

In 2004, the Central Office for the Suppression of Trafficking in Human Beings (OCRETH) identified 1,000 trafficked women, 75% of whom were foreign.<sup>639</sup> That percentage varies slightly with 78.8% in 2003 and 70% of 2006 of identified trafficked women not being French citizens.<sup>640</sup> OCRETH estimates that 50% of prostitutes in France are victims of pimping, many of whom are also involved in human trafficking.<sup>641</sup>

### **5.3b LEGISLATION AND GOVERNMENT**

#### **International human trafficking law**

France has ratified all international human trafficking law, with the exception of the 1921 Convention, and the 1949 Convention which it signed but did not ratify.

#### **Direct human trafficking legislation**

The Internal Security Act of 18 March 2003 criminalised human trafficking by amending the French Penal Code.<sup>642</sup> The French Penal Code criminalises human trafficking for the purposes of sexual exploitation, exploitation for begging, forced labour and forced criminal activities.<sup>643</sup> The definition in the Criminal Code is now consistent with the definition found in the 2000 Palermo Protocol and the 2005 Council of Europe Convention.<sup>644</sup>

#### **Indirect human trafficking legislation**

Additional parts of France's Penal Code deal with crimes indirectly related to human trafficking, including procuring prostitution and assimilated offences;<sup>645</sup> prostitution

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<sup>639</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>640</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>641</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>642</sup> Loi pour la sécurité intérieure, 18 March 2003.

<sup>643</sup> Penal Code, Art 225-4-1 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>644</sup> Penal Code, Art 225-4-1 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>645</sup> Penal Code, Art 225-5 to 225-10-1 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

of children;<sup>646</sup> exploitation of begging;<sup>647</sup> and working and living conditions which infringe human dignity.<sup>648</sup>

## **Ministry**

The Ministry of the Interior is in charge of anti-trafficking efforts in France.

## **5.3c CRIMINAL LAW**

### **Criminal law provisions**

Under the French Penal Code, committing any human trafficking-related offences<sup>649</sup> and attempting to commit the act<sup>650</sup> are both criminalised. The Penal Code also criminalises those who live off the earnings of a trafficked person or someone involved in the trafficking process.<sup>651</sup>

### **Length and nature of sentences**

Those convicted of human trafficking in France are liable to seven years' imprisonment and a fine of €150,000.<sup>652</sup> The penalties are increased to ten years' imprisonment and a fine of €1,500,000 for aggravating factors, which include the acts of trafficking involving: a child; a particularly vulnerable person; two or more people; a person outside French territory or upon his or her arrival in France; when a telephone or the Internet was used in the trafficking process; when the trafficked person is put at immediate risk of death or injury; with the use of threats, constraints, violence or fraudulent behaviour against the trafficked person; a legitimate, natural, or adoptive ascendant of the trafficked person; or by a person whose post requires him or her to participate in anti-trafficking efforts or to uphold public order.<sup>653</sup> The penalties

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<sup>646</sup> Penal Code, Art 225-12-1 to 225-12-4 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>647</sup> Penal Code, Art 225-21-5 to 225-12-7 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>648</sup> Penal Code, Art 225-13 to 225-15-1 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>649</sup> Penal Code, Art 225-4-7 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>650</sup> Human trafficking for the purposes of sexual exploitation, exploitation for begging, forced labour, and forced criminal activities.

<sup>651</sup> Penal Code, Art 225-4-8 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>652</sup> Penal Code, Art 225-4-1 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>653</sup> Penal Code, Art 225-4-2 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

are increased to 20 years' imprisonment and a fine of €3,000,000 when the act of trafficking is committed by an organised gang;<sup>654</sup> and to life imprisonment and a fine of €4,500,000 when human trafficking involves torture.<sup>655</sup> Those who live off the earnings of a trafficked person or someone involved in the trafficking process receive seven years' imprisonment and a fine of €750,000.<sup>656</sup>

A person is exempted from punishment if he or she attempts to commit an act of human trafficking, but in alerting judicial or administrative authorities, has prevented the offence from being carried out and/or has identified the perpetrators or accomplices.<sup>657</sup> If a person directly involved in the trafficking process enables the offence to be stopped and/or identifies other people involved, his or her sentence will be reduced by half.<sup>658</sup>

### **Prosecutions and convictions**

**Table 4**<sup>659</sup>

<b>Year</b>	<b>Number of human trafficking court proceedings</b>
2006	745
2007	744
2008	555

<sup>654</sup> Penal Code, Art 225-4-3 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>655</sup> Penal Code, Art 225-4-4 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>656</sup> Penal Code, Art 225-4-8 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>657</sup> Penal Code, Art 225-4-9 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>658</sup> In the case of those who would have received life imprisonment, the sentence would be reduced to 20 years' imprisonment. Penal Code, Art 225-4-9 inserted by Act 2003-239 of 18 March 2003, Art 23, Official Journal of 19 March 2003.

<sup>659</sup> Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

**Table 5**<sup>660</sup>

<b>CONVICTIONS</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
Begging	n/a	15	15	7	5	17
Non-existent or inadequate remuneration of vulnerable people	n/a	13	14	28	32	25
Submission of vulnerable people to working conditions and unsuitable accommodation	n/a	48	71	61	45	54
Aiding the entry/illegal stay of a foreigner and subjecting him/her to conditions incompatible with human dignity	n/a	0	0	1	16	14
Pimping	675	1083	980	998	999	1236
<b>Total</b>	<b>675</b>	<b>1159</b>	<b>1080</b>	<b>1095</b>	<b>1097</b>	<b>1346</b>

**Table 6**<sup>661</sup>

<b>CONVICTIONS</b>	<b>2006</b>	<b>2007</b>
Single offence of trafficking in human beings	0	1
Trafficking in human beings committed against several persons	1	8
Trafficking in human beings committed against a person upon arrival in France	0	5
Trafficking in human beings committed against a person outside of France	1	0
Trafficking in human beings committed with threats, coercion, violence	0	5
<b>Total</b>	<b>2</b>	<b>19</b>

France's first conviction of human trafficking came in 2006.<sup>662</sup> Of the 19 convictions made in 2007, four were for offences as the principal trafficker, while both the convictions in 2006 were made against people aiding or abetting the trafficking process.<sup>663</sup>

<sup>660</sup> Philippe, Annabelle. Magistrat, Bureau de la lutte contre la criminalité organisée, le terrorisme et le blanchiment, Direction des Affaires Criminelles et des Grâces, Ministère de la Justice. E-mail correspondence. 20 April 2009.

<sup>661</sup> Philippe, Annabelle. Magistrat, Bureau de la lutte contre la criminalité organisée, le terrorisme et le blanchiment, Direction des Affaires Criminelles et des Grâces, Ministère de la Justice. E-mail correspondence. 20 April 2009.

<sup>662</sup> Philippe, Annabelle. Magistrat, Bureau de la lutte contre la criminalité organisée, le terrorisme et le blanchiment, Direction des Affaires Criminelles et des Grâces, Ministère de la Justice. E-mail correspondence. 20 April 2009.

<sup>663</sup> Philippe, Annabelle. Magistrat, Bureau de la lutte contre la criminalité organisée, le terrorisme et le blanchiment, Direction des Affaires Criminelles et des Grâces, Ministère de la Justice. E-mail correspondence. 20 April 2009.

The police and magistrates still do not regularly use the offence of human trafficking, but rather opt for the offence of pimping.<sup>664</sup> Pimping is used because it has the same penalties as human trafficking under the Penal Code, and is easier to prosecute because it only requires providing proof of the sexual exploitation or prostitution.<sup>665</sup> The Ministry of Justice stated that the number of human trafficking convictions may be low because the offence was only incorporated into the Penal Code in 2004, and many indirect human trafficking offences exist, which are also used to convict traffickers.<sup>666</sup>

Similarly, forced labour is dealt with in France primarily in terms of illegal work, without cooperation with the agencies and departments that deal with human trafficking.<sup>667</sup>

### **5.3d HUMAN RIGHTS**

#### **Human rights provisions**

Assistance and protection for prostitutes has been in place in France since 1960, and has been evolving steadily.<sup>668</sup> A 1960 law provided for services to prevent prostitution, to seek and provide assistance for persons in danger of prostitution, and to provide free medical care and other assistance for prostitutes.<sup>669</sup> In 1970, the assistance was increased to include access to shelter and social reintegration for prostitutes and people in danger of prostitution.<sup>670</sup> The Family Code, 2000 stipulates that places in Accommodation and Reintegration Centres must be allocated to

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<sup>664</sup> Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>665</sup> Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>666</sup> Philippe, Annabelle. Magistrat, Bureau de la lutte contre la criminalité organisée, le terrorisme et le blanchiment, Direction des Affaires Criminelles et des Grâces, Ministère de la Justice. E-mail correspondence. 20 April 2009.

<sup>667</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>668</sup> Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>669</sup> Ordonnance n° 60-1246 du 25 novembre 1960 et décret n° 60-1248 du 25 novembre 1960; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>670</sup> Décret n° 76-256 du 15 juin 1976; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.



trafficked persons in secure conditions.<sup>671</sup> The Internal Security Act, 2003 stipulates that identified trafficked persons must receive protection and social assistance, coordinated by the government.<sup>672</sup> This includes providing shelter and social integration to trafficked persons in secure conditions.<sup>673</sup> A 2006 law provides trafficked persons with a temporary residence permit and funding of €306 a month for up to a year.<sup>674</sup> The most recent law, from 2007, provides trafficked persons with police protection during criminal proceedings and measures for the protection of rights, such as the right to reparation for injury and referral to the Committee of Compensation to Crime Victims.<sup>675</sup>

### **State assistance**

Local initiatives in major cities such as Paris, Lyon, Bordeaux and Nice have been developed which provide emergency shelter for trafficked persons.<sup>676</sup> These facilities include unmarked apartments, foster houses, shelters for women and hotel suites, as well as comprehensive social services.<sup>677</sup>

There is also coordination of safe housing for trafficked persons on a national level.<sup>678</sup> This programme consists of a network of housing and social services for trafficked persons and prostitutes.<sup>679</sup> The housing is located in various parts of France, which

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<sup>671</sup> Code de la famille et de l'aide sociale, 2000, Art 173; 187-1.

<sup>672</sup> Loi pour la sécurité intérieure, Art 42, 18 March 2003.

<sup>673</sup> Loi pour la sécurité intérieure, 18 March 2003; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>674</sup> Loi n° 2006-911 du 25 juillet 2006 relative à l'immigration et à l'intégration; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>675</sup> Décret n° 2007-1352 du 13 septembre 2007; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>676</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>677</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>678</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>679</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

allows for isolation and privacy.<sup>680</sup> Approximately 300 trafficked women have availed of the services from their implementation until 2007.<sup>681</sup>

Trafficked persons who wish to return to their origin State, regardless of their nationality, may avail of the return and reintegration programme implemented by the Agence Nationale de l'Accueil des Etrangers et des Migrations.<sup>682</sup>

### **State funding**

The Ministry for Employment and Social Cohesion financed a national plan for the accommodation and protection of trafficked persons.<sup>683</sup> The State funds local initiatives providing emergency shelter for trafficked persons, which is co-financed by local governments.<sup>684</sup>

### **Permission to remain in the State**

A 2006 law provides trafficked persons with a temporary residence permit for a minimum of six months.<sup>685</sup> A 2007 law introduced a 30-day reflection period during which the trafficked person may decide whether to cooperate with judicial proceedings.<sup>686</sup> If the trafficked person decides to cooperate, they will be issued with a temporary residence permit for the duration of the criminal proceedings. In the event of conviction of the trafficker, the trafficked person may be granted a ten-year

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<sup>680</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>681</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>682</sup> The Agence Nationale de l'Accueil des Etrangers et des Migrations is the principal public agency responsible for receiving legal migrants to France, for administrative, health and welfare actions concerning changes in foreign population and for the employment of French citizens internationally. See [http://www.ambafrance-pk.org/france\\_pakistan/spip.php?article624](http://www.ambafrance-pk.org/france_pakistan/spip.php?article624). Last accessed 13 May 2009. Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>683</sup> Caritas. "National Law – France." [www.coatnet.org/en/21211.asp](http://www.coatnet.org/en/21211.asp). Last accessed 3 February 2009.

<sup>684</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>685</sup> Loi n° 2006-911 du 25 juillet 2006 relative à l'immigration et à l'intégration; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>686</sup> Décret n° 2007-1352 du 13 septembre 2007; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

residence card.<sup>687</sup> A total of 180 trafficked persons obtained permits under this scheme in 2004.<sup>688</sup> Provisional residence permits are not systematically renewed.<sup>689</sup>

In addition, there are bilateral agreements between France and Bulgaria and Romania, to facilitate the voluntary repatriation of trafficked persons.<sup>690</sup>

Under previous legislation, between March 2003 and 2004, 352 residence permits were issued to trafficked persons who agreed to cooperate with law enforcement officials.<sup>691</sup> In Paris in 2005, 306 temporary residence permits were issued, including 191 renewals of previously-issued permits.<sup>692</sup>

### **5.3e VIEWS OF IGOs AND NGOs**

The Commissioner for Human Rights of the Council of Europe, Alvaro Gil-Robles noted in a 2006 report that some aspects of human trafficking are not sufficiently addressed by French law, as slavery and servitude are not rendered illegal as such in French criminal law.<sup>693</sup> In *Silidin v France*,<sup>694</sup> the European Court of Human Rights found that France was in breach of its international obligations by failing to prohibit slavery and servitude in French law. Since then some 30 cases, also dealing with issues of slavery and servitude, are brought to the attention of NGOs each month.<sup>695</sup> The European Court of Human Rights and the Commissioner reminded France of its

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<sup>687</sup> Décret n° 2007-1352 du 13 septembre 2007; Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

<sup>688</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>689</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>690</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, Appendix.

<sup>691</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>692</sup> Ministère de l'emploi, de la cohésion sociale et du logement et Ministère de la santé et des solidarités. "Direction générale de l'action sociale Sous-direction des politiques d'insertion et de lutte contre les exclusions." 3 May 2007.

<sup>693</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>694</sup> European Court of Human Rights, *Silidin v France*, Application No 73316/01 of 26 July 2005.

<sup>695</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

obligation to strengthen its legislation, particularly the Internal Security Act, which aims to criminalise slavery and forced labour.<sup>696</sup>

The Organisation for Security and Cooperation in Europe (OSCE) Special Representative and Co-ordinator for Combating Trafficking in Human Beings stated in its 2008 report that France has a National Co-ordinating Mechanism for responding to human trafficking in place that addresses prosecution, prevention and protection.<sup>697</sup> In practice, however, these policies are generally only applied in the context of prostitution.<sup>698</sup> In fact, France deals with human trafficking almost exclusively in terms of prostitution.<sup>699</sup> The report also noted that France did not have a National Action Plan for combating human trafficking.<sup>700</sup>

The Commissioner also indicated that there is a lack of harmonisation of trafficking legislation at a European level, which creates difficulties for France with some of its border States.<sup>701</sup> The Commissioner also stated that the protection provided to guarantee the safety of trafficked persons is inadequate in many respects and that assistance with reintegration is poor and in some regions nonexistent.<sup>702</sup> Both the NGO Caritas and the Council of Europe Commissioner mentioned that the assistance provided to trafficked persons is conditional upon whether they cooperate with authorities by providing a testimony against those involved in their trafficking process.<sup>703</sup>

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<sup>696</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>697</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 37.

<sup>698</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 37.

<sup>699</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 51.

<sup>700</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 45.

<sup>701</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>702</sup> Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

<sup>703</sup> Caritas, "National Law – France." [www.coatnet.org/en/21211.asp](http://www.coatnet.org/en/21211.asp). Last accessed 3 February 2009; Gil-Robles, Alvaro. "Report by the Commissioner for Human Rights on the Effective Respect for Human Rights in France following his visit from 5 to 21 September 2005." 15 February 2006, p 93.

### **5.3f ANALYSIS**

France has ratified all of the recent international human trafficking law, indicating that it takes the issue seriously. In addition, France has adopted both criminal law on human trafficking, found in the Penal Code, and laws containing human rights provisions for trafficked persons.

#### **Criminal**

The fact that the Ministry of the Interior is responsible for anti-trafficking efforts in France indicates that the State regards human trafficking as an issue of to be dealt with through policing, immigration and security measures. France provides various punishments for different levels of human trafficking, depending on aggravating factors.

