

# **The Global Problem of Sex Trafficking in Women**

A Comparative Legal Analysis of International, European, and National  
Responses

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## **Abstract**

There has been a flurry of legislative action at the international and regional levels to address the global problem of trafficking in persons, which victimises epidemic-proportions of individuals and generates one of the largest proceeds of organised crime. The harmonisation of national legal responses based on minimum standards around prevention, prosecution, and protection as espoused by those international and regional instruments is a prerequisite for effective and wide cooperation among countries of origin, transit, and destination. However, the reluctance of states to lift to the lofty heights of international consensus the contentious policy issues surrounding trafficking, including prostitution, has resulted in the adoption of rather ambiguous anti-trafficking norms and obligations, which allow states to individually determine what constitutes ‘trafficking in persons’ within their own jurisdictions. The subsequent divergence in national responses reveals that legal harmonisation has not taken place. The mechanisms of enforcement, which attach directly or indirectly to those international and regional instruments, therefore, have the formidable task of assisting states in the implementation of the substantive content of anti-trafficking norms and obligations through their monitoring and reporting mandates. However, their work remains a neglected area of academic research, compared to writings on the ambiguity of the international anti-trafficking framework. The challenge to international regulation of the trafficking problem, as identified in this thesis, relates on a fundamental level to the systemic limitations of the formal processes of law based on state consent and respect for the principles of sovereignty and territorial integrity. Through a comparative legal analysis of international and European legal responses to sex trafficking in women, this thesis illuminates the main systemic challenges to combating trafficking in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, and how the work of those enforcement mechanisms remedies some of those challenges.

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## Acronyms and Abbreviations

ATC	Anti-Trafficking Coordinator (of the EU)
BNRM	Bureau Nationaal Rapporteur Menschenhandel ('Bureau of the Dutch National Rapporteur')
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women (of the CEDAW)
CJEU	Court of Justice of the European Union
COE	Council of Europe
COE Trafficking Convention	Council of Europe Convention on Action against Trafficking in Human Beings
COP	Conference of the Parties (of the UNCTOC)
ECOSOC	Economic and Social Council (of the UN)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Trafficking Directive	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
Frontex	European External Borders Agency
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
IGO	inter-governmental organisation
ILO	International Labour Organization
NCID	National Criminal Investigation Department of the National Police (of Sweden)
NPB	National Police Board (of Sweden)
NGO	non-governmental organisation
NREM	national rapporteur or equivalent mechanism (on trafficking in persons)

OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
SRTIP	Special Rapporteur on Trafficking in Persons, especially Women and Children
TFEU	Treaty on the Functioning of the European Union
TIP	trafficking in persons
TIP Office	Office to Monitor and Combat Trafficking in Persons (of the TVPA)
Trafficking Principles and Guidelines	Recommended Principles and Guidelines on Human Rights and Human Trafficking
TVPA	Trafficking Victims Protection Act
TVPRA	Trafficking Victims Protection Reauthorization Act
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCTOC	United Nations Convention against Transnational Organized Crime
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UN Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
UK	United Kingdom
US	United States
WGTIP	Working Group on Trafficking in Persons (of the COP to the UNCTOC)

# 1

## Introduction

### 1.1. The Broader Legal and Political Context

Trafficking in persons<sup>1</sup> is one of the most serious transnational crimes and violations of human rights in the last two decades. It encompasses the movement or harbouring of persons using force or deceit for sexual and labour exploitation, as well as, the removal of organs.<sup>2</sup> In 2012, the International Labour Organization (ILO) estimated that 20.9 million men, women, and children worldwide are trapped in transnational and domestic situations of trafficking.<sup>3</sup> Most transnational trafficking is apparently for sexual exploitation of women in Central and South-Eastern Europe.<sup>4</sup> Even though the current understanding of trafficking is necessarily influenced by early anti-sex trafficking efforts based on European political ideologies and idiosyncrasies.<sup>5</sup>

The exact nature and scale of trafficking are unknown because most of the victim population is ‘hidden’ and traffickers use sophisticated and new technology tools. There is a general lack of awareness and capacity among national authorities to respond rapidly to existing and emerging forms of trafficking. The identification process of trafficking victims is burdensome because victims cannot be easily distinguished from illegal migrants on the

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<sup>1</sup> The terms ‘trafficking in persons’, ‘trafficking in human beings’, and ‘human trafficking’ are used interchangeably in this thesis, and the term ‘sex trafficking’ refers to trafficking in persons for sexual exploitation, that is, forced prostitution. According to the global definition, ‘trafficking in persons’ means ‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’. Protocol to Prevent Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (UN Trafficking Protocol) art 3(a).

<sup>2</sup> *ibid.*

<sup>3</sup> Farhad Mehran and Michaëlle de Cock (eds), *ILO Global Estimate of Forced Labour: Results and Methodology* (ILO 2012) 13.

<sup>4</sup> *ibid.* 14-16.

<sup>5</sup> Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013) 342.

ground, where there is considerable movement and overlapping between trafficking in persons and smuggling of migrants. While both crimes ‘require distinct legal, operational and policy responses’,<sup>6</sup> there is fear that national officials have an incentive for misidentification tied to the fact that trafficking victims are entitled to protection and assistance unlike illegal migrants.<sup>7</sup> In particular, as the fight against trafficking often serves as a veil for restrictive immigration policies.<sup>8</sup> That international law prohibits only forced prostitution does not prevent states from criminalising consensual prostitution in their own jurisdictions. But the fine line between forced and consensual prostitution in trafficking cases, based on the growing use of more subtle forms of coercion, can lead to misidentification and prosecution of trafficked persons as illegal prostitutes.<sup>9</sup>

The involvement of organised criminal groups is an important factor in perpetuating trafficking to a global scale. It also makes trafficking in persons the third most lucrative transnational crime, following drugs and weapons trafficking, generating in 2014 about USD 36 billion.<sup>10</sup> However, unlike those crimes, trafficked persons can be reused and resold with relative impunity for traffickers because the implementation of national anti-trafficking legislation is inadequate.<sup>11</sup> Countries of origin experience a decrease in human capital and social networks as large groups of nationals are removed from society. While in countries of destination the penetration of organised crime into society and the entrenchment of factors, such as poverty, sexism, and racism, that maintain vulnerability and create demand for cheap labour thwart the rule of law.<sup>12</sup> Thus, trafficking is complex and contested because of the underlying policy issues around immigration, prostitution, and organised crime, which, in turn, encourage states to adopt different approaches to trafficking around morality, public health and

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<sup>6</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 19 October 2010’ (30 March 2011) UN Doc CTOC/COP/WG.4/2010/7 annex para (a).

<sup>7</sup> Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime ‘Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children’s Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons’ (8 February 2000) UN Doc A/AC.254/27 para 2.

<sup>8</sup> Jennifer M Chacon, ‘Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement’ (2010) 158(6) *University of Pennsylvania Law Review* 1609, 1619.

<sup>9</sup> Janie Chuang, ‘Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy’ (2010) 158(6) *University of Pennsylvania Law Review* 1655, 1669, 1671.

<sup>10</sup> ‘Human Trafficking Has No Place in Modern World, General Assembly President Says’ (*UN News Centre*, 14 July 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48271#.VrZiW1iLShc>> accessed 8 March 2017.

<sup>11</sup> Louise Shelley, ‘The Relationship of Drug and Human Trafficking: A Global Perspective’ (2012) 18(3) *European Journal on Criminal Policy and Research* 241, 242.

<sup>12</sup> P Lloyd, BA Simmons and BM Stewart, ‘Combating Transnational Crime: The Role of Learning and Norm Diffusion in the Current Rule of Law Wave’ in M Zürn, A Nollkaemper and R Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (CUP 2012) 166.

order, labour, immigration, crime, and human rights.<sup>13</sup> Individually, these approaches can address only an element of trafficking but holistically they can effectively suppress the crime.

In cases of transnational trafficking, state cooperation in matters of confiscation of proceeds of crime, extradition, mutual legal assistance, application of extra-territorial jurisdiction, and assistance to and protection of victims, requires that the crime be common to both jurisdictions. Thus, the harmonisation of national anti-trafficking legislation is a prerequisite for effective cooperation. States subsequently regulate trafficking in persons within the transnational cooperative framework of organised crimes, under the United Nations Convention against Transnational Organized Crime,<sup>14</sup> which stipulates minimum standards for the adoption of measures to prevent trafficking, prosecute traffickers, and protect victims, manifest in the Protocol to Prevent Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime.<sup>15</sup> While the contextual understanding of trafficking, in turn, necessitates regional responses.

In Asia, there are no rights-based anti-trafficking instruments. The South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution focuses on trafficking in women and children for forced prostitution and, to this end, prevents ‘the use of women and children in international prostitution networks’.<sup>16</sup> This Convention is much narrower in scope than the Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children that covers prevention and protection without individual entitlements.<sup>17</sup> Both the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,<sup>18</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women<sup>19</sup> focus on trafficking in women as a gender-based violence. The Arab Charter on Human Rights prohibits trafficking both in the context of slavery and forced labour and mentions in addition to the forms in the UN Trafficking Protocol exploitation of children in armed conflict.<sup>20</sup> In Europe, trafficking in persons is a key political issue for several

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<sup>13</sup> Marjan Wijers, ‘Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol’ (2015) 4 *Anti-Trafficking Review* 56, 57-59.

<sup>14</sup> (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNCTOC).

<sup>15</sup> UN Trafficking Protocol (n 1).

<sup>16</sup> (adopted 5 January 2002, entered into force 1 December 2005) art 2.

<sup>17</sup> (adopted 21 November 2015).

<sup>18</sup> (adopted 11 July 2003, entered into force 25 November 2005) (African Protocol) art 4(2)(g).

<sup>19</sup> 33 ILM 1534 (1994) (Inter-American Convention) art 2(b).

<sup>20</sup> (adopted 22 May 2004, entered into force 15 March 2008) art 10.

organisations, particularly the European Union (EU), the Council of Europe (COE), the Organization for Security and Co-operation in Europe (OSCE),<sup>21</sup> and the Council of the Baltic Sea States (CBSS).<sup>22</sup> However, only the first two organisations have developed legally binding anti-trafficking standards, namely the Council of Europe Convention on Action against Trafficking in Human Beings,<sup>23</sup> and the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA<sup>24</sup> respectively.

The legislative response to trafficking in persons has been robust and within a decade of the UN Trafficking Protocol entering into force the vast majority of states around the globe had passed or modified their national anti-trafficking legislation. The strongest push for legislative action has come from Central and South-Eastern European states shortly after the Protocol was opened for signature.<sup>25</sup> That some of these states were already entering into bilateral anti-trafficking agreements is an important reason behind the initial push.<sup>26</sup> However, the criminal justice system response appears to be stagnating at a low level and investigations, prosecutions, and convictions are limited, particularly in African, Caribbean, and Middle Eastern states with more recently enacted legislation or no legislation.<sup>27</sup> Thus, one of the internationally more authoritative sources on trafficking, namely the annual report on trafficking in persons (TIP Report) focuses most recently on increasing criminal accountability of traffickers and addressing challenges in prosecution.<sup>28</sup>

The harmonisation of national anti-trafficking legislation that is necessary for effective cooperation in transnational trafficking cases has not taken place. Crimes with a transnational dimension fall outside the exclusive competence of states precisely because they cannot individually tackle the spoils of today's globalised world. For European states this means subjecting their domestic legal systems to harmonising measures at the EU level and at the

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<sup>21</sup> Permanent Council 'OSCE Action Plan to Combat Trafficking in Human Beings' (24 July 2003) PC.DEC/557.

<sup>22</sup> See generally Task Force against Trafficking in Human Beings <<http://cbss.idynamic.lv/Civil-Security-and-the-Human-Dimension/about-the-tf-thb>> accessed 10 September 2017.

<sup>23</sup> (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (COE Trafficking Convention).

<sup>24</sup> [2011] OJ L101/1 (EU Trafficking Directive).

<sup>25</sup> UNODC, *Global Report on Trafficking in Persons* (UN 2016) 50.

<sup>26</sup> Dimitri Vlassis, 'The UN Convention Against Transnational Organized Crime' in Mats Berdal and Monica Serrano (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Lynne Rienner 2002) 85.

<sup>27</sup> UNODC (2016) (n 25) 51.