It is problematic, as the Council of Europe Commissioner highlighted, that France has not yet criminalised slavery and servitude. This omission in French law undermines all existing human trafficking law, as the two issues are intrinsically linked.

Similarly, the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings noted that France deals with human trafficking almost strictly in terms of prostitution, and that their National Co-ordinating Mechanism to deal with prosecution, prevention and protection is only applied in the context of trafficking for sexual exploitation.

France's human trafficking laws, like those in other States, are relatively new and therefore States utilise them less frequently than indirect human trafficking offences. The offence of pimping is used in many human trafficking cases as it is much easier to prove. The relatively low number of human trafficking prosecutions is a direct result of the courts using primarily indirect offences to convict traffickers. However, the jump from only two convictions in 2006 to 19 in 2007 conveys increasing use of the law.

#### **Human rights**

France has laws dating back nearly 50 years that provide assistance and protection to prostitutes or persons in danger of prostitution, regardless of whether they have been

trafficked into France. Although the trafficking-specific legislation did not exist until 2000, because France tends to deal with human trafficking through the criminalisation and treatment of various aspects of prostitution, the provisions in place have had the potential of assisting many trafficked women. Furthermore, the assistance is offered to prostitutes or persons in danger of prostitution in general – there is no stipulation that they must cooperate with authorities to receive these services. On the other hand, these provisions are only available to those trafficked for sexual exploitation, excluding those trafficked for forced labour.

While the residence permit is tied to whether trafficked persons participate in the investigation of their traffickers, the assistance and provisions themselves, at least initially, are not. France also has the unique system of awarding trafficked persons with a 10-year residence permit in the event that their trafficker(s) is/are convicted following their participation in the investigation.

Overall, France provides relatively strong human rights provisions, which are included in both laws and policy. While it is positive that those involved in or who could potentially become involved in prostitution receive State assistance without the condition of testifying, this does exclude those trafficked into France for forced labour.

## **Conclusion**

While France has taken several steps to criminalise human trafficking for sexual exploitation and provide assistance and protection to those involved in prostitution, it is considerably weaker in both criminal and human rights provisions relating to trafficking for forced labour. The large number of convictions for pimping, as opposed to the relatively small number of human trafficking convictions suggests that many traffickers are convicted of pimping as a result of the difficulty in obtaining evidence in human trafficking cases, coupled with the newness of the direct human trafficking law. The fact that slavery and servitude is not outlawed in French law, coupled with fewer human rights provisions for those trafficked for forced labour enshrined in legislation indicates that France does not take the issue of forced labour as seriously as sexual exploitation.

## **5.4 IRELAND**

### **5.4a INTRODUCTION**

Ireland, with a population of 4.2 million<sup>704</sup> is a destination State for people trafficked for sexual exploitation and forced labour.<sup>705</sup> Women have been trafficked into Ireland for the purpose of sexual exploitation from Eastern Europe, Nigeria and other parts of Africa, with small numbers from South America and Asia.<sup>706</sup> Men and women have been trafficked into Ireland for the purpose of forced labour from Bangladesh, Pakistan, Egypt and the Philippines, with more potentially coming from Eastern Europe, South America and other parts of Asia and Africa.<sup>707</sup> Most people trafficked for forced labour are found in domestic labour, and restaurant and agricultural work.<sup>708</sup>

### **5.4b LEGISLATION AND GOVERNMENT**

#### **International human trafficking treaties**

Ireland has signed and ratified the 1904 Agreement, and 1910, 1921 and 1933 Conventions. It has signed, but not yet ratified the 1949 Convention, the 2000 UN Convention, the 2000 Palermo Protocol, and the 2005 Council of Europe Convention.

#### **Direct human trafficking legislation**

The Child Trafficking and Pornography Act, 1998 criminalises the trafficking of children, under the age of 17.<sup>709</sup>

The Illegal Immigrants (Trafficking) Act, 2000 criminalises human trafficking, and defines the offence as organising or knowingly facilitating the entry into the State of a person whom is known or can be believed with reasonable cause that they are an illegal immigrant or a person who intends to seek asylum.<sup>710</sup>

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<sup>704</sup> July 2008 estimate. Central Intelligence Agency. "The World Factbook." <https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html>. Last accessed 12 March 2009.

<sup>705</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 144.

<sup>706</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 144.

<sup>707</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 144.

<sup>708</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 144.

<sup>709</sup> Child Trafficking and Pornography Act, 1998, S 3.

<sup>710</sup> Illegal Immigrants (Trafficking) Act, 2000, S 2.

The most comprehensive direct human trafficking law to date in Ireland is the Criminal Law (Human Trafficking) Act, 2008. The definition of human trafficking is consistent with the definitions set out in the 2000 Palermo Protocol and the 2005 Council of Europe Convention.

### **Indirect human trafficking legislation**

Ireland also indirectly criminalises various acts of or relating to human trafficking. The Immigration Act, 2004 criminalises offences related to the immigration side of human trafficking, including the presence in the State of non-nationals,<sup>711</sup> failing to register,<sup>712</sup> and failing to produce documents.<sup>713</sup> In addition, the Employment Permits Acts, 2003-2006 set out the requirements for non-nationals working legally in Ireland.<sup>714</sup>

The Non-Fatal Offences Against the Person Act, 1997 criminalises other acts that may take place during the trafficking process, such as assault,<sup>715</sup> coercion,<sup>716</sup> false imprisonment<sup>717</sup> and abduction of children.<sup>718</sup> The Criminal Law (Sexual Offences) Act, 1993 criminalises soliciting or importuning for purposes of prostitution,<sup>719</sup> organisation of prostitution,<sup>720</sup> living on earnings of prostitution<sup>721</sup> and brothel keeping.<sup>722</sup>

### **Ministry**

The Department of Justice, Equality and Law Reform is responsible for anti-trafficking efforts in Ireland. The Department established the Anti-Human Trafficking

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<sup>711</sup> Immigration Act, 2004, S 5.

<sup>712</sup> Immigration Act, 2004, S 9.

<sup>713</sup> Immigration Act, 2004, S 12.

<sup>714</sup> Employment Permits Acts, 2003-2006.

<sup>715</sup> Non-Fatal Offences Against the Person Act, 1997, S 2.

<sup>716</sup> Non-Fatal Offences Against the Person Act, 1997, S 9.

<sup>717</sup> Non-Fatal Offences Against the Person Act, 1997, S 15.

<sup>718</sup> Non-Fatal Offences Against the Person Act, 1997, S 16 and 17.

<sup>719</sup> Criminal Law (Sexual Offences) Act, 1993, S 7.

<sup>720</sup> Criminal Law (Sexual Offences) Act, 1993, S 9.

<sup>721</sup> Criminal Law (Sexual Offences) Act, 1993, S 10.

<sup>722</sup> Criminal Law (Sexual Offences) Act, 1993, S 11.



Unit was established in November 2008 to ensure that the Government's response to human trafficking is "coordinated, comprehensive and holistic."<sup>723</sup>

## **5.4c CRIMINAL LAW**

### **Criminal law provisions**

The Child Trafficking and Pornography Act, 1998 criminalises trafficking children for the purpose of sexual exploitation.<sup>724</sup>

The Criminal Law (Human Trafficking) Act, 2008 criminalises human trafficking of children<sup>725</sup> and adults,<sup>726</sup> in addition to soliciting or importuning trafficked persons for the purposes of prostitution.<sup>727</sup> It also criminalises publishing or broadcasting an image or any other representation or physical likeness of a trafficked person, in order to protect their anonymity.<sup>728</sup>

### **Length and nature of sentences**

Those involved in the trafficking process and guilty of conviction on indictment of human trafficking offences in Ireland are liable to imprisonment for life or a lesser term, and a fine, at the discretion of the court.<sup>729</sup> The law provides for the same punishment for all trafficking offences or attempts at trafficking offences related to children and those of full age.<sup>730</sup> Those guilty of an offence on a summary conviction of soliciting or importuning a trafficked person for the purposes of prostitution are liable to a fine not exceeding €5,000 or up to 12 months' imprisonment.<sup>731</sup>

### **Prosecutions**

Prior to the Criminal Law (Human Trafficking) Act, An Garda Síochána utilised the Illegal Immigrants (Trafficking) Act, 2000 in cases of suspected human trafficking.<sup>732</sup>

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<sup>723</sup> Department of Justice, Equality and Law Reform, <http://www.blueblindfold.gov.ie/website/bbf/bbfweb.nsf/page/whatisbeingdone-administrativearrangements-en>. Last accessed 25 August 2009.

<sup>724</sup> Child Trafficking and Pornography Act, 1998, S 3.

<sup>725</sup> Criminal Law (Human Trafficking) Act, 2008, S 2.

<sup>726</sup> Criminal Law (Human Trafficking) Act, 2008, S 4.

<sup>727</sup> Criminal Law (Human Trafficking) Act, 2008, S 5.

<sup>728</sup> Criminal Law (Human Trafficking) Act, 2008, S 11.

<sup>729</sup> Criminal Law (Human Trafficking) Act, 2008.

<sup>730</sup> Criminal Law (Human Trafficking) Act 2008, S 2(5), S 3 and S 4(7).

<sup>731</sup> Criminal Law (Human Trafficking) Act, 2008, S 5(3)(a).

<sup>732</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

The statistics for prosecutions and convictions under this law include figures for both human trafficking and smuggling, as they are not differentiated since the law includes both criminal activities.<sup>733</sup> Since September 2000, more than 100 people have been arrested and detained in respect of alleged breaches of the Illegal Immigrants (Trafficking) Act, 2000 which relates to the facilitation and organisation of the illegal entry of persons into the State for gain.<sup>734</sup>

No prosecutions or convictions have arisen under the Criminal Law (Human Trafficking) Act<sup>735</sup> in its first six months in existence, which is not surprising considering it has been in existence for a short period of time.<sup>736</sup> Gardaí are, however, currently investigating several cases pertaining to activity that occurred prior to the passage of the Criminal Law (Human Trafficking) Act, 2008 and also may reflect other issues and crimes besides human trafficking.<sup>737</sup>

As of the end of 2008,<sup>738</sup> one person had been charged by the Garda National Immigration Bureau (GNIB) of four counts of attempting to incite another to commit an offence contrary to the Child Trafficking and Pornography Act, 1998.<sup>739</sup>

### **Convictions**

As of the end of 2008,<sup>740</sup> there had been no convictions made under the Criminal Law (Human Trafficking) Act, 2008.<sup>741</sup> There have been four persons convicted in respect of 22 breaches of facilitating and organising the illegal entry of persons into the State for gain under the Illegal Immigrants (Trafficking) Act, 2000 and one person was currently awaiting trial as of December 2008.<sup>742</sup>

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<sup>733</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>734</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>735</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>736</sup> From 7 June 2008 to 8 December 2008.

<sup>737</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>738</sup> 8 December 2008.

<sup>739</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>740</sup> 8 December 2008.

<sup>741</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>742</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

Between the establishment of the GNIB in 2000, and November 2005, 85 trafficking-related investigations were undertaken, many of which resulted in prosecutions.<sup>743</sup>

However, only a relatively small number of the prosecutions have led to convictions, which may be a result of the difficulty in obtaining proof of trafficking, and that some of the allegations did not stand up in court.<sup>744</sup>

#### **5.4d HUMAN RIGHTS**

##### **Human rights provisions**

There are no human rights provisions in Irish human trafficking law.

##### **State assistance**

According to the Department of Justice, Equality and Law Reform, arrangements are being put in place to provide the following services for trafficked persons in terms of both their short and long-term needs: accommodation, material assistance, medical assistance, counselling, legal advice, education, access to the labour market and residence rights.<sup>745</sup>

Currently, the Irish government refers trafficked persons on a case-by-case basis to NGOs which provide food, shelter, health care and legal assistance.<sup>746</sup> The government provides funding to the IOM to facilitate the return and reintegration of trafficked persons.<sup>747</sup> In addition, the government also provides funding to an Irish NGO called Ruhama that works with trafficked persons as a part of its wider mission of assisting women involved in commercial sexual exploitation.<sup>748</sup> In 2008, the Department of Justice, Equality and Law Reform provided Ruhama with funding to produce a short film to raise awareness about trafficking for the purpose of sexual exploitation.<sup>749</sup> Furthermore, the government and semi-State sectors also provide funding to the Migrant Rights Centre Ireland (MRCI) to provide assistance to migrant

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<sup>743</sup> EU AGIS. "Improvement of Best Practice in the Prevention, Detection & Investigation of Trafficking of Human Beings." 17-18 November 2005, p 8.

<sup>744</sup> EU AGIS. "Improvement of Best Practice in the Prevention, Detection & Investigation of Trafficking of Human Beings." 17-18 November 2005, p 8

<sup>745</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>746</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>747</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>748</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>749</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

workers and those who have been trafficked for labour exploitation.<sup>750</sup> The funding for the MCRI is not trafficking-specific and is also used to assist non-trafficked migrant workers.<sup>751</sup>

In addition, any children who are found to be trafficked are placed in the care of the Health Service Executive (HSE).<sup>752</sup> The HSE is responsible for providing support to the child, as well as providing for his or her immediate and ongoing needs through appropriate placement and links with health, psychological, social and educational services.<sup>753</sup>

### **State funding**

The aforementioned services will be provided by the State through its various agencies and funded by the government.<sup>754</sup>

### **Permission to remain in the State**

A person who has been recognised<sup>755</sup> as a trafficked person is lawfully permitted to remain in Ireland for a “recovery and reflection period” of 60 days<sup>756</sup> in order to allow the person time to recover, to escape the influence of the alleged perpetrators of trafficking, and to make an informed decision as to whether to assist the Gardaí or other authorities in relation to the investigation.<sup>757</sup> A person’s recovery and reflection period may be terminated if he or she voluntarily renews contact with the alleged perpetrators of trafficking; if it is in the interest of national security or public policy to do so; or victim status is being claimed improperly.<sup>758</sup>

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<sup>750</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>751</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>752</sup> Department of Justice, Equality and Law Reform, 15 December 2008; See Health Service Executive, [www.hse.ie](http://www.hse.ie). Last accessed 11 May 2009.

<sup>753</sup> Department of Justice, Equality and Law Reform, 15 December 2008; See Health Service Executive, [www.hse.ie](http://www.hse.ie). Last accessed 11 May 2009.

<sup>754</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

<sup>755</sup> By a member of the Garda Síochána not below the rank of Superintendent in the Garda National Immigration Bureau.

<sup>756</sup> Department of Justice, Equality and Law Reform. “Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.” para 5. 13 November 2008.

<sup>757</sup> Department of Justice, Equality and Law Reform. “Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.” para 5. 13 November 2008.

<sup>758</sup> Department of Justice, Equality and Law Reform. “Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking.” para 8. 13 November 2008.

If a trafficked person has ceased all relations with the alleged perpetrators of trafficking and is required to remain in Ireland to assist with an investigation, the Minister will grant him or her a six-month temporary residence permit.<sup>759</sup> This permit may be granted prior to or following the recovery and reflection period, and may be renewed if the person's presence and assistance with the investigation is still required, and he or she has not re-established contact with the alleged perpetrators of trafficking.<sup>760</sup> However, a person's temporary residence permit may be revoked if he or she renews contact with the alleged perpetrators of trafficking; is no longer willing to assist with the investigation or prosecution of the trafficking; the allegation of trafficking is fraudulent or unfounded; the investigation or prosecution has been finalised or terminated, or the Minister is satisfied that it is in the interest of national security or public policy to do so.<sup>761</sup> The granting of a temporary residence permit does not create any right to long-term or permanent residence in Ireland.<sup>762</sup> If the trafficked person had a pre-existing residence permit prior to obtaining the temporary residence permit, he or she may, with the permission of the Minister for Justice, Equality and Law Reform, remain in Ireland until the end of his or her pre-existing permission.<sup>763</sup>

The Minister will make arrangements for the voluntary repatriation of a trafficked person at the end of, or prior to the expiry of his or her period of residence.<sup>764</sup> This assistance may also be arranged through the IOM.<sup>765</sup>

The Immigration, Residence and Protection Bill, 2008, if adopted and implemented, will grant suspected trafficked persons a 45 day recovery and reflection period to escape the influence of their traffickers and make an informed decision on whether or

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<sup>759</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 11. 13 November 2008.

<sup>760</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 12. 13 November 2008.

<sup>761</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 13. 13 November 2008.