<sup>28</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: June 2017* (US Department of State 2017) 1.

international level. Thus, scholars increasingly speak of legal pluralism that ‘immediately creates (at least) a duality of law across the entire globe’.<sup>29</sup> Since trafficking is a multidisciplinary and multidimensional crime, international documents tend to dictate a holistic approach.<sup>30</sup> But on a deep level, the solution to this complicated problem lies, first, in understanding the limitations of the international system to develop an appropriate response that will vary depending on context. As this thesis argues, an important part of the reason behind the inadequacy of current responses, rooted in the UN Trafficking Protocol, is inherent in the systemic limitations of international law broadly-speaking to manage the problem of trafficking in persons. Thus, international law is part of the problem. A more nuanced solution to current inadequacies lies elsewhere, namely at the domestic level with the establishment and development of mechanisms capable of gathering and analysing trafficking data to increase understanding of the problem, as well as, of monitoring, evaluating, and reporting on the domestic realities to assess why the law on the books has not translated into the law in action.

The next section defines the contours of this research project, in light of the primary and secondary research questions directing the study and the three main contributions to the field. Within the discussion of the third contribution, the section identifies the methodology.

## 1.2. Research Questions and Contribution to the Field

This thesis is interested in the current progress in the global fight against sex trafficking in women. By way of example of the national anti-trafficking responses of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, it studies the harmonisation of international and European anti-trafficking norms and standards, which were developed and adopted by states within the formal processes of law, with a view to international cooperation. In doing so, it examines the preeminent legal instruments, mechanisms, and procedures in the field and assesses their impact on knowledge production and international regulation. The *primary research question*, then, asks: to what extent the anti-trafficking norms and standards adopted within the consent-based system of international law actually promote progress in the

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<sup>29</sup> Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 815.

<sup>30</sup> States note that trafficking in persons as a serious form of organised crime that equally affects countries of origin, transit, and/or destination requires ‘a holistic approach that balanced criminal justice aspects with human rights’. UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October 2010’ (2 December 2010) UN Doc CTOC/COP/2010/17 para 62. See also EU Trafficking Directive (n 24) preamble para 7.

global fight against sex trafficking in women? The main components of this research question relate, in particular, to the design of anti-trafficking instruments and mechanisms, the narrow self-interests of states, and the use of unilateralism and soft law to improve the compliance behaviour of states. The *secondary research questions*, then, guiding this study ask: How states have chosen to respond to the global challenge of sex trafficking in women at the international level, and what their legal choices reveal about the political interests and priorities underpinning international regulation? Whether the systemic limitations to enforcement of the anti-trafficking norms and standards adopted within the formal processes of international and European law warrant more intrusive enforcement by unilateral mechanisms? How the formal mechanisms of enforcement developed and adopted by states can work around their systemic limitations to increase knowledge production and international regulation?

There is a saturation of scholarly literature focusing on the shortcomings of the UN Trafficking Protocol as the most appropriate response to the global challenge of trafficking in persons.<sup>31</sup> Most writings examine the definitional and conceptual ambiguities in the Protocol as impediments to a successful legal harmonisation of national anti-trafficking legislation so that it appears the Protocol does little to enhance international cooperation in matters of transnational trafficking.<sup>32</sup> Thus, most writings are concerned with the practical effects of the Protocol on domestic trafficking situations. An important reason behind this fixation is the lack of reliable data in the field to assess progress by measuring the nature and scale of trafficking.<sup>33</sup> Vast amounts of money are being pumped into the field of action to improve knowledge production and investors demand tangible results.<sup>34</sup> Thus, stakeholders revert to what can be measured, namely the number of identified victims, investigations, prosecutions, convictions, service providers, ratified legal instruments, and so on. These indicate that the criminal justice response of states is inadequate.<sup>35</sup> But there is a danger in focusing on, for example, whether a

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<sup>31</sup> See 'Anti-Trafficking Review' Issue 4 (2015). For example, Marjan Wijers' article on the Protocol's inadequate human rights coverage, Grupo Davida's article on the Protocol's impact on Brazil as a signatory, Kathryn Baer's article on the Protocol's impact on Singapore as a non-signatory.

<sup>32</sup> For example, Jean Allain, 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7 Albany Government Law Review 111.

<sup>33</sup> Elżbieta M Goździak, 'Empirical Vacuum: In Search of Research on Human Trafficking' in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime* (OUP 2014) 613.

<sup>34</sup> For an empirical study on the prevalence of anti-trafficking efforts in areas of research, awareness-raising, prevention, and rehabilitation, see KA Foot, A Toft and N Cesare, 'Developments in Anti-Trafficking Efforts: 2008–2011' (2015) 1(2) *Journal of Human Trafficking* 136.

<sup>35</sup> For a discussion of the main impediments to effective evaluations of a criminal justice response, namely the lack of clearly defined end-points and an overarching vision, see Anne T Gallagher and Rebecca Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who Decides-and How?' (2012) 1 *Anti-Trafficking Review* 10.



state has consented to become a party to the Protocol, or whether it has established a domestic mechanism on trafficking in persons as a definite sign of action.<sup>36</sup> Since there is an important difference between the law on the books and the law in action. Even if the setting-up of a domestic anti-trafficking mechanism is a positive development, that there is little evaluation of their actual impact on domestic realities is disconcerting.<sup>37</sup> Perhaps the anti-trafficking project is just another foreign policy that states are pressured to engage with to avoid criticism, improve their international image, and develop useful diplomatic relations.<sup>38</sup> In particular, as it competes for attention with other equally prevalent global challenges, such as smuggling of migrants and trafficking in firearms that are criminalised alongside trafficking in persons within the UNCTOC regime.<sup>39</sup> Even though the nature, scale, and effects of trafficking on governments and societies should be reason enough for genuine (concerted) action.

This thesis contributes to the debate on international regulation of trafficking in persons in three separate but related ways. The *first contribution* addresses the inadequate focus on mechanisms of enforcement at the national, regional, and international levels.<sup>40</sup> Often members of those mechanisms themselves assess the impact of their work to raise awareness of their mandate.<sup>41</sup> Also, in the context of awareness-raising, the reports of a number of mechanisms identified here are additionally available on the EU's anti-trafficking website.<sup>42</sup> In this specific case, the mechanisms to be explored are, at the national level, the national rapporteurs or

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<sup>36</sup> Dominika B Jansson, *Modern Slavery: A Comparative Study of the Definition of Trafficking in Persons* (Koninklijke Brill 2015) 9.

<sup>37</sup> For a 'state of play' assessment of the role and function of national rapporteurs or equivalent mechanisms on trafficking in persons in relation to data collection and analysis at the EU level, see Neil Paterson and Gert Vermeulen, *The Montrasec Demo: A Bench-mark for Member State and EU Automated Data Collection and Reporting on Trafficking in Human Beings and Sexual Exploitation of Children* (Maklu 2010) 49-61.

<sup>38</sup> Simmons identifies three categories of governments based on the decision to ratify human rights treaties, namely 'sincere ratifiers' that value the treaty content and anticipate compliance, 'false negatives' that are committed in principle but nonetheless fail to ratify, and 'strategic ratifiers' that ratify because of peer pressure and to avoid criticism. Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) 58.

<sup>39</sup> UNGA Res 55/25 (8 January 2001) UN Doc A/RES/55/25; UNGA Res 55/255 (31 May 2001) UN Doc A/RES/55/255.

<sup>40</sup> For a general overview of the mechanisms under the UN Trafficking Protocol, the COE Trafficking Convention, and the TVPA, as well as, the SRTIP, see Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 466-486. For a general overview of domestic mechanisms in Europe, see Mohamed Y Mattar, 'Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings' (2008) 41 *Vanderbilt Journal of Transnational Law* 1.

<sup>41</sup> For example, by the SRTIP, see Anne T Gallagher and Joy N Ezeilo, 'The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review' (2015) 37(4) *Human Rights Quarterly* 913. By the Dutch NREM, see Corinne E Dettmeijer-Vermeulen, 'Trafficking in Human Beings: Ten Years of Independent Monitoring by the Dutch Rapporteur on Trafficking in Human Beings' (2012) 18(3) *European Journal on Criminal Policy and Research* 283.

<sup>42</sup> See <[http://ec.europa.eu/anti-trafficking/publications\\_en?solsort=ds\\_field\\_publication\\_date%20desc](http://ec.europa.eu/anti-trafficking/publications_en?solsort=ds_field_publication_date%20desc)> accessed 13 September 2017.

equivalent mechanisms (NREMs) on trafficking in persons in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden.<sup>43</sup> At the European level,<sup>44</sup> the European Commission and the Anti-Trafficking Coordinator (ATC) that are responsible for evaluating transposition of the EU Trafficking Directive, as well as, the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties that attach directly to the COE Trafficking Convention. At the international level, the Conference of the Parties (COP) and the Working Group on Trafficking in Persons (WGTIP), the former attaching by extension to the UN Trafficking Protocol and the latter attaching directly to the Protocol to assist the COP in reviewing the Protocol's implementation. Two international mechanisms of relevance to the promotion of the human rights of trafficking victims, an area largely overlooked in multilevel responses, are the Special Rapporteur on Trafficking in Persons (SRTIP) that attaches indirectly to the UN Trafficking Protocol, and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) that attaches directly to the CEDAW.<sup>45</sup> The general provision on trafficking in women in the CEDAW is included in this study because the rights and guarantees in the CEDAW when interpreted as a whole offer sufficient protection to women's issues in all spheres of governance. This is important because most trafficking-related exploitation is private in nature and benefits from differences in the law *de jure* and *de facto*.<sup>46</sup> The final mechanism of relevance to this study is a domestic one in the US, namely the Office to Monitor and Combat Trafficking in Persons (TIP Office) that attaches directly to the Victims of Trafficking and Violence Protection Act of 2000.<sup>47</sup> In particular, the TIP Report published by the TIP Office as part of the US' foreign anti-trafficking policy because of the effects of the TIP Report on knowledge production and international regulation in the field. Academic interest in the TIP Report is somewhat comparable to that in the practical effects of the UN Trafficking Protocol on domestic trafficking situations as the

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<sup>43</sup> For a justification of the selection of case studies, see section 1.3.

<sup>44</sup> The OSCE and the CBSS are not included in this study, which is limited to formal legal structures with legislative and/or judicial functions.

<sup>45</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>46</sup> Mehran and de Cock (n 3) 13.

<sup>47</sup> (Public Law 106-386) (TVPA). See also Trafficking Victims Protection Reauthorization Act of 2003 (Public Law 108-193) (TVPRA 2003); Trafficking Victims Protection Reauthorization Act of 2005 (Public Law 109-164) (TVPRA 2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Public Law 110-457) (TVPRA 2008); Trafficking Victims Protection Reauthorization Act of 2013 (Title XII of the Violence against Women Reauthorization Act of 2013) (Public Law 113-4) (TVPRA 2013).

TIP Office claims to be the de facto monitoring mechanism of the UN Trafficking Protocol that has not yet established a proper review mechanism.<sup>48</sup>

The *second contribution* is to situate trafficking in persons within the broader literature on enforcement in international relations (IR) to assess whether and to what extent slow progress in the field is rooted in the limitations of consent-based systems of European and international law to effectively manage the trafficking problem. Of particular relevance is IR literature that examines the different stages of enforcement, namely law-making, implementation, and compliance.<sup>49</sup> In particular, what states' choices about the design of European and international anti-trafficking instruments reveal about the advantages and shortcomings of supra-territorial regulation of global challenges.<sup>50</sup> Thereby, looking at the interplay between hard law and soft law and its practical effects on compliance.<sup>51</sup> The anti-trafficking instruments examined here contain both hard and soft measures in terms of legally-binding obligations. There is also a growing body of soft instruments, including the Trafficking Principles and Guidelines that aspire to a higher standard of human rights protection and assistance for victims than espoused by the UN Trafficking Protocol.<sup>52</sup> An important reason that this document offers a higher level of protection and assistance is that it was designed without any state input.<sup>53</sup> Thus, bolstering the claim that soft law advantageously addresses the limitations of consent-based law-making.<sup>54</sup>

The interplay between hard law and soft law also informs the examination of the design of mechanisms developed by states within the formal processes of law-making to afford at least

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<sup>48</sup> See UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its seventh session, held in Vienna from 6 to 10 October 2014' (13 November 2014) UN Doc CTOC/COP/2014/13 resolution 7/1 para 3 ('the review of the implementation of the Convention and the Protocols thereto is an ongoing and gradual process ... it is necessary to explore all options regarding an appropriate and effective mechanism to assist the Conference in that review').

<sup>49</sup> Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

<sup>50</sup> On the issue of international consensus formation around the most appropriate response to trafficking, see V Charnysh, P Lloyd and BA Simmons, 'Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons' (2015) 21(2) *European Journal of International Relations* 323.

<sup>51</sup> For an empirical study on the link between states' primary interests in fighting trafficking and the hard nature of prevention obligations, compared to the optional objectives of international cooperation and victim support, see Seo-Young Cho and Krishna C Vadlamannati, 'Compliance with the Anti-trafficking Protocol' (2011) 28 *European Journal of Political Economy* 249.

<sup>52</sup> ECOSOC 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (20 May 2002) UN Doc E/2002/68/Add.1 (Trafficking Principles and Guidelines).

<sup>53</sup> Gallagher (2010) (n 40) 140.

<sup>54</sup> On the claim that 'better outcomes would result from greater use of non-consensual forms of international law', see Andrew T Guzman, 'Against Consent' (2012) 52(4) *Virginia Journal of International Law* 747.

a perception of international accountability of states in the trafficking field.<sup>55</sup> That those mechanisms seek to interpret and apply European and international anti-trafficking law in noncoercive, political settings necessarily influences the level of compliance of individual states. This is in contrast to coercive, judicial mechanisms, including the European Court of Human Rights (ECtHR) that seeks to increase the salience of legal interpretation of ambiguous trafficking definitions and concepts found in international anti-trafficking instruments.<sup>56</sup> The Court of Justice of the European Union (CJEU) has not been called upon so far to interpret the provisions of the EU Trafficking Directive, which makes it irrelevant in this specific case, because all infringement proceedings initiated for delayed or non-communication of transposition of the Directive by EU member states, including the Netherlands, were closed at an early stage by the European Commission.<sup>57</sup>

The IR literature on general compliance factors provides valuable insights about the preferred direction of national responses in the field as these are applied to the specific contexts of the case studies examined here.<sup>58</sup> The relative divergence in formal and practical compliance within and among states leads to two important conclusions. First, that there are certain challenges that are experienced by all identified states. Second, that there are challenges that are country-specific. Thus, the trafficking problem requires nuanced solutions that will vary depending on context. The international community now advocates a holistic response around issues of morality, public health and order, labour, immigration, crime, and human rights. Yet, states prefer to pick and choose their approaches depending on not only context but also narrow self-interests to the detriment of state cooperation.

The *third contribution* tackles the lacuna in comparative research on non-English countries by providing a comparative analysis of national responses in Belgium, the Czech

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<sup>55</sup> The legislation framework proposed by Goldstein et al and the language of hard law advanced by Abbott et al provides a framework for examining intrusiveness in relation to mechanisms of enforcement explored here. Kenneth W Abbott and others, 'The Concept of Legalization' (2000) 54(3) *International Organization* 401.

<sup>56</sup> On the normative implications of conflating slavery and trafficking in persons to bring the latter within the jurisdiction of the ECHR, see Jean Allain, '*Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) *Human Rights Law Review* 546.

<sup>57</sup> See infringements of EU Home Affairs law on trafficking in human beings by Austria (2013/0204), Cyprus (2013/0210), Germany (2013/0214), France (2013/0221), Greece (2013/0217), Italy (2013/0228), Ireland (2013/0226), Luxembourg (2013/0235), Malta (2013/0240), the Netherlands (2013/0242), Portugal (2013/0244), Spain (2013/0218), and Slovakia (2013/0253).

<sup>58</sup> For example, it is argued that compliance with anti-trafficking norms decreases with corruption and increases with respect for women's rights. S-Y Cho, A Dreher and E Neumayer, 'The Determinants of Anti-Trafficking Policies: Evidence from a New Index' (2014) 116(2) *Scandinavian Journal of Economics* 429. It is also argued that human rights protection efforts are stronger where female parliamentarians and left-wing politicians are involved in anti-trafficking policy-making. Johanna Schönhöfer, 'Political Determinants of Efforts to Protect Victims of Human Trafficking' (2016) *Crime, Law and Social Change* 1, 20.

Republic, Finland, the Netherlands, Romania, and Sweden, in the context of their international and regional anti-trafficking obligations. Most comparative studies focus on Anglo-Saxon countries with common law traditions because those still use English as their (main) official language, which can be useful at the informative level.<sup>59</sup> Civil law states, especially those with less widely spoken languages, such as Czech, Dutch, Finnish, Romanian, and Swedish, are somewhat under-researched.<sup>60</sup> There is also, to a certain extent, an absence of a culture-sensitive approach in comparative accounts, even though in this specific case an informed inquiry about the cultural ‘otherness’ explicates the relative divergence in national approaches to sex trafficking based on different policies on prostitution.<sup>61</sup> Function and context are two important concepts in comparative methodology and to meaningfully grasp the foreign laws requires consideration of both the operating institution and the law in action.<sup>62</sup> Functionalism is also the most common ‘method’ in comparative law and the one employed here because the primary purpose is ‘to look at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems’.<sup>63</sup> The functional method already refers by definition to a context, thus, the law-in-context method is relevant to an adequate understanding of the law, and to explain why the law is as it is. This method is complementary and cannot be isolated from other comparative methods.<sup>64</sup> But this method is used here only to point to a generally-known context element, namely the influence of prostitution policies on conceptualisations of sex trafficking. Like the law-in-context method, the historical method cannot be avoided, since a proper understanding of the function of contemporary law requires identifying where it comes from and why it is as it is today.<sup>65</sup> Again, the historical method is used only to understand the link between sex trafficking and prostitution on the national level. The historical method in this specific case reveals that the current divergence in conceptualisations of sex trafficking are just differences as to the outcome of ongoing tensions between opposite views on prostitution. All case studies at one point in time regulated or criminalised prostitution and more recently at least considered legalisation

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<sup>59</sup> Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ (2015) *Law and Method* 1, 3.

<sup>60</sup> For a comparative study of the trafficking definition in Sweden, Poland, and Russia, see Jansson (n 36).

<sup>61</sup> Pierre Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45(1) *International and Comparative Law Quarterly* 52, 60.

<sup>62</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34.

<sup>63</sup> There is disagreement over whether comparative law is a method, a new perspective, or a domain of study, which has implications for the exact methodology to be followed. As there is no ‘one’ method, any combination of the methods, namely functional, structural, analytical, law-in-context, historical, and common-core, can be used in the same research. Van Hoecke (n 59) 8-9.

<sup>64</sup> *ibid* 16.

<sup>65</sup> *ibid* 18.

for tax revenue. In sum, a micro-comparative methodology based on the functional method and, more minimally, on the law-in-context and historical methods most appropriately assesses legal harmonisation of anti-trafficking norms and standards at the international, European, and national levels. In other words, '[i]f the aim is to harmonize the law ... comparing the legal systems involved is already implied by this aim, but also the approach to be followed is partly determined by it, as the focus will be on the commonalities, on the common core of the compared legal systems and on the possible ways of erasing differences'.<sup>66</sup>

The next section explains the reasons for choosing Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden as the primary case studies, as well as, the importance of the European context. The methodological difficulties arising from the selection of case studies are also addressed.

### **1.3. Research Scope, Selection of Case Studies, and Methodological Difficulties**

Trafficking in persons develops differently in different regional contexts. The specificities of a region can facilitate or complicate the trade, thus, making it more or less attractive for traffickers. Trafficking typically flows into Europe because of the wealth disparities between Western and Central European states belonging to the EU and countries to the east and south of the European territory of the EU, which are primarily developing countries.<sup>67</sup> The EU states are among the wealthiest in the world and there is demand for cheap sexual and labour services following the economic crisis.<sup>68</sup> A context-specific dimension of EU trafficking is that EU states, namely Romania, Bulgaria, Netherlands, Hungary, and Poland, are the most significant origins of trafficking.<sup>69</sup> Non-EU victims primarily originate in Nigeria, China, Albania, Vietnam, and Morocco.<sup>70</sup> An important reason behind the dominance of EU victims, also known as internal trafficking, is the removal of internal borders in lieu of one external EU border. This means that EU citizens can exercise free movement within the EU area and traffickers have exploited this right, in the same vein that they exploited the ease of travel in

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<sup>66</sup> *ibid* 2-3.

<sup>67</sup> UNODC (n 25) 75.

<sup>68</sup> Commission Staff Working Document accompanying the Commission Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims SWD(2016)159 final 14.

<sup>69</sup> *ibid* 12.

<sup>70</sup> Previously, between 2010 and 2012, victims primarily originated in Brazil, China, and Russia. Thus, only the citizenship of non-EU victims has changed. *ibid*.

the wake of globalisation.<sup>71</sup> Thus, the fight against trafficking often serves as a veil for restrictive immigration policies as states have limited options to keep their borders both open and secure from crime.<sup>72</sup> In particular, the more recent influx of refugees and migrants into the EU demonstrates ‘the failure to recreate the means of governing space and persons once internal border controls were removed’.<sup>73</sup> These groups of persons are particularly susceptible to trafficking-related exploitation and the TIP Report documents recruitment attempts by traffickers at reception centres in Belgium and the inability of government institutions to conduct sufficient screenings of migrants to identify potential trafficking in Sweden.<sup>74</sup> According to intelligence from Europol the refugee influx will result in (more) forced marriages of migrant and asylum-seekers for legal residency.<sup>75</sup>

Within the EU, trafficking in women for sexual exploitation is most prevalent and the reported level of sex trafficking is among the highest in the world.<sup>76</sup> The majority of offenders are men from EU states like their victims, as well as, third regions, such as Africa.<sup>77</sup> An obvious deduction is that trafficking data in the EU is stereotypical in its image of innocent women who are sexually exploited by socially deviant men.<sup>78</sup> This is cause for reflection about the advancement of knowledge in the EU field. Even though the European Commission identifies ‘a worrying consistency in terms of victims’ countries of origin, countries of destination, the forms of exploitation, and the age and gender profile of victims over the five years’.<sup>79</sup> An important reason behind the stereotypical construction of the nature of trafficking relates to the fact that in many European countries the trafficking offence predates the adoption of the UN Trafficking Protocol when it covered only sex trafficking. For example, the Netherlands introduced sex trafficking into national law in 1911, although it was amended in 2005 to cover additional exploitation forms found in the UN Trafficking Protocol.<sup>80</sup> Certain presuppositions

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<sup>71</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 arts 4-5.

<sup>72</sup> On an area of freedom, security, and justice, policies on border checks, asylum, and immigration, and police cooperation in relation to serious forms of organised crime, including trafficking, see Consolidated Version of Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) arts 67, 77, 87-89.

<sup>73</sup> Agustín José Menéndez, ‘The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration’ (2016) 22(4) *European Law Journal* 388, 388-389.

<sup>74</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: June 2016* (US Department of State 2016) 94, 336.

<sup>75</sup> Commission Staff Working Document (2016) (n 68) 19.

<sup>76</sup> UNODC (2016) (n 25) 72-73.

<sup>77</sup> Commission Staff Working Document (2016) (n 68) 12.

<sup>78</sup> See Wijers (2015) (n 13) 73.

<sup>79</sup> Commission Staff Working Document (2016) (n 68) 13.

<sup>80</sup> UNODC (2016) (n 25) 77.

and prejudices about the crime and its victims, then, dictate the potential success of the anti-trafficking framework. Thus, there are international variations of sex trafficking and elements, such as internal trafficking and the refugee crisis, are idiosyncratic to European states as countries of origin, transit, and/or destination.<sup>81</sup>

The selection of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden as the six case studies in thesis is rooted in five reasons, some necessitated by the comparative research undertaken here, others are of a more pragmatic nature. *First*, it is expressed in comparative law that ‘the only things which are comparable are those which fulfil the same function’.<sup>82</sup> If the basic methodological principle of all comparative law is similarity, then, the main similarity among the case studies is that they all follow a civil law tradition. However, today, in Europe all legal systems are mixed. For example, in 1804, the Dutch system adopted the Code Napoléon, in 1838 it enacted the Burgerlijk Wetboek, and in 1992 it enforced a new Burgerlijk Wetboek under the influence of the German legal tradition.<sup>83</sup> There is also a notable influence of the Anglo-Saxon doctrine on the Dutch system. Broadly-speaking, through EU law and ECHR law, concepts of the French and German legal doctrines have entered other European systems. In this specific case, the EU Trafficking Directive makes mandatory the exercise of the nationality principle under article 10, which reflects the current position of some member states, including Austria, Denmark, and Ireland.<sup>84</sup>

*Second*, it is expressed in comparative law, to the contrary, that ‘a respect for alterity is not so much the result of a quest for difference as it is its pre-requisite’.<sup>85</sup> If the basic methodological principle of all comparative law is difference, then, the main difference among the case studies is their trafficking experience as illustrated in the table below. An instinctive conclusion is that labour trafficking in men, women, and children is more prevalent than sex trafficking in the Netherlands, Romania, and Sweden. The former two states are major origin countries for sex trafficking, while the increase in labour trafficking reflects the economic crisis in the EU. In relation to sex trafficking in women, all six states are origin countries (Belgium, Finland, and Sweden to a limited extent), transit countries (Sweden to a limited extent), and destination countries. The Netherlands is most affected by sex trafficking. Sex trafficking in

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<sup>81</sup> Leonard Territo and George Kirkham (eds), *International Sex Trafficking of Women & Children: Understanding the Global Epidemic* (Looseleaf Law Publications Inc 2010) 5.