<sup>762</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 15. 13 November 2008.

<sup>763</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 16. 13 November 2008.

<sup>764</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 17. 13 November 2008.

<sup>765</sup> Department of Justice, Equality and Law Reform. "Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking." para 17. 13 November 2008.

not to cooperate with Gardaí investigations.<sup>766</sup> The recovery and reflection period may be terminated if the trafficked person has re-established ties with his or her trafficker, if it is a threat to public security, or if the person has falsely claimed to have been trafficked.<sup>767</sup> The trafficked person may be granted a six-month residence permit if he or she has severed all ties to his or her trafficker(s), and is required to remain in the State for the purpose of the investigation of their trafficker(s).<sup>768</sup> The residence permit may be renewed as long as the aforementioned criteria are met.<sup>769</sup> A trafficked person's residence permit may be revoked if he or she re-establishes contact with his or her trafficker; no longer wishes to participate in Gardaí investigations; has made a fraudulent claim of being trafficked; the Gardaí investigation of his or her trafficker(s) has ended; or in the interest of public security.<sup>770</sup>

#### **5.4e VIEWS OF IGOs AND NGOs**

Both IGOs and NGOs note that a stronger focus on human rights is required when responding to trafficked persons in Ireland. Ruhama has “huge concerns” about Ireland's human trafficking laws and policies,<sup>771</sup> and believes that the Irish approach, policy and legislation as it is, is completely focused on the criminal investigation, while the basic human rights of the trafficked persons are not being respected.<sup>772</sup> The Commissioner for Human Rights of the Council of Europe stated in his report that while Ireland has signed the 2005 Council of Europe Convention, it has yet to ratify this victim-centred instrument.<sup>773</sup> He also noted that while the Criminal Law (Human Trafficking) Act, 2008 criminalised human trafficking, NGOs and the Children's Ombudsman had criticised it for lacking measures of support and assistance for trafficked persons when it was in bill form.<sup>774</sup> According to the Commissioner, children in the care of the State should be provided with information adapted to their

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<sup>766</sup> Immigration, Residence and Protection Bill, 2008, S 124(1), (3).

<sup>767</sup> Immigration, Residence and Protection Bill, 2008, S 124 (4)(b).

<sup>768</sup> Immigration, Residence and Protection Bill, 2008, S 124 (7).

<sup>769</sup> Immigration, Residence and Protection Bill, 2008, S 124 (8).

<sup>770</sup> Immigration, Residence and Protection Bill, 2008, S 124 (10).

<sup>771</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>772</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>773</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights on his visit to Ireland.” 30 April 2008, S 53.

<sup>774</sup> Hammarberg, Thomas. “Report by the Commissioner for Human Rights on his visit to Ireland.” 30 April 2008, S 53.

age regarding the dangers of human trafficking.<sup>775</sup> Finally, he indicated that the role that NGOs play in providing support and assistance for trafficked persons should be recognised and supported by the State.<sup>776</sup>

Between January 2007 and September 2008, 102 women were identified by 10 agencies as being trafficked.<sup>777</sup> The trafficked women were referred to organisations by NGOs (28), themselves (15), a friend/solicitor/member of the public (20), a governmental refugee service (15), hospitals/doctors/prisons/probation service (14), and the GNIB (5).<sup>778</sup> In 2007, Ruhama's Trafficking Unit provided services to 44 women.<sup>779</sup> Of those, 11 were referred to the NGO prior to 2007, and of the 33 referrals from 2007,<sup>780</sup> only two were from the Gardaí.<sup>781</sup> The remaining referrals came from refugee agencies, refugee hostels, hospitals, prisons and other organisations.<sup>782</sup> Ruhama refers more trafficked persons to the Gardaí than the Gardaí refer trafficked persons to Ruhama.<sup>783</sup>

According to Ruhama, there are currently no set criteria for identifying trafficked persons, and as a result there is no transparency.<sup>784</sup> Furthermore, once a decision has been made regarding the status of a possible trafficked person, it cannot be appealed.<sup>785</sup> The MRCI and Immigrant Council of Ireland (ICI) recommend that the identification of trafficked persons is not left solely up to the GNIB, but also incorporates the experiences of those who work firsthand with trafficked persons on a regular basis.<sup>786</sup>

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<sup>775</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights on his visit to Ireland." 30 April 2008, S 54.

<sup>776</sup> Hammarberg, Thomas. "Report by the Commissioner for Human Rights on his visit to Ireland." 30 April 2008, S 54.

<sup>777</sup> Immigrant Council of Ireland. "Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland." April 2009, p 55.

<sup>778</sup> Immigrant Council of Ireland. "Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland." April 2009, p 55.

<sup>779</sup> Ruhama. "Analysis of Ruhama's Trafficking Figures 2007." 30 June 2008, p 1.

<sup>780</sup> Ruhama. "Analysis of Ruhama's Trafficking Figures 2007." 30 June 2008, p 1.

<sup>781</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>782</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>783</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>784</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>785</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>786</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 11; Immigrant Council of Ireland. "Submission to the National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 7.

The MRCI recommends that Ireland establish a National Referral Mechanism to ensure that a human rights-based approach to human trafficking is taken, and to facilitate cross-sector collaboration.<sup>787</sup> Both the MRCI and the ICI recommend that a National Rapporteur's office should be established as a formal mechanism for ensuring ongoing monitoring of the government's efforts to combat trafficking in human beings and include the input of NGOs.<sup>788</sup> The MRCI also requests that the Irish government collaborates with NGOs and takes the MRCI's input into consideration as the organisations that deal with trafficked persons directly.<sup>789</sup>

Ruhama, the MRCI and the ICI recommend that human rights provisions are enshrined in legislation, rather than being left to administrative policies.<sup>790</sup> The organisations believe that the following assistance should be granted to trafficked persons: an immediate reflection period in Ireland, not dependent on participation in criminal proceedings; provision of a six-month temporary residence permit; access to interpreting services; access to appropriate and safe accommodation, financial and medical assistance; support in accessing legal redress; and access to employment and training opportunities.<sup>791</sup> Furthermore, NGOs that provide support to trafficked persons should be supported financially.<sup>792</sup>

Ruhama also finds it problematic that the Irish government's current approach is to place identified trafficked persons in refugee hostels.<sup>793</sup> The organisation believes that a refugee hostel is not a proper environment for recovery, and, in fact, may be used as

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<sup>787</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 6.

<sup>788</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 6; Immigrant Council of Ireland. "Submission to the National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 1.

<sup>789</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 9.

<sup>790</sup> Ruhama. "National Action Plan to Prevent and Combat Human Trafficking." 30 November 2007, p 10; Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 13; Immigrant Council of Ireland. "Submission to the National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 3.

<sup>791</sup> Immigrant Council of Ireland. "Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland." April 2009, p 133-134; Immigrant Council of Ireland. "Submission to the National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 4-5; Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 13; Ruhama. "National Action Plan to Prevent and Combat Human Trafficking." 30 November 2007, p 5.

<sup>792</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 13.

<sup>793</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.



a recruitment centre for human trafficking.<sup>794</sup> Ruhama contends that this also contributes to the continual conflation of human trafficking and the asylum process in Irish policies.<sup>795</sup>

Ruhama said that it is very difficult for trafficked persons to obtain the reflection and recovery period, and it is left up to the Gardaí to identify trafficked persons.<sup>796</sup> As of April 2009, only two women have been granted the reflection and recovery period.<sup>797</sup> This is problematic because trafficked persons may not be comfortable with law enforcement officials and may not be completely candid while providing them with information on their case.<sup>798</sup> Even when trafficked persons do cooperate with investigations, they may have to wait weeks to be granted the reflection period.<sup>799</sup>

In terms of funding, Ruhama believes that the same level of resources should be put into responding to human trafficking that is put into anti-immigration policing.<sup>800</sup> Similarly, the MRCI believes that the Irish government should focus on forced labour and the outcomes of trafficking, rather than on border controls and mechanisms by which people are trafficked.<sup>801</sup>

#### **5.4f ANALYSIS**

Ireland is not legally bound by the treaties' provisions as it has not yet ratified the 2000 Palermo Protocol or the 2005 Council of Europe Convention. However, a policy document from the Department of Justice, Equality and Law Reform indicated that the State has promised to ratify.<sup>802</sup>

#### **Criminal**

At this stage, Ireland has adopted more elements of the criminal model. It is clear that the primary aim of the Criminal Law (Human Trafficking) Act, 2008 is criminalising

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<sup>794</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>795</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>796</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>797</sup> Immigrant Council of Ireland. "Globalisation, Sex Trafficking and Prostitution: The Experiences of Migrant Women in Ireland." April 2009, p 134.

<sup>798</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>799</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>800</sup> Ruhama. Telephone interview with Gerardine Rowley. 19 March 2009.

<sup>801</sup> Migrant Rights Centre Ireland. "Submission to the Proposed National Action Plan to Prevent and Combat Human Trafficking." December 2007, p 7.

<sup>802</sup> Department of Justice, Equality and Law Reform, 15 December 2008.

human trafficking, with no reference to human rights. The criminal law itself does little more than criminalise the acts of trafficking and ensure that the anonymity of trafficked persons is protected.

Irish criminal law does not, however, fully comply with the provisions of the 2005 Council of Europe Convention. It does not list endangering the life of the victim, human trafficking committed by a public official in the performance of his/her duties, nor human trafficking within the framework of a criminal organisation as aggravating circumstances in any law. The 2005 Council of Europe Convention requires States to ensure that each of these offences are considered aggravating circumstances and are treated as such in the law.

The belief of the NGOs, particularly Ruhama, is that many trafficked persons are treated as criminals in Ireland, particularly for breaches of immigration law. Furthermore, the identification process is tied in with law enforcement, as it is carried out solely by members of An Garda Síochána, who the trafficked persons may be reluctant to trust. An EU AGIS paper states that the GNIB approach to human trafficking is based on the notion that prevention – in other words, immigration law – is more efficient than detection.<sup>803</sup>

### **Human rights**

Ireland's human rights provisions are part of a policy – not a law. A section of a bill which may enter into law – the Immigration, Residence and Protection Bill, 2008 – decreases the recovery and reflection period from 60 days to 45 days, and does not eliminate the requirement for trafficked persons to participate in the investigations of their trafficker(s). Therefore in this particular example, the proposed law provides less coverage than the current policy.

Furthermore, the Department of Justice, Equality and Law Reform stated that the arrangements for assistance for trafficked persons are still being put in order. Both the fact that the human rights provisions are not a part of established legislation – which is far more difficult to alter or cut than stated policies – as well as the fact that the

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<sup>803</sup> EU AGIS. “Improvement of Best Practice in the Prevention, Detection & Investigation of Trafficking of Human Beings.” 17-18 November 2005, p 12.

policy has not yet been enacted convey that Ireland is prioritising criminal law provisions, which are currently in place.

A much stronger emphasis on human rights and more substantial human rights provisions – either in the form of law or policy – are required in order to comply with the 2005 Council of Europe Convention. Currently, there are no human rights provisions for trafficked persons whatsoever in either of the laws that deal with trafficking in Ireland. Any of the human rights provisions mentioned above are from a policy document from the Department of Justice, Equality and Law Reform. This has become a major area of concern for NGOs.

### **Conclusion**

Regardless of whether States have signed or ratified international law on human trafficking, they can still be held to those accepted international standards for the purpose of analysis, even if they are not legally bound by their provisions. In Ireland's case, this translates to the need for more permanent and accessible human rights provisions. Despite the fact that the governmental policy suggests that arrangements for human rights provisions are being put in place, as it is merely policy rather than legislation, it is potentially easy to alter or eliminate altogether. As a result, it is clear that at this point in time, Ireland has adopted the criminal model of human trafficking laws and policies.

## **5.5 LUXEMBOURG**

### **5.5a INTRODUCTION**

Luxembourg, with a population of 486,000<sup>804</sup> is primarily a destination State for women trafficked for the purpose of sexual exploitation.<sup>805</sup> Most trafficked women come from Eastern Europe, although there are increasing numbers of women working in prostitution from Africa and Latin America who also may have been trafficked into Luxembourg.<sup>806</sup>

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<sup>804</sup> July 2008 estimate. Central Intelligence Agency. "The World Factbook." <https://www.cia.gov/library/publications/the-world-factbook/geos/lu.html>. Last accessed 12 March 2008.

<sup>805</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 167.

<sup>806</sup> United States Department of State, "Trafficking in Persons Report 2008," June 2008, p 167.

## **5.5b LEGISLATION AND GOVERNMENT**

### **International human trafficking law**

The 2000 UN Convention is the only international human trafficking law that Luxembourg has both signed and ratified. It did not sign any of the earliest four treaties, and has signed but not ratified the 1949 Convention, the 2000 Palermo Protocol, and the 2005 Council of Europe Convention.

### **Direct human trafficking legislation**

Human trafficking is criminalised in the Criminal Code.<sup>807</sup> The definition of human trafficking is consistent with the definitions set out in the 2000 Palermo Protocol and the 2005 Council of Europe Convention.<sup>808</sup>

### **Indirect human trafficking legislation**

Luxembourg also indirectly criminalises various acts of or relating to human trafficking. The Criminal Code criminalises inciting and facilitating the prostitution of a child<sup>809</sup> and exploiting a child for the purpose of prostitution or production of pornographic material.<sup>810</sup> It also criminalises owning or managing a brothel<sup>811</sup> and knowingly allowing all or part of an establishment to be used for prostitution.<sup>812</sup> Procuring prostitution is criminalised, including aiding and abetting the prostitution of others,<sup>813</sup> receiving financial compensation from another person engaging in prostitution;<sup>814</sup> employing, inciting or supporting another person for the purpose of prostitution;<sup>815</sup> acting as an intermediary between persons engaged in prostitution and those who exploit or pay them for their services;<sup>816</sup> and preventing inspection, assistance or rehabilitation work performed by relevant bodies on behalf of persons engaged in prostitution.<sup>817</sup>

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<sup>807</sup> Criminal Code, 1879-2008, Art 382(1).

<sup>808</sup> Criminal Code, 1879-2008, Art 382(1).

<sup>809</sup> Criminal Code, 1879-2008, Art 379(1).

<sup>810</sup> Criminal Code, 1879-2008, Art 379(2).

<sup>811</sup> Criminal Code, 1879-2008, Art 379bis(3).

<sup>812</sup> Criminal Code, 1879-2008, Art 379bis(4).

<sup>813</sup> Criminal Code, 1879-2008, Art 379bis(5)(a).

<sup>814</sup> Criminal Code, 1879-2008, Art 379bis(5)(b).

<sup>815</sup> Criminal Code, 1879-2008, Art 379bis(5)(c).

<sup>816</sup> Criminal Code, 1879-2008, Art 379bis(5)(d).

<sup>817</sup> Criminal Code, 1879-2008, Art 379bis(5)(e).

## **Ministry**

The Ministry of Justice and the Ministry for Equal Opportunities is in charge of anti-trafficking efforts in Luxembourg.

### **5.5c CRIMINAL LAW**

#### **Criminal law provisions**

The Criminal Code criminalises human trafficking for the purposes of prostitution, sexual assault,<sup>818</sup> enslavement,<sup>819</sup> organ removal<sup>820</sup> and committing a crime or offence against the person.<sup>821</sup> The Criminal Code specifically states that the consent of a trafficked person does not exonerate the offender or his or her accomplice from criminal responsibility.<sup>822</sup>

#### **Length and nature of sentences**

Those convicted of human trafficking receive three to five years' imprisonment and a fine of €10,000-50,000.<sup>823</sup> Attempting to commit human trafficking is punishable by one to three years' imprisonment and a fine of €5,000-10,000.<sup>824</sup> Punishment is also three to five years' imprisonment and a fine of €10,000-50,000 with aggravating offences such as: placing the trafficked person in danger with a deliberate intent or gross negligence;<sup>825</sup> abusing a person who is in a particularly vulnerable position because of his or her illegal immigration status, precarious social welfare status, pregnancy, illness, physical or mental disability;<sup>826</sup> using threats or force or other forms of restraint, fraud or deception, or kidnapping;<sup>827</sup> offering or accepting payment or benefits in order to obtain the consent of a person who has authority over the trafficked persons;<sup>828</sup> a legitimate, natural or adopted parent/guardian who abuses his or her authority over the trafficked person;<sup>829</sup> or by an officer, public functionary or

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<sup>818</sup> Criminal Code, 1879-2008, Art 382(1)(1).