<sup>82</sup> Zweigert and Kötz (n 62) 34.

<sup>83</sup> Van Hoecke (n 59) 26.

<sup>84</sup> Tom Obokata and Brian Payne, ‘Implementing Action against Trafficking of Human Beings under the TFEU: A Preliminary Analysis’ (2012) 3(3-4) *New Journal of European Criminal Law* 298, 305.

<sup>85</sup> Pierre Legrand, ‘The Same and the Different’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 272.



children appears to be as prevalent in all six states as sex trafficking in women. Only Belgium and the Netherlands appear to report on sex trafficking in men as origin (Belgium to a limited extent), transit, and destination countries. Also, only Belgium (limited origin country) and the Netherlands experience the full realm of sex and labour trafficking.

Table 1. Nature of trafficking in persons for sexual and labour exploitation.<sup>86</sup>

	Sex Trafficking									Labour Trafficking								
	Origin			Transit			Destination			Origin			Transit			Destination		
	M	W	C	M	W	C	M	W	C	M	W	C	M	W	C	M	W	C
<b>Belgium</b>	L	L	L	X	X	X	X	X	X	L	L	L	X	X	X	X	X	X
<b>Czech Republic</b>		X	X		X	X		X	X	X	X		X	X		X	X	
<b>Finland</b>		L	L		X	X		X	X	L	L		X	X		X	X	
<b>Netherlands</b>	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
<b>Romania</b>		X	X		X	X		X	X	X	X	X	X	X	X	X	X	X
<b>Sweden</b>		L	L		L	L		X	X	X	X	X	X	X	X	X	X	X

M = men      W = women      C = children      X = 'full'      L = limited

The different trafficking experiences of the case studies necessarily influence whether and to what extent they are involved in the fight against trafficking. More general indicators of commitment are the signature and ratification of preeminent anti-trafficking instruments, such as the UN Trafficking Protocol and the COE Trafficking Convention, and communication of transposition of the EU Trafficking Directive. At the same time, the level of compliance with these instruments as measured by mechanisms of enforcement attaching to these very instruments or more generally by, for example, the TIP Report can be a good indication of state involvement. In particular, in the absence of reliable trafficking data for accurate assessments. All six states are parties to the instruments just mentioned and their compliance scores in the TIP Report fall into the highest categories of full compliance or incomplete compliance with significant efforts to come into compliance.<sup>87</sup> Even though compliance in the TIP Report is measured not against international anti-trafficking standards to which these states have consented but against domestic US anti-trafficking standards that differ in some significant ways. The Czech Republic is the most recent state party to ratify the COE Trafficking Convention, although it was already involved in the fight against trafficking, at the very least as a result of its accession to the EU and the requirement of *acquis communautaire*. The same

<sup>86</sup> Data source: TIP Office (2017) (n 28).

<sup>87</sup> TIP Office (2017) (n 28) 46.

point applies to Romanian involvement in the anti-trafficking project. As a result of the acquis incorporation, the ‘new’ EU states, in particular, the Czech Republic often outperform the ‘old’ EU states in matters of formal compliance with EU law generally.<sup>88</sup> A further point related to the significant gap between signature and ratification of the UN Trafficking Protocol and the COE Trafficking Convention by the Czech Republic is the status of international law in individual states. The Czech Republic could not ratify both instruments until and unless national law defined criminal liability of legal persons.<sup>89</sup>

*Third*, and related to the second reason, the conceptualisation of sex trafficking in these states differs depending upon their prostitution policies. While some states, such as Finland and Sweden draw a direct connection between prostitution and the increase in sexual exploitation, other states, such as the Netherlands, distinguish legally between consensual and forced prostitution and seek to reduce sexual exploitation in the legalised sex industry by improving the working conditions of sex workers that create vulnerability. The specific conceptualisation of sex trafficking will influence the priorities of government institutions and their ability and the extent to which they cooperate with other states in transnational trafficking cases. The prostitution policies of individual states, in turn, depend upon their different cultural settings. For example, the Czech Republic and Romania belong to the group of formerly communist states that believed the transition from capitalism to communism would end prostitution as ‘depraved capitalism’ and the moral failing, especially of prostitutes themselves.<sup>90</sup> This labelling resurfaces in current approaches to prostitution-related exploitation as just another criminal activity. By contrast, Finland and Sweden are two countries with long-standing respect for women’s human rights, as evidenced by the formulation of their trafficking policies around gender equality, which is documented to increase overall compliance with international anti-trafficking norms and standards.<sup>91</sup> The stigma attached to prostitution will influence the treatment of persons in prostitution-related exploitation, such as the types of assistance available to sex trafficking victims, the potential

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<sup>88</sup> Serena Bressan, ‘Criminal Law against Human Trafficking within the EU: A Comparison of an Approximated Legislation?’ (2012) 20(2) *European Journal of Crime, Criminal Law and Criminal Justice* 137, 161.

<sup>89</sup> UN Committee for the Elimination of All Forms of Discrimination against Women ‘Responses to the list of issues and questions with regard to the consideration of the combined fourth and fifth periodic report: Czech Republic’ (26 July 2010) UN Doc CEDAW/C/CZE/Q/5/Add.1 para 97.

<sup>90</sup> DA Dragomirescu, C Necula and R Simion, ‘Romania: Emerging Market for Trafficking? Clients and Trafficked Women in Romania’ in A Di Nicola, A Cauduro, M Lombardi and P Ruspini (eds), *Prostitution and Human Trafficking: Focus on Clients* (Springer 2009) 124.

<sup>91</sup> Cho, Dreher and Neumayer (2014) (n 58) 432.

outcome of trafficking proceedings, and so on. Societal attitudes will influence the judiciary, in particular, the reasoning of a judge on a specific matter of anti-trafficking law.

*Fourth*, and related to the second reason, the trafficking experiences of individual states associate with economic and political instability, as well as, geographical location. Romania and the Czech Republic illustrate how the transitioning of their economies after the fall of communism precipitated unemployment and, in turn, transnational trafficking. The wealth disparities between neighbouring countries also increase sex trafficking in women, such as along the Czech-German border, known as the largest brothel in Europe, and the Finnish-Russian border.<sup>92</sup>

*Fifth*, the case studies have set up different NREMs in terms of structural design and scope of mandate. The NREMs are found to take one of four structures, namely inter-agency coordinating structures, stand-alone institutions, offices within government institutions, and institutions that are integrated into a broad-based human rights institution. Only the Belgian NREM is bi-structured. Each structure has certain advantages and shortcomings depending upon the size of the state, its geographical location, the extent of the domestic trafficking situation, and the availability of resources. The structure of the NREM has some influence on the impact of its mandate and more free-standing structures, such as the Dutch and Finnish ones, appear to exert greater influence on the compliance behaviour of their governments because they are sufficiently independent. At a minimum, the NREM carries out assessments of trafficking trends, measures the results of anti-trafficking action, gathers statistics, and reports to government. A wider mandate will obviously have a greater impact on domestic situations but only if there are adequate resources to carry out the identified tasks. A governmental structure maximises utilisation of existing human, financial, and material resources and can ensure accountability within existing governmental procedures. But at the cost of independence of work.

When domestic trafficking situations are studied from an international and regional perspective, there is a risk of casting the net too wide in terms of the number of case studies chosen for a meaningful comparative analysis. Consequently, research can become formalistic as there is little scope for analysis. The TIP Report that assess compliance of 188 countries illustrates the analytical and methodological problems arising when the net is cast too wide so

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<sup>92</sup> Anne-Maria Marttila, 'Desiring the "Other": Prostitution Clients on a Transnational Red-Light District in the Border Area of Finland, Estonia and Russia' (2008) 12(1) Gender Technology and Development 31, 32-33.

that the focus becomes the status of compliance rather than its quality.<sup>93</sup> At the same time, a single case study does not facilitate the comparison of laws, institutions, compliance behaviours, or trafficking situations. Even if an individual focus has the benefit of a deep analysis of historical developments.<sup>94</sup> The selection of case studies here hopefully accommodates these concerns, in particular, as the purpose of the comparative research is to draw out international cooperation in transnational trafficking cases and the importance of legal harmonisation to this end. A more limited focus may be necessary when conducting a critical legal analysis of specific legal provisions in anti-trafficking instruments.<sup>95</sup> Given the number of case studies used here the functional comparative methodology does not require thorough analysis of the broader cultural context of states, which already reduces some of the complexity in comparing different legal systems. Although, reducing the complexity of comparison also reduces the explanatory force of functional-based research.<sup>96</sup> Thus, there is a real risk of excluding the voices of the non-dominant in the field of action whose input is necessary for a comprehensive and meaningful analysis. To a certain extent, their voices surface in the reports of local NGOs, hence, the value of their inclusion in this study.

That this study has not conducted any empirical research somewhat reduces the quality of the impact assessment of the anti-trafficking laws and mechanisms examined here. The heavy reliance on theoretical, literature-based, desktop research, however, underlines a lack of knowledge in the field. The differences in the trafficking experiences of the case studies are also reflected on an empirical level as information is more readily available and accessible in Belgium, Finland, the Netherlands, and Sweden than in the Czech Republic and Romania, especially on and by their NREMs. That the information is not translated into more widely spoken languages, such as English, presents a further impediment to comparative research. At the same time, translations in English tend to focus on legislation and do not always follow amendments to the law so that the information rapidly becomes outdated. The rather formalistic nature of the laws and reports examined here has facilitated their translating by the author

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<sup>93</sup> For a criticism of the TIP Report, see Anne T Gallagher, 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports' (2011) 12 Human Rights Review 381.

<sup>94</sup> See Roth's thesis depicting almost a century of legal discourse on trafficking in persons, which corroborates that the contemporary discourse is led by an unhistorical approach to prostitution. Venla Roth, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff 2012) 42-62. See also Sarah Krieg, *Multilevel Regulation against Trafficking in Human Beings: A Critical Application Analysis of International, European and German Approaches* (Nomos 2014).

<sup>95</sup> See Jansson (n 36).

<sup>96</sup> Van Hoecke (n 59) 11.

herself. To ascertain whether and to what extent information was lost in translation this information is cross-checked against general introductions in English, state reports, and reports and other material by the enforcement mechanisms examined here, in addition to the vast literature in the field generally.<sup>97</sup> Given the different periods of state reporting to specific enforcement mechanisms information also depicts legislative and enforcement developments.

#### **1.4. Structure of the Thesis**

This thesis covers a subject-area that is broad from both a geographic and a thematic perspective. It is structured into four core chapters that examine, first, the laws and policies on sex trafficking in women and the systemic limitations to implementation of the preeminent legal instruments. Second, the mechanisms of enforcement attaching to these instruments and to what extent their work remedy the identified systemic limitations. To further facilitate comparison, each core chapter considers the three levels of comparison (international, European, and national) cumulatively so as to better depict the realities of international regulation.

*Chapter 2* examines the definitional ambiguities, the conceptual uncertainties, and the practical obstacles to implementation of the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive as the preeminent legal instruments. Within the international paradigm, it also considers the effects of the trafficking provision in the CEDAW, the higher human rights standard in the Trafficking Principles and Guidelines, and the inclusion of consensual prostitution in the TVPA on normative development in the field. The chapter assesses whether a successful harmonisation has taken place in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden in favour of international cooperation.

*Chapter 3* explores the main systemic challenges to implementation of the preeminent legal instruments to understand why the law on the books has not translated into the law in action in the case studies. In particular, what the legal choices of states reveal about the political priorities and interests underpinning international regulation, and whether these serve the international objective of cooperation or the narrow self-interests of individual states. The prostitution policies of the case studies are used here as an instructive example. The underlying challenges, thereby, discovered centre on the contentious nature of trafficking-related policies, the power asymmetries in negotiations that cannot effectively accommodate the interests of all

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<sup>97</sup> The European Commission's website on trafficking in persons includes international documents, reports, studies, and other material in the field <<http://ec.europa.eu/anti-trafficking/>> accessed 14 September 2017.

participants, and the need for state consent to ensure the effectiveness of the legal instrument and the institution managing cooperation.

*Chapter 4* evaluates the formal mechanisms and tools of enforcement that attach directly or indirectly to the preeminent legal instruments, as well as, the CEDAW Committee, the TIP Office, and the NREMs in the case studies. This evaluation focuses on four features, namely the scope of mandate, the degree of independence and accountability of office, the availability of adequate resources, and the extent of cooperation with NGOs. As monitoring and reporting are believed to threaten the sovereign prerogatives of states, the four features reveal the level of intrusiveness of the mechanisms chosen by states to improve their compliance behaviours.

*Chapter 5* assesses the impact of the very mechanisms identified in chapter 4 on knowledge production and international regulation, since a global challenge requires a global response. In particular, whether and to what extent these mechanisms are able to remedy the definitional ambiguities, the conceptual uncertainties, and the practical obstacles identified in chapter 2. It probes whether the systemic limitations identified in chapter 3 warrant enforcement by more intrusive mechanisms, such as the TIP Office that operates outside any formal process of consent.

*Chapter 6* presents the central findings of the core chapters, with a recommendation for strengthening existing NREMs within a uniform framework based on their similarities and potential to progress the global fight against sex trafficking in women by improving the compliance behaviour of states. It ends with a call for further impact studies on the mandates of NREMs to raise awareness of their role and function and to explore the potential ways in which NREMs can influence the current anti-trafficking discourse through individual and collective action.

## **The Legal Framework of Sex Trafficking: An International Definition and Harmonised Responses to Prevention, Prosecution, and Protection**

### **2.1. Introduction**

Trafficking in persons, particularly women, for sexual exploitation not only persists but also appears to be rising as states struggle to prosecute traffickers as a means of deterrence. There is a corresponding increasing recognition of the inadequacies of current national responses rooted in the UN Trafficking Protocol. The international community is consequently desperate to explore new legal options to address the current inadequacies of international regulation of the trafficking problem. An important part of the problem is that the harmonisation project of national anti-trafficking legislation through the UN Trafficking Protocol and supporting regional responses has been largely unsuccessful in promoting effective and wide cooperation. The definitional and conceptual ambiguities found in international and regional responses illustrate that the trafficking problem is both complex and contested. These ambiguities form the basis of this chapter that seeks to explore how the international community has chosen to manage cooperation as a prerequisite for the prevention of transnational trafficking, the prosecution of transnational traffickers, and the protection of transnational victims. While domestic situations of trafficking can be adequately dealt with within the confines of domestic systems, transnational situations depend upon state cooperation through a harmonised framework.

Section 2.2 deals with international responses, namely the UN Trafficking Protocol, the Trafficking Principles and Guidelines, the CEDAW, and the TVPA. The latter instrument is domestic by nature but the focus here is on its extraterritorial scope and effect on international regulation as it is the only domestic instrument in the field to exert significant influence at the international level. Section 2.3 concerns European responses, namely the COE Trafficking Convention, the European Convention on Human Rights and the Protection of Fundamental Freedoms (ECHR), and the EU Trafficking Directive. Finally, section 2.4 focuses on national

responses in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden. By way of example of these case studies, this chapter illustrates that a successful legal harmonisation of supra-territorial responses has not taken place as there is relative divergence in national responses, particularly the law on the books has not translated into the law in action. This impedes state cooperation and has stunted progress in the global fight against sex trafficking in women. The core conclusions of this chapter are laid out in section 2.5.

The inquiry about multilevel responses is facilitated by pluralist understandings of the relationship between legal systems at different levels of governance.<sup>98</sup> In particular, that there exists ‘spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us’.<sup>99</sup> These help to mediate the conflicting interests of multiple systems seeking to assert their norms over the trafficking problem with a view to legal harmonisation. Thus, we see how regional responses in applying international definitions and seeking to raise international standards of protection of victim’s human rights are constituted within the broader international framework around trafficking in persons. While the comparative methodology based on a consideration of the law in context, including the law in action, pulls together the various components of multilevel regulation. Thereby, looking to deduce the preferred general direction of national responses to the trafficking problem, which will necessarily depend upon context.

## **2.2. International Legal Responses**

The section begins by examining the UN Trafficking Protocol as current responses are rooted in the conceptualisation of trafficking in persons as manifest in this instrument. It is followed in section 2.2.2 by a closer look at the Trafficking Principles and Guidelines and the trafficking provision in the CEDAW, both with a human rights perspective on the trafficking problem. Finally, section 2.2.3 discusses the normative implications of the TVPA on the current anti-trafficking discourse as it seeks worldwide criminalisation of consensual prostitution under the veil of trafficking responses. The three preliminary conclusions to this core section are outlined in section 2.2.4.

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<sup>98</sup> Davies (n 29).

<sup>99</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012) 10.



### 2.2.1. The UN Trafficking Protocol: The Conceptualisation of Sex Trafficking as a Transnational Organised Crime

The UN Trafficking Protocol is riddled with definitional and conceptual ambiguities, which hamper effective application of key operational provisions by its currently 172 state parties. The Protocol's definition is its most contested and notable feature as the first attempt to define contemporary trafficking at the international level through an all-inclusive but non-exhaustive list of exploitation forms, taking into account any forms unnamed or unforeseen during the negotiations.<sup>100</sup> Sexual exploitation as a form of trafficking in persons was a particularly controversial issue during the negotiations of the Protocol because of the underlying policy concern over whether to include consensual prostitution as part of the international definition. As illustrated more clearly in the next chapter, states follow different approaches to prostitution, which influence how the migration of women in commercial sex work is viewed. The typology introduced by Outshoorn outlines three different prostitution regimes based on abolition by criminalising third parties, prohibition by penalising prostitutes, and regulation by the state.<sup>101</sup> A fourth typology of neo-abolition by criminalising only sex-buying denotes the current prostitution regime promulgated by Sweden.<sup>102</sup> While there are correspondingly four theoretical positions that define the relationship between women's movement and women's policy agencies, the major divide is between feminists who view prostitution as sexual domination and the essence of women's oppression and those who perceive prostitution as work freely chosen by women.<sup>103</sup> Thus, the former position advocates the abolition of prostitution and the latter one aims at legalisation by removing prohibitive provisions in criminal laws, as well as, some form of regulation to guarantee sex worker's fair working conditions.

The first expression of trafficking in women as an international political issue emerged in the regulation of the 'white slave traffic', which criminalised the procurement and transportation of typically white women for 'immoral purposes' abroad.<sup>104</sup> While some note

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<sup>100</sup> UNODC, *Travaux Préparatoires: Of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2006) 343.

<sup>101</sup> Joyce Outshoorn, 'Introduction: Prostitution, Women's Movements and Democratic Politics' in Joyce Outshoorn (ed), *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (CUP 2004) 8.

<sup>102</sup> Niklas Jakobsson and Andreas Kotsadam, 'The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation' (2013) 35(1) *European Journal of Law and Economics* 87, 91.

<sup>103</sup> Outshoorn (n 101) 9.

<sup>104</sup> International Agreement for the Suppression of the 'White Slave Traffic' (signed 18 May 1904) 1 LNTS 83 art 1. See also International Convention for the Suppression of the White Slave Traffic (signed 4 May 1910) LNTS

that the underlying rationale for the adoption of the white slave traffic framework was the restriction of women's movement to prevent the spread of venereal disease among troops, which threatened the European colonial project.<sup>105</sup> Trafficking in women within this framework was intrinsically linked to prostitution. This basic conceptualisation of trafficking in women characterises subsequent efforts by the international community to regulate prostitution, culminating in the 1950 Trafficking Convention as the first trafficking instrument adopted by the newly established UN.<sup>106</sup> In attempting to pierce the veil of state sovereignty, the Convention abolished state recognised prostitution and the licensing of brothels as part of trafficking.<sup>107</sup> However, the Convention did not garner wide ratification, thus, indicating to the international community that the most appropriate response to trafficking in women was not to abolish prostitution as a profitable and legal market. While Nadelmann notes that societal changes, such as the development of effective contraception and the beginning of the sexual revolution, coupled with, the decline in prostitution following colonialism, made the Convention in large part obsolete.<sup>108</sup> Thus, by 1978, 'no State had license or recognize houses of prostitution within their territory'.<sup>109</sup>

For the next fifty years nothing much happened on the international front until the 'evils' of globalisation forced a reuniting of states in 1998 on the issue of trafficking in children and women.<sup>110</sup> Although the final text of the Protocol applies to trafficking in persons, especially women and children.<sup>111</sup> Studies on consensus formation around trafficking in persons leading up to the adoption of the UN Trafficking Protocol observe that a new characterisation had emerged that viewed the problem as one of crime-fighting rather than

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8a; International Convention for the Suppression of the Traffic in Women and Children (signed 30 September 1921) 9 LNTS 415; International Convention for the Suppression of the Traffic in Women of Full Age (signed 11 October 1933) 150 LNTS 431.

<sup>105</sup> Allain (2013) (n 5) 341.

<sup>106</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271 (1950 Trafficking Convention).

<sup>107</sup> *ibid* arts 2(1), 6.

<sup>108</sup> Allain (2013) (n 5) 345.

<sup>109</sup> *ibid*.

<sup>110</sup> Argentina pushed for a new convention on trafficking in minors at the UNODC as the drafting of additional protocols to the Convention on the Rights of the Child ((adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)) in Geneva was progressing slowly as a result of its purely human rights perspective. By contrast, the UN Trafficking Protocol was concluded within two years because of its crime-fighting perspective. Dimitri Vlassis, 'The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process' (2000) United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders Resource Material Series 59, 492 <[http://www.unafei.or.jp/english/pdf/RS\\_No59/No59\\_33VE\\_Vlassis2.pdf](http://www.unafei.or.jp/english/pdf/RS_No59/No59_33VE_Vlassis2.pdf)> accessed 15 September 2017.

<sup>111</sup> See UNODC (2006) (n 100) 322.

human rights. According to Charnysh, Lloyd and Simmons, the crime-fighting perspective is associated with ‘*more sponsors, more diverse supporters, and stronger language*’, all of which were necessary to ensure effective and wide cooperation as the paramount objective of regulation at the international level.<sup>112</sup> That the 1950 Trafficking Convention was adopted within the international human rights system is seen as an important reason behind its failure to adequately address the trafficking problem. As Gallagher argues, ‘the disadvantages of a traditional, exclusively rights-based response to trafficking are significant ... States could not even agree on a definition, much less on specific legal obligations’.<sup>113</sup> It was also noted that ‘trafficking was (and still is) rarely linked to the violation of a specific provision of a specific treaty’, despite criminalisation in the CEDAW and the 1950 Trafficking Convention.<sup>114</sup>

As it turns out, a crime-fighting perspective would have important implications for the treatment of victims and the preferred general direction of national responses. In particular, there appeared to be little understanding or acknowledgement of the role of states in the trafficking process, such as the corruption of public officials, or their moral and legal responsibilities. Since trafficking is typically committed by private actors either individually or as part of an organised criminal group and international human rights law requires that harm stems from an act or omission committed by a state to constitute a human rights violation.<sup>115</sup> As argued by one delegate during the negotiations of the UN Trafficking Protocol, ‘[trafficking] is not like torture. It’s not even about human rights. We governments are not the villains here. Traffickers are just criminals. We can’t be responsible for what they are doing. In fact, if it wasn’t that we needed the cooperation of other countries to catch them, I wouldn’t even be here’.<sup>116</sup> It cannot be said that this position has changed in current national responses given their focus on prevention and prosecution as the former two objectives of the Protocol to the detriment of protection as the third and final objective.<sup>117</sup> A fourth objective of cooperation was formally acknowledged in 2008.<sup>118</sup>

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<sup>112</sup> Charnysh, Lloyd and Simmons (n 50) 333.

<sup>113</sup> Gallagher (2010) (n 40) 4.