<sup>819</sup> Criminal Code, 1879-2008, Art 382(1)(2).

<sup>820</sup> Criminal Code, 1879-2008, Art 382(1)(3).

<sup>821</sup> Criminal Code, 1879-2008, Art 382(1)(4).

<sup>822</sup> Criminal Code, 1879-2008, Art 382-2(3).

<sup>823</sup> Criminal Code, 1879-2008, Art. 382(1)(2).

<sup>824</sup> Criminal Code, 1879-2008, Art 382(1)(3).

<sup>825</sup> Criminal Code, 1879-2008, Art 382-2(1)(1).

<sup>826</sup> Criminal Code, 1879-2008, Art 382-2(1)(2).

<sup>827</sup> Criminal Code, 1879-2008, Art 382-2(1)(3).

<sup>828</sup> Criminal Code, 1879-2008, Art 382-2(1)(4).

<sup>829</sup> Criminal Code, 1879-2008, Art 382-2(1)(5).

other public official when exercising his or her functions.<sup>830</sup> Punishment is increased to 10 to 15 years' imprisonment and a fine of €100,000-150,000 with aggravating offences such as: using violence,<sup>831</sup> a criminal gang or organisation,<sup>832</sup> involving a child,<sup>833</sup> using torture<sup>834</sup> or unintentionally causing the victim's death.<sup>835</sup>

## Prosecutions and convictions

**Table 7**<sup>836</sup>

Year	Number of Prosecutions	Number of Convictions
2001	2	0
2002	0	0
2003	2	0
2004	1	1
2005	1	1
2006	4	4
2007	4	3
2008	6	3

In cases where a prosecution did not result in a conviction there was not total acquittal: in these cases, there was a conviction, but on the basis of indirect law, such as for sexual exploitation or pimping.<sup>837</sup>

## 5.5d HUMAN RIGHTS

### Human rights provisions

If a person is identified as being trafficked, and is granted a 90-day reflection period, he or she has access to protection and assistance from the State.<sup>838</sup> Similarly, if a six-month residence permit is granted to the trafficked person – dependent on cooperation

<sup>830</sup> Criminal Code, 1879-2008, Art 382-2(1)(6).

<sup>831</sup> Criminal Code, 1879-2008, Art 382-2(2)(1).

<sup>832</sup> Criminal Code, 1879-2008, Art 382-2(2)(2).

<sup>833</sup> Criminal Code, 1879-2008, Art 382-2(2)(3).

<sup>834</sup> Criminal Code, 1879-2008, Art 382-2(2)(4).

<sup>835</sup> Criminal Code, 1879-2008, Art 382-2(2)(5).

<sup>836</sup> Cité judiciaire, Parquet du Tribunal D'Arrondissement de Luxembourg. "Cases of trafficking for sexual exploitation prosecuted and sentenced in Luxembourg." 18 February 2009.

<sup>837</sup> Wagner, Serge. Service de Police Judiciaire, Responsable du Département Criminalité Organisée. E-mail correspondence, 16 February 2009.

<sup>838</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 94.

with law enforcement authorities – he or she also is provided with protection and assistance from the State.<sup>839</sup> If a trafficked person is granted a residence permit, they may take up employment, if they have the professional qualifications for the position concerned, or is in possession of a work contract with a specific employer.<sup>840</sup> Some residence permit holders are also eligible for professional training courses.<sup>841</sup> Any recipients of the residence permit who are children<sup>842</sup> have the right to education.<sup>843</sup>

In addition, there is currently a bill<sup>844</sup> under consideration in Luxembourg concerning assistance for trafficked persons. As of 29 January 2009 it has not been voted on by the Chambre des Députés. The bill is comprehensive in terms of human rights provisions for trafficked persons. While the bill does not state that human rights provisions are conditional upon whether a trafficked person cooperates with authorities, it does indicate that the welfare benefits are subject to approval.<sup>845</sup> It provides trafficked persons with suitable accommodation, social and socio-educational assistance, practical and financial assistance, medical assistance, psychological or therapeutic counselling,<sup>846</sup> linguistic/translation assistance,<sup>847</sup> and judicial assistance.<sup>848</sup> Financial assistance may be granted for up to 15 months, and extended beyond 15 months where it has been confirmed as being necessary for the trafficked person's well-being.<sup>849</sup> Unaccompanied children are provided with a guardian until they are taken into care by an agency of that child's origin State.<sup>850</sup>

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<sup>839</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 97.

<sup>840</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 97.

<sup>841</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 97.

<sup>842</sup> Persons under the age of 18.

<sup>843</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 97.

<sup>844</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008.

<sup>845</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 6.

<sup>846</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 3(1)(a).

<sup>847</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 3(1)(b).

<sup>848</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 3(1)(c).

<sup>849</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 3(4).

<sup>850</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 4.

The bill also states that trafficked persons who are citizens of the EU may work while in Luxembourg,<sup>851</sup> as well as attend training courses.<sup>852</sup> The police must inform the welfare agencies that a trafficked person has been identified, put the trafficked person in contact with the welfare agencies, and inform him or her of the different possible civil and criminal proceedings.<sup>853</sup> The welfare agencies must also inform the trafficked person of his or her rights, the judicial and administrative procedures and the welfare benefits available at the time of his or her first contact.<sup>854</sup> The police and welfare agencies must cooperate to ensure protection of trafficked persons and may exchange information to do so.<sup>855</sup> The bill also requires educational programmes in schools on sex discrimination,<sup>856</sup> as well as training for police officers and social service employees on combating human trafficking.<sup>857</sup>

Moreover, the bill establishes a committee to monitor the battle against human trafficking, which is responsible for implementing a monitoring system, coordinating preventative actions and evaluating human trafficking in Luxembourg.<sup>858</sup> The committee may submit proposals to the government.<sup>859</sup> Lastly, the bill requires the compilation of statistics on human trafficking, broken down by gender, age, origin State, and how a person was trafficked and exploited.<sup>860</sup> The statistics will also include the number of complaints, legal proceedings, convictions, measures to protect trafficked persons, and assistance provided for trafficked persons.<sup>861</sup>

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<sup>851</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 5(1).

<sup>852</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 5(2).

<sup>853</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 7.

<sup>854</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 8.

<sup>855</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 9.

<sup>856</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 10.

<sup>857</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 11.

<sup>858</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 12.

<sup>859</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 12.

<sup>860</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 13.

<sup>861</sup> Project de loi l'assistance et la protection des victims de la traite des êtres humains, 18 March 2008, Art 13.



### **State assistance**

Despite contacting the relevant governmental agencies, they did not provide any evidence of State assistance to trafficked persons that is not included in the draft bill.

### **State funding**

Despite contacting the relevant governmental agencies, they did not provide any information regarding State funding for anti-trafficking programmes.

### **Permission to remain in the State**

An identified trafficked person is granted a 90-day reflection period, in order to determine whether or not to assist in the investigation of his or her trafficker(s).<sup>862</sup> This reflection period can be revoked if the trafficked person is discovered to have voluntarily reconnected with his or her traffickers.<sup>863</sup> Following the reflection period, if the trafficked person: 1) participated with the investigation of his or her trafficker(s); 2) is required to be in Luxembourg to continue with the investigation or for a personal situation; 3) has broken all bonds with his or her trafficker(s); and 4) is not regarded as dangerous or a security threat, then the Minister may grant him or her a residence permit valid for six months.<sup>864</sup> It is renewable for additional six month periods, as long as the aforementioned conditions are met.<sup>865</sup> The residence permit can also be revoked if the trafficked person is found to be in breach of any of the aforementioned conditions.<sup>866</sup> When the residence permits expire, the Minister may grant the trafficked person an authorisation to stay in Luxembourg.<sup>867</sup>

## **5.5e VIEWS OF IGOs AND NGOs**

In a 2004 report, the Council of Europe Commissioner on Human Rights noted that Luxembourg should review its policy of granting “artiste” visas, similar to those available in Cyprus,<sup>868</sup> which did occur following his visit and recommendation.<sup>869</sup>

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<sup>862</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 93.

<sup>863</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 93.

<sup>864</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 95.

<sup>865</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 95.

<sup>866</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 96.

<sup>867</sup> Libre circulation des personnes det immigration, 10 september 2008, Art 98.

<sup>868</sup> Gil-Robles, Alvaro. “Report by Mr Alvaro Gil-Robles on his visit to the Grand Duchy of Luxembourg, 2-3 February 2004.” 8 July 2004, S 34-38.

The OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings stated in its 2008 report that Luxembourg incorporates human trafficking into its national action plan for equal opportunities for men and women.<sup>870</sup> Included in the plan are provisions for a network to provide services to women who are trafficked for sexual exploitation; to provide special training to the staff of women's shelters for responding to women trafficked for sexual exploitation; and to raise awareness among customers of sexual services about human trafficking.<sup>871</sup> The plan also notes that Luxembourg's plan was developed from a specific gender perspective and does not attempt to combat any forms of human trafficking aside from the sexual exploitation of women.<sup>872</sup>

Three NGOs in Luxembourg – Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte – submitted comments to the Ministers of Luxembourg regarding the draft bill on human trafficking.<sup>873</sup> The NGOs welcome the draft bill's reflection period of 90 days, noting that it goes beyond the requirements of the 2005 Council of Europe Convention.<sup>874</sup> They are also satisfied with the possibility, under the bill, to grant permission to trafficked persons to stay in Luxembourg for "humanitarian reasons of exceptional gravity."<sup>875</sup> The NGOs did note, however, that given the vulnerability of trafficked persons, this permit should be granted with care and diligence, so as not to further traumatise the trafficked persons.<sup>876</sup>

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<sup>869</sup> Gil-Robles, Alvaro. "Follow Up Report on Cyprus: Assessment on the progress made in implementing the recommendations of the Council of Europe Commissioner on Human Rights." 29 March 2006, S 58.

<sup>870</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 45.

<sup>871</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 45.

<sup>872</sup> Organisation for Security and Cooperation in Europe Special Representative and Co-ordinator for Combating Trafficking in Human Beings. "Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms." 13 November 2008, p 45.

<sup>873</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>874</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>875</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>876</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

The organisations do not approve of the stipulation that trafficked persons must cooperate with law enforcement in order to receive a temporary residence permit, stating that many trafficked persons are unwilling to participate, given the potential consequences for themselves and their families.<sup>877</sup> They noted that trafficked persons should be treated as victims, and repatriating them involuntarily will not help, as it returns them to the start of their ordeal.<sup>878</sup>

Similarly, the NGOs are also disappointed with the fact that the human rights provisions – available while a trafficked person has a residence permit – are only available to those who participate with investigations.<sup>879</sup> They stated that trafficked persons should receive assistance because they are victims of a crime – not because they assist law enforcement authorities with investigations.<sup>880</sup>

Lastly, the NGOs were concerned with the well-being of trafficked persons after they have been repatriated to their origin States.<sup>881</sup> They noted that a programme to avoid re-victimisation should be established for trafficked persons who are repatriated.<sup>882</sup>

## **5.5f ANALYSIS**

Luxembourg has ratified the 2000 UN Convention, but has only signed the 2000 Palermo Protocol and the 2005 Council of Europe Convention. As the 2000 UN Convention is entirely concerned with criminal law, the fact that Luxembourg has yet to ratify the 2000 Palermo Protocol and the 2005 Council of Europe Convention could indicate that it prioritised the criminal provisions and is working towards adopting human rights provisions in line with the conventions.

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<sup>877</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>878</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>879</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>880</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>881</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

<sup>882</sup> Caritas, Femmes en Detresse and la Fondation Maison de la Porte Ouverte. Document received from Marie-Christine Wirion at Caritas. 29 April 2009.

## **Criminal**

Luxembourg has criminalised human trafficking, both directly and indirectly. The fact that the Ministry of Justice and the Ministry for Equal Opportunities are the governmental departments responsible for combating human trafficking indicates that Luxembourg takes a criminal law and gendered approach to human trafficking.

The fact that some of the prosecutions did not result in convictions of human trafficking, but of indirect offences indicates that it may be more difficult to prove a case of human trafficking. This may be a result of lack of evidence or witnesses, therefore making it easier to prove that sexual exploitation or pimping took place.

## **Human rights**

As the law in Luxembourg currently stands, a trafficked person must have either a reflection period or temporary residence permit – granted as a result of contemplating or participating in cooperative efforts with law enforcement, respectively – in order to avail of human rights provisions. This would change if the current bill under consideration was adopted. The bill contains fairly extensive human rights provisions, ranging from emergency assistance, such as shelter, to more long-term assistance such as financial assistance, educational assistance and linguistic/translation services.

## **Conclusion**

At the moment, Luxembourg has adopted more of a criminal model, but has the potential of incorporating a higher level of human rights if the current bill is passed, and if the 2000 Palermo Protocol and the 2005 Council of Europe Convention are ratified. As it stands, however, human rights provisions are only available to trafficked persons under a reflection period or a temporary residence permit, conditional upon cooperation with law enforcement authorities. The current human rights bill is promising, however, because if passed, the human rights provisions would be relatively strong, and enshrined in legislation, which is stronger than a non-legislative State policy.

## **5.6 MALTA**

### **5.6a INTRODUCTION**

Malta, with a population of 403,500<sup>883</sup> is primarily a destination State for women trafficked for the purpose of sexual exploitation, mainly originating in Russia, Ukraine, Romania and other Eastern European States.<sup>884</sup>

### **5.6b LEGISLATION AND GOVERNMENT**

#### **International human trafficking treaties**

Malta has ratified every international human trafficking treaty.

#### **Direct human trafficking legislation**

Malta criminalised white slave traffic in the White Slave Traffic (Suppression) Ordinances, 1930-2007.<sup>885</sup>

The Criminal Code also addresses human trafficking.<sup>886</sup> Human trafficking means “the recruitment, transportation or transfer of a person, or of a child, as the case may be, including harbouring and subsequent reception and exchange of control over that person, or child, and includes any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of any country” for any of the purposes mentioned above.<sup>887</sup> It is consistent with the definition in the 2000 Palermo Protocol and the 2005 Council of Europe Convention.

#### **Indirect human trafficking legislation**

The White Slave Traffic (Suppression) Ordinances, 1930-2007 criminalises indirect human trafficking offences, such as detaining a person against his or her will in a brothel,<sup>888</sup> living on the earning of prostitution,<sup>889</sup> keeping a brothel,<sup>890</sup> using a shop,

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<sup>883</sup> July 2008 estimate. Central Intelligence Agency. “The World Factbook.” <https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html>. Last accessed 12 March 2009.

<sup>884</sup> United States Department of State, “Trafficking in Persons Report 2008,” June 2008, p 177.

<sup>885</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007.

<sup>886</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>887</sup> Criminal Code, 1854-2008, Ch 9, Art 248E.

<sup>888</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 5.

<sup>889</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 7.

<sup>890</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 8.

etc. for the purpose of prostitution,<sup>891</sup> and using a house for the purpose of prostitution.<sup>892</sup>

The Immigration Act criminalises acts such as being an illegal immigrant,<sup>893</sup> failure to produce documents and provide information,<sup>894</sup> assisting a person to enter or reside in Malta illegally,<sup>895</sup> providing employment to a prohibited immigrant,<sup>896</sup> providing false immigration information about another person,<sup>897</sup> forging immigration documents,<sup>898</sup> obstructing or impeding the lawful exercise of the Immigration Act,<sup>899</sup> and possessing a forged immigration document.<sup>900</sup> The Criminal Code criminalises various indirect human trafficking offences, such as abduction,<sup>901</sup> forgery of documents,<sup>902</sup> inducing a person under age to prostitution,<sup>903</sup> instigating with violence a person under age to prostitution,<sup>904</sup> and compelling or inducing a person of full age to prostitution.<sup>905</sup>

## **Ministry**

The Ministry for Justice and Home Affairs is responsible for anti-human trafficking efforts in Malta.

## **5.6c CRIMINAL LAW**

### **Criminal law provisions**

The White Slave Traffic (Suppression) Ordinances, 1930-2007 criminalises inducing a person<sup>906</sup> to enter Malta or leave Malta for the purpose of prostitution.<sup>907</sup>

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<sup>891</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 9.

<sup>892</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 10.

<sup>893</sup> Immigration Acts, 1970-2008, Art 5.

<sup>894</sup> Immigration Acts, 1970-2008, Art 28.

<sup>895</sup> Immigration Acts, 1970-2008, Art 32(1)(a).

<sup>896</sup> Immigration Acts, 1970-2008, Art 32(1)(b).

<sup>897</sup> Immigration Acts, 1970-2008, Art 32(1)(c).

<sup>898</sup> Immigration Acts, 1970-2008, Art 32(1)(d).

<sup>899</sup> Immigration Acts, 1970-2008, Art 32(1)(e).

<sup>900</sup> Immigration Acts, 1970-2008, Art 32(1)(f).

<sup>901</sup> Criminal Code, 1854-2008, Ch 9, Art 199 and 200.

<sup>902</sup> Criminal Code, 1854-2008, Ch 9, Art 183, 184 and 189.

<sup>903</sup> Criminal Code, 1854-2008, Ch 9, Art 204; 204B.

<sup>904</sup> Criminal Code, 1854-2008, Ch 9, Art 204A.

<sup>905</sup> Criminal Code, 1854-2008, Ch 9, Art 205.

<sup>906</sup> Both 21 years of age or older, Art 2, and under 21 years of age, Art 3.

<sup>907</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 2, 3.

The Criminal Code criminalises the human trafficking of children<sup>908</sup> and adults for the purpose of exploiting the person for the production of goods or services under conditions and in circumstances which infringe labour standards governing working conditions, salaries and health and safety.<sup>909</sup> The means of the exploitation may be in the form of violence or threats, including abduction;<sup>910</sup> deceit or fraud;<sup>911</sup> misuse of authority, influence or pressure;<sup>912</sup> or giving or receiving payments or benefits to achieve the consent of the person having control over another person.<sup>913</sup> The law also specifically criminalises trafficking a person for the purposes of pornography,<sup>914</sup> and for the removal of organs.<sup>915</sup>

The Criminal Code also criminalises aiding, assisting, counselling or procuring people for the purpose of human trafficking, and entering, leaving or transiting across Malta, or attempting to do so, or conspiring with another person to commit the act.<sup>916</sup> It also provides additional punishment for trafficking more than three people, participating in an activity of a criminal organisation, or endangering the lives of the trafficked persons.<sup>917</sup>

### **Length and nature of sentences**

Under the White Slave Traffic (Suppression) Acts, those convicted of inducing a person 21 years of age or older to enter or leave Malta for the purpose of prostitution receive two to 10 years' imprisonment.<sup>918</sup> Those convicted of inducing a person under 21 years of age or older to enter or leave Malta for the purpose of prostitution receive three to 10 years' imprisonment.<sup>919</sup>

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<sup>908</sup> Criminal Code, 1854-2008, Ch 9, Art 248D.

<sup>909</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(1).

<sup>910</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(2)(a).

<sup>911</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(2)(b).

<sup>912</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(2)(c).

<sup>913</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(2)(d).

<sup>914</sup> Criminal Code, 1854-2008, Ch 9, Art 248B.

<sup>915</sup> Criminal Code, 1854-2008, Ch 9, Art 248C.

<sup>916</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>917</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>918</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 2.

<sup>919</sup> White Slave Traffic (Suppression) Ordinances, 1930-2007, Art 3.

Those convicted of sexual exploitation or forced labour receive two to nine years' imprisonment,<sup>920</sup> and four to 12 years' imprisonment for organ removal.<sup>921</sup> Trafficking offences involving grievous bodily harm, a profit exceeding €11,646.87 or with the involvement of organised crime will have punishments increased by one degree.<sup>922</sup> Those convicted of facilitating trafficking into Malta receive six months to five years' imprisonment and/or a fine of €23,293.73.<sup>923</sup> The same punishment is given to those who are convicted of aiding, assisting, counselling or procuring people for the purpose of human trafficking.<sup>924</sup> If a person aids, assists, counsels or procures more than three people, he or she receives a harsher penalty.<sup>925</sup> Furthermore, if the offence is committed as an activity of a criminal organisation, or while endangering the lives of the trafficked persons, they receive a harsher punishment, even when the previous provision is not applied.<sup>926</sup> Imprisonment is the most prevalent sentence, although the sentence could be suspended for a period of time, especially in cases where the accused admits to the charge.<sup>927</sup>

## Prosecutions and convictions

**Table 8**<sup>928</sup>

<b>Year</b>	<b>Number of Prosecutions</b>	<b>Number of Convictions</b>
2003	1 case, 3 persons	n/a
2004	2 cases, 12 persons	10 persons
2005	1 case, 2 persons	3 persons <sup>929</sup>
2006	1 case, 5 persons	n/a
2007	2 cases, 6 persons	n/a
2008	1 case, 2 persons	n/a

The remaining cases are *sub judice*.<sup>930</sup>

<sup>920</sup> Criminal Code, 1854-2008, Ch 9, Art 248A(1).

<sup>921</sup> Criminal Code, 1854-2008, Ch 9, Art 248C.

<sup>922</sup> Criminal Code, 1854-2008, Ch 9, Art 248E(2).

<sup>923</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>924</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>925</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>926</sup> Criminal Code, 1854-2008, Ch 9, Art 337A(1).

<sup>927</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

<sup>928</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

<sup>929</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.



## 5.6d HUMAN RIGHTS

### Human rights provisions

Trafficked persons are offered assistance and protection during a reflection period or a residence permit, provided that they are contemplating or have agreed to cooperate with authorities to investigate those involved in their trafficking process (or are contemplating cooperating with authorities, during a reflection period).<sup>931</sup> If the person does not have sufficient resources, he or she will be provided with: the standards of living capable of ensuring his or her subsistence;<sup>932</sup> access to emergency medical care;<sup>933</sup> and, where applicable: attention to the needs of the most vulnerable;<sup>934</sup> psychological assistance;<sup>935</sup> translation and interpreting services;<sup>936</sup> and free legal aid.<sup>937</sup> If the trafficked person is a child, he or she will have access to the education system under the same conditions as Maltese nationals.<sup>938</sup>

While trafficked persons are typically viewed by Malta as victims, there have been occasions where the alleged trafficked person decides not to cooperate with the police, despite being offered protection and shelter.<sup>939</sup>

### State assistance

There is a Memorandum of Understanding between the Malta Police and the Ministry for Social Policy for the provision of social support services in cases of potential

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<sup>930</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

<sup>931</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5).

<sup>932</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(i).

<sup>933</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(ii).

<sup>934</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(iii).

<sup>935</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(iv).

<sup>936</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(v).

<sup>937</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5)(vi).

<sup>938</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5).

<sup>939</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

victims of human trafficking, with the work carried out by Agenzija Appogg.<sup>940</sup> Agenzija Appogg, a governmental agency, provides shelter, psychological therapy, and family therapy to trafficked persons.<sup>941</sup> The Malta Police will inform the Ministry for Social Policy about each trafficked person that requires assistance.<sup>942</sup> In those cases, the Ministry will provide social support in which social workers will interview, assess, counsel and provide support to the potentially trafficked persons.<sup>943</sup> During human trafficking investigations, social workers are typically requested to support the trafficked persons by ensuring they have shelter.<sup>944</sup>

### **State funding**

The government does not specifically allocate funding for the assistance and protection of trafficked persons.<sup>945</sup> Three governmental ministries – the Ministry for Social Policy, the Ministry for Justice and Home Affairs, and the Ministry of Health – liaise amongst themselves and with any NGOs they deem necessary to respond to human trafficking in Malta.<sup>946</sup> The Maltese government, through the Ministry for Social Policy, funds the NGO Agenzija Appogg, which provides assistance for trafficked persons.<sup>947</sup> Agenzija Appogg – the duties of which include assisting, protecting and supporting victims of crime – describes itself as “the national social welfare agency for children and families in need.”<sup>948</sup> Agenzija Appogg operates a telephone line to report acts of human trafficking for both Maltese and non-Maltese citizens.<sup>949</sup>

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<sup>940</sup> Agenzija Appogg. “Adult and Family Services: Overview.”

[http://www.appogg.gov.mt/adultandfamily\\_overview.asp](http://www.appogg.gov.mt/adultandfamily_overview.asp). Last accessed 14 April 2009.

<sup>941</sup> Agenzija Appogg. E-mail correspondence with Christine Marchand Agius. 19 February 2009.

<sup>942</sup> Agenzija Appogg. “Adult and Family Services: Overview.”

[http://www.appogg.gov.mt/adultandfamily\\_overview.asp](http://www.appogg.gov.mt/adultandfamily_overview.asp). Last accessed 14 April 2009.

<sup>943</sup> Agenzija Appogg. “Adult and Family Services: Overview.”

[http://www.appogg.gov.mt/adultandfamily\\_overview.asp](http://www.appogg.gov.mt/adultandfamily_overview.asp). Last accessed 14 April 2009.

<sup>944</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

<sup>945</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 12 February 2009.

<sup>946</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 12 February 2009.

<sup>947</sup> St John, Joseph. The Ministry for Justice and Home Affairs. E-mail correspondence of 17 February 2009; Community and Media Relations Unit, Malta Police. E-mail correspondence of 12 February 2009.

<sup>948</sup> Agenzija Appogg. See <http://www.appogg.gov.mt/default.asp>. Last accessed 18 February 2009.

<sup>949</sup> Agenzija Appogg. [http://www.appogg.gov.mt/pdf/downloads/leaflet\\_human\\_trafficking.pdf](http://www.appogg.gov.mt/pdf/downloads/leaflet_human_trafficking.pdf). Last accessed 18 February 2009.

### Permission to remain in the State

A non-EU citizen<sup>950</sup> that has been trafficked is permitted to remain in Malta if he or she cooperates with the Maltese authorities.<sup>951</sup> The Principal Immigration Officer determines whether the trafficked person is cooperating<sup>952</sup> with authorities “in the fight against trafficking in human beings,”<sup>953</sup> and may invite an NGO to provide information on the third country national involved.<sup>954</sup> Once the trafficked person has been informed by the Principal Immigration Officer of his or her eligibility to remain, he or she has no more than two months to detach himself or herself from the traffickers in order to make an informed decision regarding cooperating.<sup>955</sup> The period of reflection may be terminated at any time by the Principal Immigration Officer for reasons related to public policy or national security, or if the trafficked person re-establishes contact with his or her trafficker.<sup>956</sup> The trafficked person will be provided with assistance if he or she does not have sufficient resources.<sup>957</sup>

At the end of the reflection period, or prior to its conclusion, the Principal Immigration Officer may grant the trafficked person a residence permit if he or she is required to remain in Malta to take part in criminal proceedings,<sup>958</sup> intends to cooperate with authorities,<sup>959</sup> and has severed all relations with his or her

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<sup>950</sup> A “third country national” means any person who is not a national of a Member State of the European Union. Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 2.

<sup>951</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3.

<sup>952</sup> “‘Cooperate’ means the giving of information by the third country national to the immigration authorities related, *inter alia*, to his arrival in Malta as a victim of trafficking or related to his illegal arrival in Malta and includes, in particular, the names of persons of traffickers and their accomplices or details related to points of departure, which information leads to, or contributes significantly to, the tracing or prosecution of the trafficker.” Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 2.

<sup>953</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(1).

<sup>954</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(2).

<sup>955</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(3).

<sup>956</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(6).

<sup>957</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 3(5).

<sup>958</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(1)(a).

<sup>959</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(1)(b).

traffickers.<sup>960</sup> The residence permit is valid for six months, and is renewable if the aforementioned conditions continue to be met.<sup>961</sup> The trafficked person will continue to receive assistance if he or she still lacks sufficient resources,<sup>962</sup> and may be granted a work permit, or in the case of a trafficked child, access to vocational training and education.<sup>963</sup> The trafficked person may also have access to schemes provided by the government or NGOs aimed at the recovery of a normal life, which may include assisted repatriation.<sup>964</sup>

Under the Criminal Code, a person will not be deported until the lapse of 30 days from the date that the Principal Immigration Officer has reasonable grounds to believe that the person concerned has been trafficked.<sup>965</sup>

As of December 2008, there have been no cases where the trafficked person opted to remain in Malta.<sup>966</sup>

## **5.6e VIEWS OF IGOs AND NGOs**

The Council of Europe Commissioner on Human Rights has visited Malta, but has never dealt with the issue of human trafficking in his reports.

The People for Change Foundation (PFC), a Maltese NGO, noted that the problem with Malta's human trafficking legislation is that human rights are only granted to trafficked persons if they collaborate with police.<sup>967</sup> Another problem with the legislation is that the structures for the rights enshrined in the law granting human rights provisions to be brought into effect still must be clarified, because a case has yet to be brought under this instrument.<sup>968</sup> PFC stated that in the public discourse in

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<sup>960</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(1)(c).

<sup>961</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(2).

<sup>962</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(3).

<sup>963</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(4).

<sup>964</sup> Permission to Reside for Victims of Trafficking or Illegal Immigrations who Co-operate with the Maltese Authorities Regulations, Subsidiary Legislation 217.07, 6 July 2007, S 5(5).

<sup>965</sup> Criminal Code, 1854-2008, Ch 9, Art 248E(7).

<sup>966</sup> Community and Media Relations Unit, Malta Police. E-mail correspondence of 29 December 2008.

<sup>967</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>968</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

Malta, human trafficking is often confused with questions of smuggling and irregular migration.<sup>969</sup> This problem is compounded by the fact that Maltese criminal law does not make a distinction in its wording between human trafficking and smuggling, as essentially the same word is used to translate both the words “smuggling” and “trafficking.”<sup>970</sup>

PFC sees the need for clearer procedures which are agreed and detailed. Currently, a Memorandum of Understanding exists between Agenzija Appogg and the Malta Police, but it needs to be further developed and improved.<sup>971</sup> In addition, NGOs and other service providers need to continue to receive regular and more intense training in the area of human trafficking; support provided to trafficked persons needs to be improved; general awareness-raising amongst the general public is needed.<sup>972</sup>

At this stage, PFC has not yet provided direct assistance to trafficked persons and their work has remained in the area of training.<sup>973</sup>

PFC, the IOM, Agenzija Appogg and the Malta Police held a training seminar on human trafficking in February 2009.<sup>974</sup> At that stage, only human trafficking for sexual exploitation had been reported, but none of the reported cases concerned illegal immigrants.<sup>975</sup> All of the identified trafficked persons in 2006 and 2007 were also trafficked for sexual exploitation, originating in Eastern Europe and South East Europe.<sup>976</sup>

## 5.6f ANALYSIS

Malta is taking the issue of human trafficking seriously by ratifying every international human trafficking law.

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<sup>969</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>970</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>971</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>972</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>973</sup> The People for Change Foundation. E-mail correspondence from Jean-Pierre Gauci. 3 April 2009.

<sup>974</sup> The People for Change Foundation, the International Organisation for Migration, Agenzija Appogg, the Malta Police. “Best practices to prevent, detect and protect victims of trafficking in human beings.” February 2009.

<sup>975</sup> The People for Change Foundation, the International Organisation for Migration, Agenzija Appogg, the Malta Police. “Best practices to prevent, detect and protect victims of trafficking in human beings.” February 2009, p 7.

<sup>976</sup> United Nations Office on Drugs and Crime. “Global Report on Trafficking in Persons.” February 2009, p 264.

## **Criminal**

Malta has criminalised human trafficking, both directly and indirectly. The fact that the Ministry of Justice and Home Affairs is the governmental department responsible for combating human trafficking indicates that Malta does treat the issue as a criminal matter.

Maltese criminal law does not, however, fully comply with the provisions of the 2005 Council of Europe Convention. It does not list human trafficking committed by a public official in the performance of his/her duties as an aggravating circumstance in any law. The 2005 Council of Europe Convention requires States to ensure that this offence is considered an aggravating circumstance and is treated as such in the law.

## **Human rights**

While Malta's human rights provisions are relatively comprehensive, they are only granted to trafficked persons who cooperate with authorities in investigations and proceedings. This represents a strict adoption of the minimum standards in the 2004 EU Directive. While it is positive that the human rights provisions are included in legislation, it is problematic that they are only provided when trafficked persons decide to participate in investigations, as many would feel unsafe or unable to do so.