<sup>114</sup> *ibid.*

<sup>115</sup> Ryszard Piotrowicz, ‘States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations’ (2012) 24(2) *International Journal of Refugee Law* 181, 186.

<sup>116</sup> Gallagher (2010) (n 40) 2.

<sup>117</sup> UN Trafficking Protocol (n 1) art 2.

<sup>118</sup> Press Release of the Secretary-General ‘Add “Partnership” to “Three P” Agenda of United Nations Anti-Trafficking Protocol, Deputy Secretary-General Urges General Assembly Thematic Debate’ (2008) DSG/SM/397-GA/10713-HR/4956.

States' inadequate understanding of trafficking and their responsibilities further complicated the position of human rights lobbyists who entered the negotiation process in the hope of either abolishing all forms of prostitution or securing sex worker's rights. A human rights perspective to the problem was critical 'to make the victim of trafficking "visible" as a subject ... whose basic rights have been violated by exploiters and whose rights can also be violated in the process of implementing anti-trafficking measures'.<sup>119</sup> This formulation was particularly important to situations of illegal border-crossing and the consequent treatment of trafficking victims as 'illegal' non-citizens. It is an inadvertent consequence of the focus on prevention in the Protocol, thus, formulating the only 'hard' provisions in the Protocol, that the primary tool to fight trafficking is the strengthening of border controls.<sup>120</sup> The link between prevention and border controls is concretised in the Protocol by placing the prevention provisions in the same part of the Protocol as its provisions on cooperation through information exchange and training, border controls, and security and legitimacy of travel documents.<sup>121</sup> This, in turn, will influence the scope of prevention measures, such as those seeking to alleviate the factors that create vulnerability to trafficking, such as poverty, underdevelopment, and lack of equal opportunity, only to the extent that they further cooperation, rather than with a view to improving victims' position in society generally.<sup>122</sup> This is an important disadvantage of an almost exclusively crime-based response. It is also one of the major contentions that sets it apart from the limited but favourable trafficking provision in the CEDAW in the spirit that 'an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity'.<sup>123</sup> Thus, the genuine efforts of human rights lobbyists 'to inject a human rights perspective wherever possible' in the Protocol inadvertently weakened the position of trafficking victims as visible subjects in favour of 'political traffickers' to whom the existence of the trafficked person is arguably a tangible benefit of financial and political gains.<sup>124</sup> As Davies and Davies observe in relation to how trafficking was being created and sustained, first, by migration policy and, later, by reopening the

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<sup>119</sup> Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 133.

<sup>120</sup> UN Trafficking Protocol (n 1) art 11.

<sup>121</sup> *ibid* pt 3.

<sup>122</sup> *ibid* art 9(4).

<sup>123</sup> CEDAW (n 45) preamble.

<sup>124</sup> Chuang (2010) (n 9) 1663.

prostitution debate, that a strange alliance has formed between the ‘political traffickers’ who create a space for trafficking to take place and the criminal traffickers who then exploit women in that conceived space.<sup>125</sup> Finally, the ‘political traffickers’ reconstruct the trafficked woman and her ‘needs’ according to their political priorities. Their argument puts into context the metaphysical and physical absence of any prostitutes in the pro-sex work lobby group present at the negotiations of the Protocol as noted by Doezema.<sup>126</sup> As it turns out, ‘the best way of protecting sex worker rights in the debate on defining trafficking was through making sex workers invisible’ to support the positions of both pro-sex work states, such as the Netherlands, and pro-abolition states, such as the US, which under domestic pressure from abolitionist groups vehemently advocated for the inclusion of consensual prostitution in the international definition.<sup>127</sup> It was in striking a middle ground that the drafters intentionally left undefined the all-important term of ‘exploitation of the prostitution of others’, ‘which is therefore without prejudice to how States parties address prostitution in their respective domestic laws’.<sup>128</sup> As illustrated below in relation to the case studies, this has had serious implications on how sex trafficking is conceptualised in individual states and whether as a result of including prostitution in their domestic trafficking definitions international cooperation is promoted or impeded. If both jurisdictions have adopted similar approaches to prostitution-related exploitation, cooperation is rendered workable. However, in jurisdictions where ‘what is termed ‘trafficking’ is different, the ability for the origin, transit, and/or destination countries to “join-up” is rendered unworkable by, for instance, extradition treaties that require crimes to be common to both jurisdictions, or the application of extraterritorial jurisdiction when what is deemed a crime in one jurisdiction is not so in another’.<sup>129</sup> The UN Trafficking Protocol is placed within a broader framework of transnational organised crimes and the UNCTOC as the parent instrument stipulates specific provisions on matters of the laundering of proceeds of crime,<sup>130</sup> money-laundering,<sup>131</sup> corruption,<sup>132</sup> liability of legal persons,<sup>133</sup> prosecution,

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<sup>125</sup> John Davies and Benjamin Davies, ‘How to Use a Trafficked Women: The Alliance between Political and Criminal Trafficking Organisations’ (2008) 1 *Recherches Sociologiques et Anthropologiques* 114, 115.

<sup>126</sup> Jo Doezema, ‘Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiations’ (2005) 14(1) *Social and Legal Studies* 61, 74.

<sup>127</sup> *ibid* 78.

<sup>128</sup> UNODC (2006) (n 100) 347.

<sup>129</sup> Allain (2014) (n 32) 113.

<sup>130</sup> UNCTOC (n 14) art 6.

<sup>131</sup> *ibid* art 7.

<sup>132</sup> *ibid* arts 8-9.

<sup>133</sup> *ibid* art 10.

adjudication and sanctions,<sup>134</sup> confiscation and seizure,<sup>135</sup> jurisdiction including optional extra-territorial jurisdiction,<sup>136</sup> extradition,<sup>137</sup> mutual legal assistance,<sup>138</sup> and assistance to and protection of victims and witnesses.<sup>139</sup> These are the priority-areas of international cooperation in transnational trafficking cases but the effect of most provisions is intrinsically tied to the individual capacities of states. Thus, the vast majority of cooperation provisions in the UNCTOC are of a ‘soft’ nature as this affords states maximum protection from being accountable to precise obligations. For this reason, trafficking is criminalised not as an international crime under the Rome Statute of the International Criminal Court<sup>140</sup> but as a transnational crime under the UNCTOC regime. Transnational crimes differ in an important way from the core of international criminal law because they depend upon domestic suppression of internationally-defined crimes.<sup>141</sup> Accordingly, Boister defines transnational criminal law as ‘the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects’.<sup>142</sup> While international tribunals or the International Criminal Court enforce international criminal law.

There was a serious attempt by notably Caribbean states to include drug trafficking, with a transnational dimension like trafficking in persons, in the Rome Statute as a particular concern for those states.<sup>143</sup> However, the majority of states notably Western states with different concerns, such as aggression, opposed the inclusion of transnational drug trafficking in the Rome Statute.<sup>144</sup> They argued that the principle of complementarity dictated that transnational crimes fall within the jurisdiction of national courts and that the inclusion of this concern could be reconsidered at a later stage at a review conference of the Statute’s effectiveness.<sup>145</sup> The exclusion of concerns deemed irrelevant by Western states with sufficient negotiating powers was identified as one of the greater hypocrisies of the negotiations of the Statute and international law-making more generally.

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<sup>134</sup> *ibid* art 11.

<sup>135</sup> *ibid* arts 12-14.

<sup>136</sup> *ibid* art 15.

<sup>137</sup> *ibid* arts 16-17.

<sup>138</sup> *ibid* arts 18-22, 27-30.

<sup>139</sup> *ibid* arts 24-25.

<sup>140</sup> UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (17 July 1998) UN Doc A/CONF.183/9 (Rome Statute).

<sup>141</sup> Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) 18.

<sup>142</sup> *ibid* 13.

<sup>143</sup> ‘Summary Records of the Plenary Meetings: 6<sup>th</sup> Meeting’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (20 November 1998) UN Doc A/CONF.183/C.1/SR.6 para 74.

<sup>144</sup> *ibid* para 92.

<sup>145</sup> *ibid* para 89.

While article 7(2)(c) of the Rome Statute criminalises trafficking in persons as a form of enslavement in the limited context of crimes against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>146</sup> An inclusion of the broader context of transnational trafficking in persons in the Rome Statute finds favour among scholars notably Obokata on account of the crime’s seriousness, transnational nature, and increasing state complicity.<sup>147</sup> More importantly, its inclusion in the Rome Statute would give rise to individual criminal responsibility under international criminal law. This means that both the trafficking offences typically committed by private actors, whose acts do not constitute human rights violations under international human rights law, and those committed by corrupt officials, who typically escape national prosecution, could be effectively prosecuted and convicted at the international level.

However, opening the Rome Statute to such a possibility would inevitably have a knock-on effect on arguments to include other crimes with a transnational dimension. This, in turn, could lead to an overloading of the international criminal law system, rendering it unworkable or reducing the gravity of its crimes as *delicta juris gentium*. The possibility of effectively criminalising trafficking in persons within domestic jurisdictions exists, according to Van der Wilt, as national courts are increasingly overcoming the traditional hurdles of ‘lack of jurisdiction, poor implementation of substantive law and ineffective co-operation’.<sup>148</sup> Moreover, Van der Wilt questions whether international criminal tribunals can offer a ‘better’ alternative as ‘their performance and effectiveness is not necessarily superior’.<sup>149</sup> While their involvement has a strong symbolic connotation, states can mobilise their resources and integrate criminal law enforcement with other measures.

For example, international human rights law already provides substantial protections that state parties to the relevant instruments must continue to apply under the ‘saving clause’ in the UN Trafficking Protocol.<sup>150</sup> This includes the slavery regime that recognises slavery as

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<sup>146</sup> See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002) para 542.

<sup>147</sup> Tom Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System’ (2005) 54(2) *International and Comparative Law Quarterly* 445, 457-458.

<sup>148</sup> Harmen van der Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’ (2014) 13(2) *Chinese Journal of International Law* 297, 334.

<sup>149</sup> *ibid.*

<sup>150</sup> UN Trafficking Protocol (n 1) art 14(1). For a list of relevant international human rights treaties, see OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (UN 2010) 21-22.

a jus cogens norm and erga omnes obligation.<sup>151</sup> While the conflation of slavery and trafficking in persons has the effect of diluting other forms of exploitation, such as sexual exploitation and the removal of organs, there is an increasing awareness of and interest in relabelling trafficking in persons as modern-day slavery because ‘slavery has been subject to some of the strongest sanctions of the international community’.<sup>152</sup> Moreover, the prohibition on slavery extends beyond international human rights law to, for example, the law of the sea, humanitarian law, and international criminal law. The normative implications of this conflation are considered more appropriately below in the context of the ECtHR’s ruling that trafficking in persons itself falls within article 4 of the ECHR on slavery and forced labour.<sup>153</sup>

In sum, leaving the term ‘exploitation of the prostitution of others’ undefined has had the aggregate effect of what Chuang labels ‘exploitation creep’, namely affording states sufficient safeguards from being accountable to precise obligations and sufficient flexibility to follow different approaches to prostitution-related trafficking to the detriment of international cooperation.<sup>154</sup> This effect is facilitated by the criminalisation of trafficking under transnational criminal law rather than international criminal law. As will become apparent in the next chapter, the choice of a specific legal instrument will influence the consequent effectiveness of national responses. Thus, trafficking is a global challenge that requires a global response but it is ‘serious’ enough to warrant inclusion in the Rome Statute only where committed as part of a widespread or systematic attack. In any case, the focus is on crime-fighting to the detriment of the human rights protection of trafficking victims. As discussed in the next section, the crime-fighting perspective of the Protocol affirms the critical importance of human rights protection under the international human rights system, in particular, under the Trafficking Principles and Guidelines and the CEDAW.

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<sup>151</sup> MC Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59(4) *Law and Contemporary Problems* 63, 68.

<sup>152</sup> Kevin Bales and Peter T Robbins, “‘No One Shall Be Held in Slavery or Servitude’: A Critical Analysis of International Slavery Agreements and Concepts of Slavery’ (2001) 2(2) *Human Rights Review* 18, 18.

<sup>153</sup> European Convention on Human Rights and the Protection of Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 5 (ECHR) art 4. See also *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010) para 282.

<sup>154</sup> Janie Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108(4) *American Journal of International Law* 609, 611.



### 2.2.2. The Trafficking Principles and Guidelines and the CEDAW: Grafting onto the Transnational Framework around Trafficking a Human Rights Perspective

The outcome of the UN Trafficking Protocol left much to be desired for human rights lobbyists who viewed the crime-fighting perspective of the Protocol, in particular, the conditionality of the few human rights provisions on victim cooperation in investigations, prosecutions, and judicial proceedings as an incipient problem.<sup>155</sup> As states can decide in individual cases whether to offer support depending upon the ‘usefulness’ of the victim in the relevant proceeding, there is no certainty of protection.<sup>156</sup> The protections available to victims under the Protocol include confidentiality in proceedings,<sup>157</sup> the right to information and legal assistance,<sup>158</sup> measures for physical, psychological and social recovery, such as housing, medical care, and employment, that take into account their age, gender, and special needs,<sup>159</sup> physical safety while remaining in the territory of the destination country,<sup>160</sup> and compensation for damage suffered.<sup>161</sup> While victims deemed ‘useless’ to proceedings are repatriated to their origin country or to that in which they hold permanent residence, with due regard for their safety.<sup>162</sup> However, the Protocol does not mention how the decision on safety is to be made and by whom and the provision on preferably voluntary return of victims only applies in relation to an ongoing proceeding in the destination country.<sup>163</sup>

The human rights coverage in the UN Trafficking Protocol is inadequate, and insufficient protection under the law can exacerbate the vulnerability of victims, pushing them further into their exploitative situations and increasing the possibility of re-victimisation. Thus, even before the Protocol had entered into force, the Office of the United Nations High Commissioner for Human Rights (OHCHR) had developed the Trafficking Principles and Guidelines to ‘promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions’.<sup>164</sup> The adoption of this instrument not only acknowledged the inadequate human rights coverage of the Protocol but also that human rights could not be successfully developed within a widely represented

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<sup>155</sup> UN Trafficking Protocol (n 1) art 6. See Trafficking Principles and Guidelines (n 52) principle 8.

<sup>156</sup> *ibid* art 7(1).

<sup>157</sup> *ibid* art 6(1).

<sup>158</sup> *ibid* art 6(2).

<sup>159</sup> *ibid* art 6(3)-(4).

<sup>160</sup> *ibid* art 6(5).

<sup>161</sup> *ibid* art 6(6).

<sup>162</sup> *ibid* art 8(1).

<sup>163</sup> *ibid* art 8(2).

<sup>164</sup> OHCHR (n 150) 15.

forum as that of the Protocol because the deep and entrenched divide between human rights lobbyists made concerted lobbying, even on issues where agreement was expected, almost impossible.<sup>165</sup> For example, the choice to leave undefined the term ‘exploitation of the prostitution of others’ in the Protocol’s definition is construed favourably by both camps of human rights lobbyists.<sup>166</sup> On the one hand, the term is interpreted to include any migration that involves sex work so that all migrating sex workers are to be treated as trafficking victims. On the other hand, the term is intentionally undefined as no consensus could form on its definition, while a departure from the 1950 Trafficking Convention that abolishes prostitution and brothel licensing is believed to now allow states to focus on forced prostitution and to deal with adult prostitution other than through abolition. The heavy focus on the Protocol’s definition during the negotiations also meant that other areas did not receive adequate attention.

The Trafficking Principles and Guidelines explicitly adopt the Protocol’s definition. It also distinguishes between trafficking in persons and smuggling of migrants based on some form of coercion ‘throughout or at some stage in the process’.<sup>167</sup> The failure of the Protocol to address the relationship between both crimes, in particular, how the identification process is to be made and by whom was one the issues raised by the OHCHR during the negotiations.<sup>168</sup> In particular, as both crimes are processes that are ‘often interrelated and almost always involving shifts, flows, overlaps and transitions’.<sup>169</sup> This means that a person can be smuggled one day and trafficked the next. Thus, the risks of misidentification are high and consequently trafficked persons may not receive their entitlements under the UN Trafficking Protocol, which are naturally not available to smuggled migrants as criminals rather than victims under the law.<sup>170</sup> Thus, the Trafficking Principles and Guidelines ask states to consider developing guidelines and procedures for rapid and accurate identification, including training national authorities and officials.<sup>171</sup> The commentary on the Trafficking Principles and Guidelines additionally clarifies the terms of the Protocol’s definition, such as slavery, servitude, practices similar to slavery,

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<sup>165</sup> Wijers (2015) (n 13) 68.

<sup>166</sup> Outshoorn (n 101) 11.

<sup>167</sup> Trafficking Principles and Guidelines (n 52) guideline 2.

<sup>168</sup> Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (2000) (n 7) para 2.

<sup>169</sup> OHCHR (n 150) 34-35.

<sup>170</sup> Although the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime ((adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (Migrant Smuggling Protocol)) takes a neutral position on whether those who procure their own illegal entry or who procure the illegal entry of others for reasons other than a financial or other material benefit should be penalised for any offences. UNODC (2006) (n 100) 469. See Trafficking Principles and Guidelines (n 52) principle 7.

<sup>171</sup> Trafficking Principles and Guidelines (n 52) guidelines 2(1)-(2).

debt bondage, servile forms of marriage, and forced labour, with reference to relevant international human rights treaties, without touching on the term ‘exploitation of the prostitution of others’.<sup>172</sup>

According to the Trafficking Principles and Guidelines, a human rights-based approach centres on three legal issues, namely trafficking as a human rights violation, trafficking as a form of gender-based violence, and trafficking in international humanitarian and criminal law.<sup>173</sup> The primacy of human rights as the first principle of all anti-trafficking efforts determines, for example, that human rights protection within the territory of a state extends to non-citizens and cannot violate non-discrimination principles or norms that protect the economic, social, and cultural rights of trafficked persons.<sup>174</sup> These basic rights are in addition to the additional protections as applicable to specific categories of victims, such as women,<sup>175</sup> migrants,<sup>176</sup> migrant workers,<sup>177</sup> and refugees.<sup>178</sup> In this context, the right to remedies, including compensation, is a critical aspect of the human rights framework as part of righting the wrongs committed against trafficked persons and ‘guaranteeing’ non-repetition.<sup>179</sup> In particular, compensation is a ‘recognition that something happened to you, and that what happened was not ok’.<sup>180</sup> Thus, it can be an important element of the recovery and reintegration processes of victims. For example, victims of prostitution-related trafficking can want compensation for the stigmatisation suffered by their community or family that in some cases

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<sup>172</sup> OHCHR (n 150) 35-36.

<sup>173</sup> Trafficking in persons in relation to international and internal armed conflicts is beyond the scope of this thesis. However, it recognises the prohibitions on trafficking-related practices, including various forms of sexual violence and enslavement, under international humanitarian law. See Gallagher (2010) (n 40) 209-217. Trafficking as a crime against humanity under the Rome Statute is briefly considered above.

<sup>174</sup> Trafficking Principles and Guidelines (n 52) principle 1 and guidelines 1(1), 1(4), 1(6), 1(9).

<sup>175</sup> CEDAW (n 45) art 6.

<sup>176</sup> Migrant Smuggling Protocol (n 170) art 5 (migrants should not be liable to criminal prosecution for having been the object of migrant smuggling offences).

<sup>177</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 arts 68-69 (state parties should ensure that migrant workers have access to regular channels for migration and consider policies, such as regularisation programmes, to avoid or resolve irregular situations and its risks).

<sup>178</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 art 42(1) (the principle of non-refoulement under article 33 is a non-derogatory right and prohibits states from returning refugees against their will where they fear persecution). Trafficking victims do not automatically have refugee status under article 1 of the Convention but women and children of sex trafficking ‘may have valid claims to refugee status’. UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (7 May 2002) UN Doc HCR/GIP/02/01 para 18.

<sup>179</sup> Trafficking Principles and Guidelines (n 52) principle 17 and guidelines 4(4), 4(9), 9.

<sup>180</sup> Biljana Meshkovska and others, ‘Trafficking of Women for Sexual Exploitation in Europe: Prosecution, Trials and their Impact’ (2016) 6 *Anti-Trafficking Review* 71, 84.

lead to social exclusion or their ostracising.<sup>181</sup> The value of this principle in the Trafficking Principles and Guidelines is that, in practice, very few victims receive compensation or even know about its possibilities as states often refuse to use confiscated funds or make available alternative sources for this purpose.<sup>182</sup> The UN Trafficking Protocol specifies in general terms ‘the *possibility* of obtaining compensation’, without linking it to the use of confiscated funds or special funds.<sup>183</sup>

Thus, the Trafficking Principles and Guidelines draw a direct link between the prohibition of ‘trafficking in persons’ as a violation in its own right and state responsibility, thus, clarifying the type and level of national responses. The failure of the UN Trafficking Protocol to define the different practices of, for example, slavery and forced labour, that already exist in their own right in international law means that ‘trafficking was (and still is) rarely linked to the violation of a specific provision of a specific treaty’.<sup>184</sup> It is important for advocacy purposes from both a policy and practical perspective to be able to speak of ‘trafficking’ as a direct violation of international law. At the same time, speaking of trafficking as a human rights violation has consequences for those states that have introduced special protection measures in cases of infringement of fundamental rights, and it is for this reason that the COE Trafficking Convention examined below recognises trafficking as a human rights violation.<sup>185</sup>

In addition to a human rights violation, trafficking in persons constitutes a form of gender-based violence according to both the Trafficking Principles and Guidelines<sup>186</sup> and article 6 of the CEDAW on all forms of traffic in women and exploitation of prostitution of women. The prohibition on sex-based discrimination under the CEDAW applies to both private and public acts of discrimination,<sup>187</sup> and it affirms the duty of states of equal protection under the law.<sup>188</sup> The CEDAW is the only other ‘core’ international human rights treaty alongside the Convention on the Rights of the Child with a specific reference to trafficking-related exploitation.<sup>189</sup> An important reason behind its limited focus on trafficking in women was the

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<sup>181</sup> Marjan Wijers, *Compensation of Victims of Trafficking under International and Dutch Law* (La Strada International 2014) 9.

<sup>182</sup> Meshkovska and others (n 180) 84-85.

<sup>183</sup> See UNODC (2006) (n 100) 371.

<sup>184</sup> Gallagher (2010) (n 40) 4.

<sup>185</sup> Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings CM(2005)32 Addendum 2 final para 41.

<sup>186</sup> Trafficking Principles and Guidelines (n 52) principles 3, 5, 7 and guidelines 7(2), 7(4), 7(6).

<sup>187</sup> See CEDAW (n 45) art 1. See also UNGA Res 48/104 (20 December 1993) UN Doc A/RES/48/104 arts 2(c), 4(c).

<sup>188</sup> See also International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 26.

<sup>189</sup> CRC (n 110) art 35.

existing coverage under the 1950 Trafficking Convention.<sup>190</sup> Yet, its inclusion within the wider international developments of women's human rights manifest in the CEDAW marked a departure from the abolitionist approach of the 1950 Trafficking Convention around prostitution-related trafficking.<sup>191</sup>

Violence against women is not directly addressed in any of the major international and regional human rights instruments.<sup>192</sup> But the General Recommendations 19<sup>193</sup> and 35<sup>194</sup> on violence against women have influenced the direction and content of this debate. The former brings the issue of violence against women within the CEDAW by stipulating that the CEDAW's definition of sex-based discrimination under article 1 includes gender-based violence as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.<sup>195</sup> However, not all violence against women will constitute gender-based violence under the CEDAW, which depends upon whether it is 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.<sup>196</sup> It follows that 'acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty' constitute gender-based violence under the CEDAW.<sup>197</sup> Trafficking in women, especially for prostitution-related exploitation, under article 6 of the CEDAW is also a recognised form of gender-based violence because '[p]overty and unemployment increase opportunities for trafficking in women ... [and] are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity'.<sup>198</sup> Thus, putting women at special risk of violence and abuse. This point has been affirmed by the Committee on the Elimination of Discrimination against Women on many

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<sup>190</sup> Lars A Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers 1993) 90.

<sup>191</sup> See *ibid* 91.

<sup>192</sup> See African Protocol (n 18) art 4(2)(g); Inter-American Convention (n 19) art 2(b); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS 210 art 3(a).

<sup>193</sup> UN Committee on the Elimination of Discrimination against Women 'General Recommendation No. 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II) 333 (General Recommendation 19).

<sup>194</sup> UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) UN Doc CEDAW/C/GC/35 (General Recommendation 35).

<sup>195</sup> General Recommendation 19 (n 193) para 1.

<sup>196</sup> *ibid* para 6.