## **Conclusion**

Despite having relatively few human trafficking prosecutions and convictions, Malta has adopted a criminal approach to human trafficking. While there is a law that grants assistance to trafficked persons, any assistance offered to them is conditional upon whether they cooperate with law enforcement authorities and aid in the prosecution of those involved in their trafficking process. It is clear that the main motivation for offering the assistance is to aid with the criminal proceedings, and not for the purpose of granting human rights to trafficked persons. In other words, the priority is that of the State, rather than the individual, which indicates that the criminal model is prevalent. Regardless, it is difficult to determine the extent to which the criminal or assistance provisions are implemented. It is also problematic because although Malta complies with the 2004 EU Directive, it does not comply with the 2005 Council of

Europe Convention, which stipulates that States parties must ensure that assistance to trafficked persons is not made conditional on his or her willingness to act as a witness.

## **5.7 NORWAY**

### **5.7a INTRODUCTION**

Norway, with a population of 4.6 million<sup>977</sup> is a destination State for people trafficked from Nigeria, Russia, Albania, Ukraine, Latvia, Lithuania, Estonia, Brazil and East Asian countries.<sup>978</sup> En route, people are trafficked through transit States of Sweden, Denmark, Italy and the Balkan States.<sup>979</sup> At this stage, most identified trafficked persons in Norway have been trafficked for the purpose of sexual exploitation in the major cities, with street prostitution, in addition to trafficked persons working from apartments or brothels.<sup>980</sup> Norway has criminalised clients of prostitution since January 2009, which, akin to laws in Sweden, criminalise the purchasing of sexual services, and may change the Norwegian prostitution market, as well as decrease the flow of human trafficking.<sup>981</sup>

### **5.7b LEGISLATION AND GOVERNMENT**

#### **International human trafficking law**

Norway has ratified every international human trafficking law, with the exception of the 1949 Convention, which it signed but has not ratified.

#### **Direct human trafficking legislation**

The direct human trafficking legislation is found in the General Civil Penal Code, under Chapter 21: Felonies Against Personal Liberty.<sup>982</sup> The definition of human trafficking in the General Civil Penal Code is generally consistent with the definition

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<sup>977</sup> July 2008 estimate. Central Intelligence Agency. "The World Factbook." <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html>. Last accessed 12 March 2009.

<sup>978</sup> United States Department of State, *Trafficking in Persons Report 2008 – Norway*, 4 June 2008. Available online at <http://norway.usembassy.gov/tip2008.html>. Last accessed 20 November 2008.

<sup>979</sup> United States Department of State, *Trafficking in Persons Report 2008 – Norway*, 4 June 2008. Available online at <http://norway.usembassy.gov/tip2008.html>. Last accessed 20 November 2008.

<sup>980</sup> Brunovskis, Anette. "Social aspects of human trafficking." Fafo, Institute of Applied International Studies, December 2007, p 1.

<sup>981</sup> Brunovskis, Anette. "Social aspects of human trafficking." Fafo, Institute of Applied International Studies, December 2007, p 1.

<sup>982</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

set out in the 2000 Palermo Protocol and 2005 Council of Europe Convention. It does not specify that human trafficking could involve the recruitment, transportation, transfer, harbouring or receipt of persons.

### **Indirect human trafficking legislation**

Norway also has a range of other criminal offences that may be involved in various stages of the trafficking process. The General Civil Penal Code criminalises procurement<sup>983</sup> – promoting and earning money from the prostitution of others – although in practice, it is difficult to distinguish between human trafficking and procurement, as well as trafficked persons and those willingly engaged in prostitution.<sup>984</sup> Other indirect provisions include the criminalisation of coercion,<sup>985</sup> deprivation of liberty,<sup>986</sup> slavery,<sup>987</sup> threats,<sup>988</sup> physical abuse,<sup>989</sup> sexual crime,<sup>990</sup> and participation in organised criminal activity.<sup>991</sup> Moreover, the Immigration Act addresses situations related to the trafficking process, such as knowingly making use of the labour of a foreign national who does not have a required work permit.<sup>992</sup> It also criminalises procuring work or accommodation for a foreign national; procuring or issuing any document or statement used for immigration purposes, which involves exploitation of the foreign national's situation; enticing a foreign national to enter Norway with a view to settling there; and misuse of passports and travel

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<sup>983</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 202.

<sup>984</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 2.

<sup>985</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 222.

<sup>986</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 223.

<sup>987</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 225.

<sup>988</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 227.

<sup>989</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 228 et seq.

<sup>990</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 192 et seq.

<sup>991</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 60.

<sup>992</sup> Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their Presence in the Realm (Immigration Act). 24 June 1988, No 64, updated with amendments, most recently 28 July 2002, S 47.



documents.<sup>993</sup> Lastly, it criminalises participating in, aiding, or abetting organised criminal activity with a view to assisting any foreign national to enter the State illegally.<sup>994</sup>

## **Ministry**

The Ministry of Justice and Police is responsible for anti-human trafficking efforts in Norway.

## **5.7c CRIMINAL LAW**

### **Criminal law provisions**

The General Civil Penal Code criminalises human trafficking for the purposes of sexual exploitation, forced labour, war service in a foreign country and removal of organs.<sup>995</sup> This also includes inducing another person to allow himself or herself to be used for human trafficking purposes.<sup>996</sup> It also criminalises participation in the trafficking process, including making arrangements for trafficking, aiding and abetting trafficking, and providing or receiving compensation in order to obtain consent to trafficking from any person who has authority over the aggrieved person.<sup>997</sup>

### **Length and nature of sentences**

Those convicted of human trafficking, or any of its related activities, as described above, is liable to up to five years' imprisonment.<sup>998</sup> Acts of gross human trafficking are determined by considering whether the person exposed to the act was a child,<sup>999</sup> whether gross violence or coercion was used, or whether the act led to considerable

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<sup>993</sup> Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their Presence in the Realm (Immigration Act). 24 June 1988, No 64, updated with amendments, most recently 28 July 2002, S 47.

<sup>994</sup> Act Concerning the Entry of Foreign Nationals into the Kingdom of Norway and their Presence in the Realm (Immigration Act). 24 June 1988, No 64, updated with amendments, most recently 28 July 2002, S 47.

<sup>995</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>996</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>997</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>998</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>999</sup> Under the age of 18.

gain.<sup>1000</sup> They are punishable with up to 10 years' imprisonment.<sup>1001</sup> When an act of trafficking is committed against a child,<sup>1002</sup> in addition to the penalty for gross human trafficking, the person convicted is also liable to an independent penalty for any use of force or threats, misuse of a person's vulnerability, or other improper conduct.<sup>1003</sup>

## Prosecutions and convictions

**Table 9**<sup>1004</sup>

Year	Prosecutions	Convictions
2005	8	7 people <sup>1005</sup> convicted between 2005-2007
2006	30 <sup>1006</sup>	
2007	n/a	

## 5.7d HUMAN RIGHTS

### Human rights provisions

There are no specific human rights provisions in Norwegian legislation, as they are implemented through governmental policies.

### State assistance

In 2006, the government of Norway established the National Coordinating Unit for Assistance and Protection for the victims of human trafficking.<sup>1007</sup> The primary function of this Unit – which is administered by the Directorate of Police – is assisting the welfare service by providing methods for planning and mobilising assistance and

<sup>1000</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>1001</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005, No 131, S 224.

<sup>1002</sup> A person under the age of 18

<sup>1003</sup> The General Civil Penal Code of Norway. Act of 22 May 1902 No 10 with subsequent amendments, the latest made by Act of 21 December 2005 No 131, Chapter 21, S 224.

<sup>1004</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 11.

<sup>1005</sup> This includes three Norwegians and four non-nationals.

<sup>1006</sup> 29 cases were for sexual exploitation and one was for forced labour.

<sup>1007</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 5.

protection services for trafficked persons, and indicators for identifying trafficked persons.<sup>1008</sup> The list of indicators, made available in 2008, help identify trafficked persons who are working as prostitutes.<sup>1009</sup> In addition, the National Coordinating Unit is responsible for: the national system for reporting on and monitoring trafficked persons; the national system for exit strategies and sustainable rehabilitation of trafficked persons; the national system of voluntary repatriation of trafficked persons; guidelines for motivating trafficked persons to cooperate with the police; guidelines for interdisciplinary cooperation; information on the rights of trafficked persons; and local coordination units.<sup>1010</sup>

Identified trafficked persons are offered coordinated assistance and protection services, adapted to the specific needs of the individual.<sup>1011</sup> This includes access to health services and social assistance as part of a coherent follow-up programme.<sup>1012</sup> Between November 2006 and May 2008, approximately 200 trafficked persons were under the support of the National Coordinating Unit, and approximately 30% of those cooperated with police investigations.<sup>1013</sup>

A State-sponsored project through the Norwegian NGO ROSA<sup>1014</sup> provides safe housing and follow-up information for trafficked women.<sup>1015</sup> The project's crisis centres can offer trafficked women food, shelter, physical security, emotional support,

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<sup>1008</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 5.

<sup>1009</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 6.

<sup>1010</sup> Ellefsen, Birgitte, Project Manager, National Coordination Unit for Victims of Trafficking National Police Directorate in Norway, Organised Crime Section. "Responses to Child Trafficking at Local Level in Norway." 2008, p 9.

<sup>1011</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 5.

<sup>1012</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 5.

<sup>1013</sup> Ellefsen, Birgitte, Project Manager, National Coordination Unit for Victims of Trafficking National Police Directorate in Norway, Organised Crime Section. "Responses to Child Trafficking at Local Level in Norway." 2008, p 9.

<sup>1014</sup> Reetablering Oppholdssteder Sikkerhet Assistanse in Norwegian, or Re-establishment, Organising Safe Places to Stay, Security, Assistance in English.

<sup>1015</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 7.

use of an interpreter, health care, free legal aid and social services.<sup>1016</sup> In addition, the Directorate of Immigration (UDI) has established special accommodation for identified trafficked persons in the asylum system.<sup>1017</sup>

ROSA assisted more than 150 women in its first two years in operation, 2005-2007.<sup>1018</sup> There is an increasing need for accommodation for trafficked men – as of November 2008 there was no specialised accommodation for them.<sup>1019</sup> There were two identified trafficked males in Norway in 2007.<sup>1020</sup> Both male and female victims were also provided with accommodation financed by municipal authorities, and some applied for asylum and live at reception centres.<sup>1021</sup> There are a total of 51 shelters in Norway that assist female victims of violence, 20 of which provide assistance for trafficked women.<sup>1022</sup>

In 2008, Pro Sentret, a national resource and help centre for those involved in prostitution in Norway, worked with 100 persons who claimed to be trafficked, 11 of whom were male.<sup>1023</sup> The vast majority of trafficked persons came from Nigeria, but Pro Sentret also worked with people from Romania, Bulgaria, Brazil, Thailand, Albania, Russia, Estonia, Somalia, Ghana, Sierra Leone and Kenya. In 2008, 15 of those who identified themselves as being trafficked to Pro Sentret were granted a reflection period.<sup>1024</sup> The organisation said that there was an increase in applications for a reflection period when it was changed from 45 days to six months in duration.<sup>1025</sup>

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<sup>1016</sup> Kill, Unni and Tove Smaadahi. "Guide to Assisting." ROSA, April 2007, p 12-14.

<sup>1017</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 7.

<sup>1018</sup> Kill, Unni and Tove Smaadahi. "Guide to Assisting." ROSA, April 2007, p 4.

<sup>1019</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 7.

<sup>1020</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 268.

<sup>1021</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 268.

<sup>1022</sup> United Nations Office on Drugs and Crime. "Global Report on Trafficking in Persons." February 2009, p 268.

<sup>1023</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1024</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1025</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

Pro Sentret said that many trafficked persons they work with do want to report their traffickers, but the special working group of the police does not have the capacity to process a high volume of such reports.<sup>1026</sup> Human trafficking investigations are difficult because oftentimes the traffickers reside outside of Norway, and the trafficked persons lack detailed information about their traffickers.<sup>1027</sup> Along the same lines, Pro Sentret said that the authorities are having difficulty convicting traffickers under the Penal Code as a result of lack of evidence, and in many cases reduce the charges to pimping.<sup>1028</sup>

Pro Sentret is partially funded by the government and partially funded by the municipality of Oslo.<sup>1029</sup> The centre has expressed its desire for a more harmonised, predictable and coordinated system for providing support and protection to the victims of trafficking.<sup>1030</sup> Pro Sentret did acknowledge the improvements made with the establishment of the National Coordinating Unit in terms of identification of trafficked persons and clarifying issues and procedures.<sup>1031</sup> Pro Sentret also indicated that there are also challenges in finding accommodation for certain trafficked persons who do not fit under ROSA's mandate, or are not suited to reside in the shelters.<sup>1032</sup>

Pro Sentret expressed concern over the fact that personal and health care services provided to trafficked persons is dependent on their residency status, rather than their status as an identified trafficked person, with the exception of safe accommodation and the five hours of legal aid.<sup>1033</sup> The organisation believes that this policy is "highly problematic, as it results in great disparities in the support and protection provided to people who have been the victims of the same crime."<sup>1034</sup>

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<sup>1026</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1027</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1028</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1029</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1030</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1031</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1032</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1033</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

<sup>1034</sup> Pro Sentret. E-mail correspondence from Berit Bulien Johansen. 5 March 2009.

## State funding

In 2007, the government provided €1.58 million<sup>1035</sup> to anti-trafficking NGOs, in addition to spending additional funds on other forms of assistance for trafficked persons, including housing and medical care.<sup>1036</sup> The Ministry of Justice and Police has financed the ROSA project operated by the Crisis Centre Secretariat since 2005.<sup>1037</sup>

Norway has allocated €10.1 million<sup>1038</sup> for anti-trafficking projects internally and in origin and transit States between 2003 and 2005 under the Ministry of Foreign Affairs' budget.<sup>1039</sup> An additional €10.1 million<sup>1040</sup> was allocated for the period of 2006 to 2009.<sup>1041</sup> The projects are identified by the Norwegian foreign missions, along with national authorities and NGOs.<sup>1042</sup> As of early 2008, around €5.27 million<sup>1043</sup> had been allocated to Norwegian NGOs, with the largest sum going to Save the Children Norway, which received €2.02 million.<sup>1044</sup>

Project funding of approximately €22.41 million<sup>1045</sup> was awarded between 2003 and the end of 2007, with an additional €6.73 million<sup>1046</sup> awarded to projects in the same period where combating human trafficking was merely a subsidiary objective.<sup>1047</sup>

Project support of €3.02 million<sup>1048</sup> has been planned for the period of 2007-2009.<sup>1049</sup>

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<sup>1035</sup> \$2 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1036</sup> United States Department of State, *Trafficking in Persons Report 2008 – Norway*, 4 June 2008. Available online at <http://norway.usembassy.gov/tip2008.html>. Last accessed 20 November 2008.

<sup>1037</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 7.

<sup>1038</sup> NOK 90 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1039</sup> Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1040</sup> NOK 90 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1041</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 4.

<sup>1042</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 4.

<sup>1043</sup> NOK 47 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1044</sup> NOK 18 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com). Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1045</sup> NOK 200 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1046</sup> NOK 60 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1047</sup> Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1048</sup> NOK 27 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

As of early 2008, more than 193 projects and project plans to combat human trafficking have been approved for funding via the Ministry of Foreign Affairs' budget for the period of 2000-2010.<sup>1050</sup> A total of €28.23 million<sup>1051</sup> in assistance is provided via the Ministry of Foreign Affairs' budget for the period of 2000-2010.<sup>1052</sup>

### **Permission to remain in the State**

Assumed trafficked persons may be granted a reflection period, consisting of a temporary residence and work permit for up to six months, as of 2006.<sup>1053</sup> In addition, a temporary work permit for one year is available if the trafficked person has broken away from those responsible for the trafficking, and a police investigation is initiated against the perpetrators.<sup>1054</sup> In 2007, 35 foreign nationals were granted a reflection period.<sup>1055</sup>

### **5.7e ANALYSIS OF IGOs AND NGOs**

The Council of Europe Commissioner for Human rights noted in his report that Norway's Plan of Action to Combat Human Trafficking was comprehensive, the attempts to ensure the availability of services to all victims were welcome, and their efforts to combat trafficking on a national and international level were commendable:<sup>1056</sup>

*Prosecuting human traffickers and taking care of the victims are complementary strategies in the fight against human trafficking. Providing victims of human trafficking with protection and assistance is not only a human rights obligation, but*

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<sup>1049</sup> Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1050</sup> Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1051</sup> NOK 252 million. Conversion done on 27 February 2009 at [www.xe.com](http://www.xe.com).

<sup>1052</sup> Norwegian Ministry of Foreign Affairs. "Measure of Combat Trafficking under the Government's Plan of Action." Department for UN, Peace and Humanitarian Affairs, 5 February 2008, p 4.

<sup>1053</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 6.

<sup>1054</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 6.

<sup>1055</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 6.

<sup>1056</sup> Gil-Robles, Alvaro. "Follow-Up Report on Norway (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights" 29 March 2006.

*also important in connection with the collection of evidence against human traffickers in criminal cases.*<sup>1057</sup>

The Commissioner suggested that further investigation and remedial measures are required in respect of the infrequent resort to reflection periods prior to expulsions.<sup>1058</sup> In addition, he welcomed the fact that the government was considering the clarification of the conditions for obtaining reflection period with a view of making them less rigid.<sup>1059</sup>

The Reform Resource Centre for Men, a Norwegian NGO, operates the Web site [www.sexhandel.no](http://www.sexhandel.no), and takes a gender-equality approach to human trafficking.<sup>1060</sup> The NGO believes that Norway's human trafficking laws are comprehensive and adequate, but questions whether they have been enforced – and that the same can be said for the support services offered to trafficked persons.<sup>1061</sup> It also noted that there has been a strong focus in Norway on human trafficking for sexual exploitation, and that forced labour or other forms of exploitation have only surfaced in the past year.<sup>1062</sup>

## **5.7f ANALYSIS**

Norway is taking the issue of human trafficking seriously by ratifying the most recent and relevant international human trafficking laws, and has attempted to adopt many of the requirements and suggestions in the 2000 Palermo Protocol and 2005 Council of Europe Convention. The Norwegian Government's Plan of Action to Combat Human Trafficking is a very comprehensive document, covering all angles of human trafficking, including demand and conditions in origin States. It lists various measures that should be taken by the State over a set period of time.<sup>1063</sup> While listing each

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<sup>1057</sup> Austad, Jan, Senior Adviser, National Coordinator on Trafficking in Human Beings, Ministry of Justice and the Police, Norway. "Trafficking in Human Beings – Norwegian Situation Report." November 2008, p 10.

<sup>1058</sup> Gil-Robles, Alvaro. "Follow-Up Report on Norway (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights" 29 March 2006.

<sup>1059</sup> Gil-Robles, Alvaro. "Follow-Up Report on Norway (2001-2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights" 29 March 2006.

<sup>1060</sup> Reform Resource Centre for Men. E-mail correspondence from Elise Skarsune. 7 May 2009.

<sup>1061</sup> Reform Resource Centre for Men. E-mail correspondence from Elise Skarsune. 7 May 2009.

<sup>1062</sup> Reform Resource Centre for Men. E-mail correspondence from Elise Skarsune. 7 May 2009.

<sup>1063</sup> The current Plan of Action covers 2006-2009.



measure, the Plan explains the steps that need to be taken, as well as the government ministry in charge of implementing the measure. Furthermore, a significant amount of funding is allocated for human trafficking in Norway, both nationally and internationally. While having a comprehensive action plan is important, it is also crucial that this plan is actually put into practice.

### **Criminal**

Although relatively few convictions of human trafficking offences have been made, Norway does have the criminal law in place to prosecute those involved in the trafficking process. As Pro Sentret explained, the lack of convictions stems from a lack of evidence in human trafficking cases, which sometimes results in reducing the charges against alleged traffickers. The fact that the Ministry of Justice and Police is the governmental department responsible for combating human trafficking indicates that Norway does treat the issue as a criminal matter.

Norwegian criminal law does not, however, fully comply with the provisions of the 2005 Council of Europe Convention. It does not list human trafficking committed by a public official in the performance of his/her duties as an aggravating circumstance in any law. The 2005 Council of Europe Convention requires States to ensure that this offence is considered an aggravating circumstance and is treated as such in the law.

### **Human rights**

Norway provides strong human rights provisions for trafficked persons, including accommodation, food, medical care, psychological support, legal aid, and a reflection period for trafficked persons. Despite the strength and availability of Norway's human rights provisions, they exist in policy form only and are not enshrined in legislation. This is problematic because it is much more difficult to alter laws than policies, which may be cut as a result of lack of funding, particularly in a time of economic recession.

It is also significant that out of the 200 trafficked persons assisted by the State between November 2006 and May 2008, only 30% of them cooperated with the police. This conveys that there are an overwhelmingly larger number of trafficked persons in need of assistance that would not otherwise receive it in States that require cooperation with police in exchange for human rights.

## **Conclusion**

Despite having relatively few human trafficking convictions, Norway has adopted many elements of the criminal model, through the criminalisation of human trafficking, and placing the Ministry of Justice and Police in charge of anti-trafficking efforts. At the same time, Norway has strong human rights provisions, available without a requirement of cooperation with authorities in exchange for assistance and protection. However, these provisions exist as State policy, rather than legislation, which is problematic because of their lack of permanence. Human rights must be enshrined in legislation and be enforceable in order to be able to operate to their fullest extent and be relied upon. While the lack of requirement for trafficked persons to act as witnesses in order to receive human rights provisions is a step in the direction of human rights, without inclusion in legislation, the human rights provisions are not as strong as the criminal laws. This indicates that Norway has adopted many elements of the human rights model to work in conjunction with their stronger adoption of the criminal model.

As a result, the human trafficking laws and policies of Norway demonstrate a direct criminal model with aspects of the human rights model.

## **5.8 CONCLUSIONS**

Three main findings emerged from the case studies. First, with the exception of Norway, each case study adopted the approach of the 2000 Palermo Protocol, rather than the 2005 Council of Europe Convention. This is primarily a result of the fact that their human rights provisions for trafficked persons – following an initial reflection period – are tied to a residence permit, only available upon cooperation with law enforcement authorities.

Secondly, the notion of human trafficking in the case studies is heavily tied to the sexual exploitation of women. While some of the case studies address forced labour in their laws, most prosecutions and convictions are made for sexual offences.

Lastly, despite the existence of direct human trafficking law in each case study, the States choose to continue to use indirect human trafficking laws to prosecute and convict traffickers.

## **CHAPTER 6: CONCLUSIONS**

Several conclusions arise from the analysis of the models, literature and case studies presented.

### **6.1 THE TRANSNATIONAL PARADOX**

Human trafficking is a transnational crime affecting a number of States. In order to respond to human trafficking, a transnational approach must be taken to facilitate the cooperation of law enforcement between States in terms of the chain of evidence and the investigation. Thus far, it is evident from the human trafficking conventions that States have largely dealt with human trafficking through a State-centric approach. The transnational paradox is the use of human trafficking conventions to deal with a transnational problem utilising a State-centric approach. This approach, also set out in the 2000 Palermo Protocol, is reflected in three ways: the criminal law, human rights and the monitoring mechanism.

Rather than adopting a State-centric approach, States can adopt a transnational approach. Despite the fact that States have signed up to transnational criminal laws on human trafficking, States tend to primarily implement these laws with a view to dealing with human trafficking internally. The aim of transnational criminal law is to respond to a crime that affects and takes place in multiple States. This should be accomplished not only through State-implemented internal measures, but also transnational cooperation.

#### **Addressing the transnational crime of human trafficking**

Despite the fact that human trafficking is a transnational organised crime, neither the international law nor States treats it as such.<sup>1064</sup> There are three pieces of evidence to suggest that States respond to human trafficking with a State-centric approach: 1) requirements of the 2000 Palermo Protocol; 2) State sovereignty; and 3) a lack of transnational criminal investigations of human trafficking.

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<sup>1064</sup> Konrad, Helen. "Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States." in *Trafficking and Women's Rights*. Christien L van den Anker and Jeroen Doomernik (eds). Hampshire: Palgrave Macmillan, 2006, p 121.

First, the 2000 Palermo Protocol stipulates that States must adopt national laws to criminalise human trafficking – and States have complied. However, prosecuting authorities in States have been reluctant to use direct human trafficking laws, and instead continue to rely upon indirect human trafficking laws. States parties of the 2005 Council of Europe Convention, however, are held accountable by GRETA, which has the ability to review their adoption and implementation of the laws and policies in the convention.

Secondly, criminal law provisions on human trafficking assert State sovereignty by allowing States to take action against possible threats, when crimes, such as human trafficking, progress from isolated incidents involved in the human trafficking process, to a recognised crime in itself.<sup>1065</sup> The process of human trafficking takes place across several States and should be prosecuted as a whole, rather than as individual acts which have taken place in each State. While any prosecution is a positive step, each prosecution typically represents only one act or crime in a multi-step and multi-State crime, and it only hinders one aspect of the process – rather than aiming to stop the process as a whole. Prosecuting human trafficking as a whole could also potentially tackle the organised crime structure in its entirety in different States, as organised crime is almost exclusively transnational in nature. Additional literature<sup>1066</sup> supports the adoption of the 2000 Palermo Protocol: to encourage as many States as possible to criminalise human trafficking and prosecute perpetrators – further application of States’ sovereignty.

Thirdly, there is a lack of transnational investigations that link the criminal activities involved in human trafficking in the origin and transit States with the criminals in the destination States.<sup>1067</sup> The process of human trafficking typically involves activities in several States, some or all of which may have different laws regarding human trafficking. Although it is the responsibility of the destination State to provide

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<sup>1065</sup> See p 20 and Nagan, Winston P and Alvaro de Medeiros. “Old Poison in New Bottles: Trafficking and the Extinction of Respect.” *Tulane Journal of International and Comparative Law*. Vol 14, 2006, p 259.

<sup>1066</sup> See p 20-21 and Amiel, Alexandra. “Integrating a Human Rights Perspective into the European Approach to Combatting the Trafficking of Women for Sexual Exploitation.” *Buffalo Human Rights Law Review*. Vol 12, 2006, p 12.

<sup>1067</sup> Konrad, Helen. “Trafficking in Human Beings: A Comparative Account of Legal Provisions in Belgium, Italy, the Netherlands, Sweden and the United States.” in *Trafficking and Women’s Rights*. Christien L van den Anker and Jeroen Doomernik (eds). Hampshire: Palgrave Macmillan, 2006, p 121.

provisions for the trafficked persons, the criminal acts of human trafficking can be investigated and prosecuted in multiple States, as criminal laws in each State involved were likely to have been broken. Despite some cooperation between police forces in various States, particularly in Europe, there appears to be a general lack of cooperation in terms of investigating and prosecuting traffickers on a transnational level, despite the nature of the crime. The literature review in Chapter 2 suggests that when States adopt national human trafficking criminal law, it allows for the prosecution of traffickers and a way of enforcing international – or in this case transnational – human trafficking law.<sup>1068</sup>

It is important to note that both the 2000 Palermo Protocol and the 2005 Council of Europe Convention contain provisions encouraging the cooperation of law enforcement, immigration authorities and other relevant agencies amongst States parties, when appropriate.<sup>1069</sup> The 2000 Palermo Protocol stipulates that the cooperation must take place in accordance with a State's national legislation,<sup>1070</sup> while the 2005 Council of Europe Convention states that the cooperation should take place through the application of relevant applicable international and regional instruments, and arrangements agreed to on the basis of uniform or reciprocal legislation and internal laws.<sup>1071</sup>

It should also be noted that I cannot draw conclusions on the lack of transnational investigations from my case studies. I did not ask the relevant ministries and governmental departments in the States about the extent of their transnational cooperation with other States on human trafficking investigations, and therefore have no evidence from the case studies.

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<sup>1068</sup> See p 21 and Bruch, Elizabeth. "Models Wanted: The Search for an Effective Response to Human Trafficking." *Stanford Journal of International Law*. Vol 40, 2004, p 17.

<sup>1069</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 10 and Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 32.

<sup>1070</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 10(1).

<sup>1071</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 32.

### **Rights of trafficked persons repatriated to their origin States**

The rights of trafficked persons repatriated to their origin States must also be considered. State sovereignty precludes destination States from holding origin States responsible for providing human rights provisions for trafficked persons repatriated to their origin States.

Both the 2000 Palermo Protocol<sup>1072</sup> and the 2005 Council of Europe Convention<sup>1073</sup> state that States parties of which a trafficked person is a national or permanent resident must take into account the person's rights, safety and dignity upon their repatriation. While it is important that these rights exist, they are vague and may be difficult to enforce.

A specific set of transnational human rights for trafficked persons must be established in order to ensure that a trafficked person receives a certain level of services and care in origin States. States would sign up to be bound by this set of transnational human rights for trafficked persons, therefore agreeing to checks from other States parties to ensure that the rights of trafficked persons are being met. First, a set of rights of trafficked persons repatriated to their origin States must be established. Secondly, the destination States must assume responsibility, through the mechanism, to ensure that trafficked persons they have repatriated receive their sets of rights. The primary concern in this case is that when destination States repatriate trafficked persons to the origin States, they receive a certain level of protection and assistance. The concern in origin States is not over State behaviour, but rather protecting trafficked persons from non-State actors, such as traffickers, who may re-victimise the trafficked persons upon their return.

### **Monitoring mechanism**

A monitoring mechanism is a very important and necessary step to hold States accountable who agree to be bound to the provisions of an international law. Monitoring mechanisms are traditionally State-centric in nature. The 2005 Council of Europe Convention has also taken that approach and therefore has established

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<sup>1072</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 8.

<sup>1073</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 16.

GRETA as a State-centric monitoring mechanism, along the same lines as those already in existence. However, unlike monitoring mechanisms established under other international laws, GRETA deals with an exclusively transnational organised crime, which is not best dealt with through a State-centric approach, since human trafficking, by its nature, typically involves more than one State.

GRETA reviews each State individually.<sup>1074</sup> When GRETA reviews one State, it may obtain information about another Council of Europe member State. It is unclear whether GRETA can use that information when the other State's conduct. GRETA has yet to undertake its monitoring and reporting functions, therefore it is too early to determine whether or not they will legitimately expand their role to include a transnational element.

This raises the question of whether State sovereignty is an obstacle to transnational organised criminal law. If States are technically only utilising indirect criminal law, it may be difficult for GRETA to have any impact on their implementation of the provisions of the 2005 Council of Europe Convention. It will be up to GRETA to make States justify their non-use of direct human trafficking laws.

### **A transnational criminal court?**

Another effect of globalisation is that the potential use of transnational criminal law will continue to increase. A review of transnational criminal offences and laws should take place in order to determine whether or not they are adequately being dealt with under universal international law, regional international law and national laws. It may be necessary to create a transnational criminal court if the review produces evidence suggesting that States are unwilling or unable to prosecute human trafficking, and that transnational crimes are not being dealt with sufficiently under existing legal systems and monitoring mechanisms. States would have to agree on the establishment of a transnational criminal court, as well as to be held to the findings of the court, and to cooperate with the court's regulations and procedures. Moreover, States may be

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<sup>1074</sup> For GRETA's workflow chart, see [http://www.coe.int/t/dghl/monitoring/trafficking/Source/Workflow\\_en.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/Source/Workflow_en.pdf). Last accessed 29 April 2009.



reluctant to agree to a transnational criminal court as it presents yet another potential limitation of their sovereignty.

## **6.2 CRIMINAL LAW**

In general, the introduction of human rights law after World War II has done little to change the overall nature of the international human trafficking law, with the exception of the 2005 Council of Europe Convention. The early international human trafficking law adopted prior to the development of human rights law, and the 1949 Convention, the 2000 UN Convention, the 2000 Palermo Protocol and the EU measures all adopt the criminal model. The primary focus of each treaty since 1910 has been to require States to criminalise human trafficking in its national law. Any assistance or protection afforded to trafficked persons was granted primarily as a means to facilitate the criminal investigations by encouraging trafficked persons to testify as witnesses against their traffickers.

Each post-World War II international human trafficking law adopts the criminal model. The 2000 Palermo Protocol adopts some elements of the human rights model, but primarily as a means to facilitate criminal prosecutions. It does not require States to provide economic and social rights for trafficked persons. The 2005 Council of Europe Convention adopts a relatively strong human rights model. It makes it mandatory for States to provide the unique human rights required by trafficked persons, in addition to requesting that States make it a possibility of not criminalising trafficked persons for illegal acts they may have participated in during the trafficking process without their consent. Most importantly, it stipulates that States should not make assistance and protection to trafficked persons contingent upon their cooperation with law enforcement. Literature discussed in Chapter 2 would support the non-punishment provision in the 2005 Council of Europe Convention, which states that States must provide for the possibility of not imposing penalties on trafficked persons for their involvement in illegal activities to the extent that they have been compelled to do so.<sup>1075</sup> Each of these factors indicates that the 2005 Council of Europe Convention adopts a strong human rights model.

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<sup>1075</sup> See p 23-24 and Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 26.

### **Direct versus indirect criminal laws**

States that adopt a criminal model can implement the model through either direct or indirect human trafficking laws. If a State directly criminalises human trafficking, trafficked persons cannot be viewed as criminals, and are dealt with automatically as victims under the human rights model. If a State uses indirect laws, such as prostitution, immigration or labour laws to deal with human trafficking, the State has the discretion to determine how to treat a trafficked person: as a criminal or as a victim. If a State does not recognise human trafficking as a crime, then trafficked persons would not be seen as victims, but rather as criminals who have breached immigration laws, at the very least.

Much of the literature reviewed in Chapter 2 is preoccupied with the potential criminalisation of trafficked persons if a criminal model is adopted.<sup>1076</sup> While that is a reasonable and logical concern, it is one that is very difficult to establish because of the fact that people are deported without being identified as trafficked persons. If States deport a person, it is highly unlikely that they have kept any record of whether or not the person may have been trafficked. As a result, aside from anecdotal evidence from NGOs in the case studies, there is really no way of determining if a State does, in fact, treat trafficked persons as criminals because of their breaches of immigration law.

As discussed in Chapter 2, when States utilise indirect law to criminalise human trafficking, they are not identifying the crimes that took place as human trafficking, and as a result, the trafficked persons are not viewed as victims of the crime and are not entitled to benefits of the human rights model. The French case study, for example, indicates that the State has relatively substantial assistance and protection available to those involved with prostitution. Pimping is commonly used as a conviction in France to prosecute those involved in human trafficking, so the trafficked persons may avail of those provisions. If States have established human rights provisions for trafficked persons and consistently use indirect law to prosecute traffickers, States still do not need to provide the trafficked persons with the provisions, as the act of human trafficking was not proven to have occurred.

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<sup>1076</sup> See pp 24-25.

At this stage, each of the case studies has implemented direct human trafficking laws, but primarily utilise indirect human trafficking laws. This means that human trafficking is recognised as a crime, and therefore trafficked persons can be viewed as victims, but because the direct laws go largely unused, it is up to the State to determine how to treat a trafficked person.

### **Dearth of direct human trafficking prosecutions/convictions in the case studies**

There are five reasons why the case studies have a dearth of direct human trafficking prosecutions and convictions. First, human trafficking laws are relatively new in most States. It may take time for prosecutions under these human trafficking laws to be processed in their respective criminal legal systems.

Secondly, those responsible for prosecuting crimes of human trafficking may be reluctant to charge traffickers with the offence because they may not be confident invoking direct criminal laws to prosecute human trafficking. Rather, traffickers are charged using the State's indirect trafficking law for specific crimes that are part of the human trafficking process.

Thirdly, States agreed to the definition of human trafficking in the 2000 Palermo Protocol, and then included that same definition in their national laws. The defined offence of human trafficking is inherently transnational; therefore, States find it difficult to prosecute a transnational offence within their national jurisdiction because of the difficulties associated with the chain of evidence and investigations across several States.

Fourthly, it may be more difficult for courts to convict people of human trafficking as it is difficult to obtain testimony from witnesses involved in or who are victims of the process. It is easier, as States like France have demonstrated, to gather evidence and prove prostitution or sexual exploitation rather than human trafficking. As a result, States are more likely to prosecute traffickers under indirect offences. Moreover, the indirect human trafficking laws have been in existence longer than the direct human trafficking laws, and therefore have a stronger precedent in States' legal systems.

Lastly, States might not want to admit to having a trafficking problem, so they amalgamate the statistics of prosecutions and convictions for trafficking and related offences. Convicting people of human trafficking indicates that States were not able to control human trafficking within their borders – something they may be unwilling to publicise. Literature reviewed in Chapter 2 suggests that prosecutors may not be willing to prosecute people under the crime of human trafficking because of the stigma attached to the crime.<sup>1077</sup> The author also suggests that traffickers may be convicted under indirect laws in cases of forced labour, because it is not seen as being as severe as trafficking for sexual exploitation, and therefore deserving of a lesser sentence.<sup>1078</sup>

### **6.3 HUMAN RIGHTS**

The limited human rights provisions included in the 2000 Palermo Protocol are a direct result of the lobbying of NGOs, rather than a strong political will amongst States parties to incorporate such provisions. This represents a shift from all previously-existing international human trafficking law, as it adopted both the criminal model alongside the human rights model.

#### **Unique set of human rights for assistance and protection of trafficked persons**

The unique set of human rights required for trafficked persons set out in the human rights model is reflected in the 2005 Council of Europe Convention, and to a far lesser extent, the 2000 Palermo Protocol. The 2005 Council of Europe Convention contains a list of mandatory specific economic and social rights which States must afford to trafficked persons, while the economic and social rights in the 2000 Palermo Protocol are discretionary. The case studies, for the most part, adopted an approach similar to the 2000 Palermo Protocol: a primarily criminal approach with a few discretionary human rights. The only exception to this is Norway, which contains policies providing trafficked persons with rights regardless of whether or not they participate in criminal investigations.

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<sup>1077</sup> See p 26 and Chacon, Jennifer M. “Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking.” *Fordham Law Review*. Vol 74, 2006, p 3035.

<sup>1078</sup> See p 26 and Chacon, Jennifer M. “Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking.” *Fordham Law Review*. Vol 74, 2006, p 3035.

### **Granting human rights in exchange for assistance with investigations**

When States make human rights for trafficked persons contingent upon their participation in the investigation and prosecution of their trafficker(s), it turns the human rights model into a means to facilitate the criminal model. Although States may provide a certain level of assistance and protection for trafficked persons following their identification, after an initial reflection period, some States do not continue to provide trafficked persons with human rights unless they participate in the investigation of their trafficker(s). While the 2000 Palermo Protocol does not stipulate whether or not trafficked persons must cooperate with law enforcement in order to receive assistance and protection, the human rights provisions included in the 2005 Council of Europe Convention are mandatory and do not require cooperation. As discussed in the literature review in Chapter 2,<sup>1079</sup> using assistance and protection along with residence permits as incentives to cooperate with law enforcement authorities undermines the purpose of the human rights model – to provide care and services to the victims of a crime.

Furthermore, the literature reviewed in Chapter 2, which suggests that when States adopt a human rights model they view trafficked persons as victims rather than criminals, really only applies in cases when the assistance and protection is not contingent upon the trafficked person's cooperation with law enforcement.<sup>1080</sup> If a State adopted the human rights model to the fullest extent, its primary concern would be ensuring that trafficked persons receive the care and services they require – rather than the prosecution of the traffickers.

The literature reviewed in Chapter 2 also suggests that whether or not a State makes a residence permit contingent upon a trafficked person's participation in investigations is indicative of which model the State favours.<sup>1081</sup> The 2005 Council of Europe Convention stipulates that States must grant trafficked persons a renewable residence permit, and may do so in one or other of the two following situations or both: a) the competent authority considers that it is necessary for the trafficked person to remain

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<sup>1079</sup> See pp 33-36.

<sup>1080</sup> See pp 27-28.

<sup>1081</sup> See p 24 and Mattar, Mohamed Y. "Establishing a Bill of Rights for Victims of Trafficking in Persons: How it Can Become a Possibility" in *Stop Trafficking in Human Beings—Together It's Possible: Proceedings of the International Conference "21<sup>st</sup> Century Slavery—The Human Rights Dimension to Trafficking in Human Beings."* 15-16 May, 2002, p 3.

in the State owing to their personal situation, and/or b) if the trafficked person is necessary for the purposes of cooperation with the criminal investigation of his or her trafficker(s).<sup>1082</sup> The Explanatory Report to the 2005 Council of Europe Convention states that although the convention does allow States to make residence permits only available to those who cooperate with investigations, it also requires States to adopt legislation or other measures to ensure that assistance to trafficked persons is not contingent upon their willingness to act as a witness.<sup>1083</sup> The 2000 Palermo Protocol does not make a residence permit mandatory, but does state that when considering providing a residence permit, States must take into account humanitarian and compassionate factors.<sup>1084</sup>

The literature reviewed in Chapter 2 is reflected in five of the six case studies – Cyprus, France, Ireland, Luxembourg and Malta – all of which require trafficked persons to cooperate with law enforcement in order to receive human rights provisions beyond the initial reflection period. This indicates that each of those five case studies adopted the approach of the 2000 Palermo Protocol, rather than the more recent 2005 Council of Europe Convention. In each of these cases, the assistance and protection offered to trafficked persons is tied into a temporary residence permit, which is only granted following the reflection period if the trafficked person has agreed to cooperate with the investigation of his or her trafficker(s). In France, the trafficked person is awarded with a 10-year residence permit if his or her trafficker(s) is/are convicted.<sup>1085</sup> The only exception to this is Norway, which does not make its assistance and protection, or its residence permits for trafficked persons contingent upon their participation in criminal investigations. Applying the theory presented in the literature, each of those five States would favour the criminal model. Those States would not be compliant with the requirements set out in the 2005 Council of Europe Convention because they tie human rights for trafficked persons to the residence permits and do not adopt measures ensuring that trafficked persons receive human rights without acting as a witness in the investigation of their trafficker(s).

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<sup>1082</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 14(1).

<sup>1083</sup> Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, para 169.

<sup>1084</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 7.

<sup>1085</sup> Décret n° 2007-1352 du 13 septembre 2007. Office Central pour la Répression de la Traite des Etres Humains, Ministère de l'Intérieur, letter dated 3 April 2009.

## **Gender**

It is clear from the focus of the 2000 Palermo Protocol and the human trafficking laws and policies of the case studies, that human trafficking is dealt with primarily in terms of women and children. While the 2005 Council of Europe Convention states in its Preamble and Chapter 3 that it takes gender equality into account, the 2000 Palermo Protocol takes a more gendered approach throughout its contents, beginning with the title: “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.” It is the general perception amongst States that a vast majority of trafficked persons are women trafficked for the purposes of sexual exploitation. As evidenced in the case studies, when States are asked to provide the number of human trafficking prosecutions and convictions, they automatically provided figures for those involving sexual exploitation. In many cases, the human rights provisions France provides to trafficked persons are synonymous with the assistance given to prostitutes.

As discussed in previous chapters, trafficked persons require a unique set of human rights because of their situation of being victims of a crime while illegally remaining in a State. Given the propensity of States to deal with human trafficking as an issue of gender, this raises the question as to whether this unique set of human rights should be specifically tailored to needs of women trafficked for sexual exploitation.

### **Assistance and protection for trafficked persons enshrined in destination States’ laws are stronger than policies**

The 2000 Palermo Protocol stipulates that States “shall consider” implementing measures to provide assistance for trafficked persons.<sup>1086</sup> The 2005 Council of Europe Convention does require States to adopt laws or measures in order to provide protection and assistance to trafficked persons.<sup>1087</sup> While measures or policies may, in the end, be just as effective as provisions included in laws, there is a difference in permanency. While it is more difficult and time consuming to enact a law, it is also more difficult to change a law. In other words, once a law is adopted requiring the

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<sup>1086</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3).

<sup>1087</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12.

State to provide assistance to trafficked persons, it is more difficult to change than a non-binding policy.

Cyprus, France, Luxembourg and Malta have all included some human rights provisions in their human trafficking laws. The human rights provisions in Ireland and Norway are policies and not included in legislation, which makes them less permanent.

Along the same lines, although each State has adopted some aspect of the human rights model, the levels of assistance and protection granted varies greatly between the States. In each case study with the exception of Norway, whether a trafficked person is permitted to remain in the destination State and receive assistance and protection beyond the initial reflection period is contingent upon their cooperation with law enforcement. This demonstrates a clear favouring of the criminal model, as human rights after an initial period are granted solely in order to facilitate criminal investigations.

### **Cooperation between destination State agencies and NGOs**

Two issues arise in relation to the cooperation between destination State agencies and NGOs: who should be in charge of the identification of trafficking persons, and provision of services to trafficked persons.

#### *Identification*

The 2000 Palermo Protocol requires law enforcement, immigration or other authorities of States parties to cooperate with one another and exchanging information to enable them to determine whether individuals crossing or attempting to cross an international border with travel documents for other persons or without travel documents, are traffickers or trafficked persons.<sup>1088</sup> The 2005 Council of Europe Convention requires States to adopt legislative or other measures to identify trafficked persons in collaboration with other States and relevant support organisations.<sup>1089</sup> It also requires States to provide their competent authorities with training in identifying

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<sup>1088</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 10(1)(a).

<sup>1089</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 10(2).



trafficked persons and to ensure collaboration with other States and relevant support organisations, taking into account the special needs of trafficked persons.<sup>1090</sup>

States possess the sole authority in the identification of trafficked persons, usually through their police or immigration officers. There are arguments, however, that NGOs should also play a role in the identification of trafficked persons. The differences in the identification process of trafficked persons represent a clear distinction between the criminal and human rights approaches to human trafficking: the police forces are more likely to view trafficked persons as criminals who have violated immigration laws, while NGOs are likely to view trafficked persons as victims of a crime. Other issues arise such as training and qualifications for dealing with trafficked persons. NGOs may be more accustomed to dealing with trafficked persons and may be better suited at identifying trafficked persons. On the other hand, most States have special divisions of the police force trained at identifying trafficked persons, particularly for the purpose of distinguishing them from other irregular or illegal immigrants.

Having the police or immigration officials in charge of the identification of trafficked persons may be problematic as trafficked persons may not trust police and be reluctant to talk to them and provide them with accurate information, given their illegal status in the State. This may result in inaccurate designations of trafficked persons as other types of irregular migrants, which could lead to them not being provided with the necessary legal and human rights provisions. Trafficked persons may be more likely to talk to NGOs and provide them with more accurate information, as they may be less afraid of revealing their own illegal position.

#### *Provision of services to trafficked persons*

The 2000 Palermo Protocol stipulates that a State's law enforcement, immigration, or other relevant officials should receive training in the prevention of human trafficking and the human rights of trafficked persons with encouraged cooperation from NGOs, other organisations, and other elements of civil society.<sup>1091</sup> In addition, the 2000

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<sup>1090</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 10(1).

<sup>1091</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 10(2).

Palermo Protocol and the 2005 Council of Europe Convention encourage cooperation with NGOs, other relevant organisations and other elements of civil society in the implementation of economic and social rights for trafficked persons, providing for their physical, psychological and social recovery.<sup>1092</sup> Furthermore, the 2005 Council of Europe Convention provides for the ability of NGOs to assist trafficked persons during the criminal proceedings of his or her trafficker, with his or her consent.<sup>1093</sup> The 2005 Council of Europe Convention also states that trafficked persons, upon being repatriated to their origin States, should be provided with a list of contacts, including law enforcement and NGOs to assist them upon their return.<sup>1094</sup>

State agencies dealing with issues of social welfare, or NGOs are best suited for providing services for trafficked persons. NGOs may be more specialised in the area of human trafficking and more accustomed to dealing with their unique set of needs. However, several questions arise in this area. Should States be able to delegate human rights to non-State bodies, even if there are good reasons to do so and they may be more qualified to deal with trafficked persons? Is that approach legal, as States are ultimately the bodies that assume responsibility for persons trafficked into their territory? If that approach is legal, how would cooperation between States and NGOs be achieved?

#### **6.4 IMPLEMENTATION OF LAWS AND POLICIES IN THE CASE STUDIES**

It is difficult to ascertain whether the laws and policies of the six case studies – or any other States for that matter – have genuinely assisted in curbing human trafficking in the State, or assisting persons trafficked into the State. The fact that human trafficking law – on an international, regional and national level – is relatively new, coupled with the lack of accurate human trafficking statistics makes it difficult to assess the impact of these laws. Lastly, it is also difficult to determine the extent to which each State has implemented its laws and policies – whether they exist only on paper, or also in practice. In some of the case studies, NGOs claim that although the laws and policies are in place, they are meaningless unless they are put into practice. Issues surrounding

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<sup>1092</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, Art 6(3) and Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 12(5).

<sup>1093</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 27(3).

<sup>1094</sup> Council of Europe Convention on Action against Trafficking in Human Beings, 2005, Art 16(6).

both States' adoption and implementation of human trafficking laws and policies are an additional reflection of the contradiction of addressing a transnational crime through a State-centric approach.

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