<sup>197</sup> *ibid*.

<sup>198</sup> *ibid* paras 14-15.

occasions, including in its consideration of communications under the CEDAW's Optional Protocol.<sup>199200</sup>

According to the General Recommendation 35, the prohibition of 'gender-based violence against women'<sup>201</sup> has evolved into a principle of customary international law.<sup>202</sup> However, it continues in many states because of 'non-existent, inadequate and/or poorly implemented' legislation based on 'tradition, culture, religion or fundamentalist ideologies, and significant reductions in public spending, often as part of "austerity measures" following economic and financial crises'.<sup>203</sup> Thus, it has evolved from an individual problem to a social one and it is now one of the fundamental social, political, and economic means of perpetuating sex-discrimination under the CEDAW.<sup>204</sup> State responsibility, therefore, extends beyond the acts or omissions of state actors to those of non-state actors, where those are attributable to states or there is a failure to exercise due diligence in prevention, investigation, prosecution, punishment, and providing reparation.<sup>205</sup> This includes repealing all legal provisions on women in prostitution.<sup>206</sup>

### 2.2.3. The US TVPA: Sex Trafficking is Consensual Prostitution

The final legal instrument of relevance to international regulation is the TVPA. By contrast, to the other three instruments studied above, the TVPA is international in neither nature nor form. It constitutes the US' domestic legal response to sex trafficking and qualifies as the first domestic implementation of the UN Trafficking Protocol precisely because of conscious efforts to ensure consistency with the Protocol's definition and overall approach. The TVPA regime includes four reauthorisation acts adopted between 2003 and 2013,<sup>207</sup> as well as, the Survivors of Human Trafficking Empowerment Act.<sup>208</sup> Each of these acts strengthens the TVPA regime that prescribes more serious punishment and accords greater priority to prosecutions and victim

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<sup>199</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (Optional Protocol) art 2.

<sup>200</sup> See General Recommendation 35 (n 194) para 5.

<sup>201</sup> The General Recommendation 35 uses this term to make explicit 'the gendered causes and impacts of the violence'. *ibid* para 9.

<sup>202</sup> *ibid* para 2.

<sup>203</sup> *ibid* para 7.

<sup>204</sup> *ibid* paras 9-10.

<sup>205</sup> *ibid* paras 22-24.

<sup>206</sup> *ibid* para 31(a).

<sup>207</sup> TVPRA 2003 (n 47); TVPRA 2005 (n 47); TVPRA 2008 (n 47); TVPRA 2013 (n 47).

<sup>208</sup> Survivors of Human Trafficking Empowerment Act (Section 115 of the Justice for Victims of Trafficking Act of 2015) (Public Law 114-22).

protection than border controls as in the Protocol.<sup>209</sup> Of course, consensus on such matters forms more easily at the domestic level. However, the higher level of protection is important because the US typically distributes to all foreign states receiving aid a model law that aims to ensure compliance with the TVPA.<sup>210</sup> For the same reason, it is beneficial that like the Protocol the TVPA emphasises the means of trafficking and frames the problem around its exploitation purposes.<sup>211</sup>

The US is the first example of states to have interpreted the Protocol's undefined term 'exploitation of the prostitution of others' to include consensual prostitution. The TVPA, thus, criminalises consensual prostitution alongside sexual and labour exploitation albeit in two separate provisions. The latter two exploitation forms constitute 'severe forms of trafficking in persons' and they represent the key operational terms of the TVPA.<sup>212</sup> Prostitution is criminalised separately as 'sex trafficking', which is confusing because this term commonly describes sexual exploitation for trafficking.<sup>213</sup> Moreover, the recent framing of sex trafficking as modern day slavery, which also marks a policy shift from sexual exploitation to other exploitation forms, has reignited the familiar conflation of sex trafficking and slavery.<sup>214</sup>

Yet, the inclusion of prostitution in the TVPA was a 'symbolic victory' for neo-abolitionist groups whose efforts at international criminalisation had failed. An important reason for their victory is that sex trafficking is a nonpartisan issue as evidenced by the composition of neo-abolitionist groups of predominantly US-based feminists, neoconservatives, and evangelic Christians.<sup>215</sup> Moreover, the inclusion of prostitution in the TVPA ensured the pursuit of the concomitant goal of global eradication of commercial and non-procreative sex as part of the US foreign policy on international cooperation against sex trafficking.<sup>216</sup> In fact, the preamble of the TVPA explicitly recognises the US' role in working 'bilaterally and multilaterally to abolish the trafficking' and urging 'the international community to take strong action in multilateral fora' against uncooperative foreign states.<sup>217</sup>

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<sup>209</sup> TVPA (n 47)bs 102(a), (b)(14)-(15), (b)(17).

<sup>210</sup> Chuang (2014) (n 154) 618.

<sup>211</sup> TVPA (n 47) s 103(8).

<sup>212</sup> *ibid* s 103(8).

<sup>213</sup> *ibid* s 103(9).

<sup>214</sup> See Chuang (2014) (n 154).

<sup>215</sup> Lindsay Strauss, 'Note: Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act' (2010) 19 *Cornell Journal of Law and Public Policy* 495, 500.

<sup>216</sup> 'Trafficking in Persons National Security Presidential Directive/NSPD-22' (*US Army Combat Trafficking in Persons Program*, 16 December 2002) <[www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf](http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf)> accessed 10 March 2017.

<sup>217</sup> TVPA (n 47) preamble.

In financial terms, this entailed becoming the largest single donor in the fields of both sex trafficking and prostitution. Since 2001, the US Agency for International Development Office of Women and Development has spent USD 528 million on anti-trafficking initiatives.<sup>218</sup> Since 2003, the US has additionally spent USD 15 billion as part the US President's Emergency Plan for AIDS Relief.<sup>219</sup>

In legal terms, this is achieved through the unilateral economic sanctions regime established under the TVPA that empowers the US President to withhold non-humanitarian, nontrade-related foreign assistance to any foreign state that does not meet the standards and criteria set forth in the TVPA. Chapter 4 revisits the sanctions regime in the context of the enforcement mechanism entrusted with monitoring compliance with the TVPA and foreign state progress in fighting sex trafficking. An important point is that the US is determined to use a full arsenal of enforcement tools to encourage international cooperation and assume the hegemonic position in the anti-sex trafficking discourse. Yet, the TVPA's sanctions regime has not emerged in a legal or policy vacuum but, as Gallagher and Chuang explain, from an established tradition of congressional oversight of foreign states in matters of political significance to the US, such as human rights, religious freedom, and drug trafficking.<sup>220</sup> However, this oversight resonates with the image of an imperial international law of the nineteenth century because the US is the only superpower with the financial resources, political power, and foreign policy interest to assert such a powerful position in the international anti-sex trafficking discourse. The UK assumed a similar hegemonic position over the seas that 'allowed it to precipitate the end of the slave trade at sea'.<sup>221</sup>

The hegemonic position of the US in the present case is a serious threat to the consent-based system of international law, least of all the UN Trafficking Protocol that rests on a very delicate consensus ridden with conceptual uncertainties. Moreover, the use of the sanctions regime to monitor foreign state progress and induce compliance is also objectionable on two grounds. First, the criteria and standards in the TVPA are purely domestic and no state has given its explicit consent to be bound by them. Second, in the same vein, states must consent to their monitoring by an international mechanism and they have serious reasons to oppose

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<sup>218</sup> Aziza Ahmed and Meena Seshu, "'We Have the Right Not To Be 'Rescued'...": When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers' (2012) 1 *Anti-Trafficking Review* 149, 152.

<sup>219</sup> *ibid* 153.

<sup>220</sup> Anne T Gallagher and Janie Chuang, 'The Use of Indicators to Measure Government Responses to Human Trafficking' in Kevin Davis and others (eds), *Governance by Indicators: Global Power through Quantification and Ranking* (OUP 2012) 328.

<sup>221</sup> Allain (2013) (n 5) 360.



monitoring, particularly unilateral monitoring, by a domestic mechanism due to a real possibility that monitoring serves a narrow self-interest. Moreover, international law rests on the principles of national sovereignty and domestic non-interference, and states have made it clear that they do not wish to lift the policy issues underlying sex trafficking to the lofty heights of international consensus or regulation, as evidenced in the previous sections. This will become evident in chapter 4 in the context of the design of the international enforcement mechanism that attaches by extension from the UNCTOC to the UN Trafficking Protocol. The hegemonic position of the US within the international anti-sex trafficking discourse, therefore, questions the possibility of international law to constrain powerful states from acting unilaterally at their pleasure and, in doing so, encroaching too heavily on the sovereign prerogatives of foreign states.

#### 2.2.4. Preliminary Conclusion

The international study draws three preliminary conclusions. First, the UN Trafficking Protocol includes within its definition the ‘exploitation of the prostitution of others’ but does not define this term, which is therefore without prejudice to how states address consensual prostitution in their domestic laws. Second, the Trafficking Principles and Guidelines and the CEDAW underline the primacy of human rights in all anti-trafficking efforts so that victims become visible as subjects whose human rights as established in the Protocol have been violated. This is important given the Protocol’s predominantly crime-fighting perspective. Third, the US seeks to redirect normative development at the international level through the extraterritorial scope of the TVPA for worldwide criminalisation of consensual prostitution. Even though the Protocol intentionally leaves the precise definition to the sovereign prerogatives of states.

### 2.3. European Responses

This section illustrates regional responses to trafficking in persons with a view to determining whether there is harmonisation between international and regional responses, using the European legal systems as an instructive example. Section 2.3.1 examines the preeminent anti-trafficking instruments of the Council of Europe, namely the COE Trafficking Convention and the ECHR. While section 2.3.2 focuses on the most recent response of the European Union manifest in the EU Trafficking Directive. The three preliminary conclusions to this core section are outlined in section 2.3.3.

### 2.3.1. The COE Trafficking Convention and the ECHR: Raising the Human Rights Standard of the UN Trafficking Protocol-based Framework in the Eurasian Context

The Council of Europe (COE) has been battling trafficking in persons as early as the 1990s as trafficking directly undermines the fundamental values of the COE system, namely human rights protection. Early efforts focused on trafficking in women and children, in particular, prostitution-related trafficking as a form of gender-based violence.<sup>222</sup> But the first legally-binding instrument on trafficking was adopted only after the UN Trafficking Protocol had entered into force. The COE Trafficking Convention, then, is in many respects a (successful) response to the inadequate coverage of human rights under the Protocol as it seeks to strengthen the protection afforded by the Protocol and raise the standards laid down therein.<sup>223</sup> As the ‘hard’ nature of human rights provisions under the Convention will ensure that the human rights perspective forms the basis of all anti-trafficking efforts of member states. Even though the Convention applies to a specific Eurasian context of 47 member states, many of them are major origin, transit, and/or destination countries. Russia is the only member state that has neither signed nor ratified the Convention, which means it applies the lower standard of protection manifest in the UN Trafficking Protocol to which it is party since May 2004. Consequently, its anti-trafficking efforts are not subject to monitoring by the Group of Experts on Action against Trafficking in Human Beings (GRETA) as a key feature of the Convention.<sup>224</sup> Non-ratification will influence international cooperation between Russia and other member states, as well as, the treatment of victims as Russia is an origin, transit, and destination country for sex and labour trafficking. Currently, about 1.5 million illegal migrants are believed to be working in Russia in exploitative labour conditions that are characteristic of labour trafficking.<sup>225</sup> There are also reports of European women and children, predominantly from Ukraine and Moldova that are both parties to the COE Trafficking Convention, being trafficked for sexual exploitation to Russia.<sup>226</sup> Yet, Russia appears to be inadequately involved

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<sup>222</sup> Committee of Ministers Recommendation 91(11) on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults.

<sup>223</sup> Explanatory Report (n 185) para 6.

<sup>224</sup> COE Trafficking Convention (n 23) art 36(1).

<sup>225</sup> TIP Office (2017) (n 28) 337-338.

<sup>226</sup> *ibid* 338.

in the fight against trafficking as it consistently fails to meet the minimum standards for eliminating trafficking under the TVPA and is not making significant compliance efforts.<sup>227</sup>

The added-value of the COE Trafficking Convention lies in strengthening existing protections under the Protocol, as well as, concretising two of the more important human rights principles espoused by the Trafficking Principles and Guidelines, namely the *possibility* of non-punishment of victims for criminal activities committed as part of their trafficking, and the non-conditionality of victim support on their cooperation in trafficking proceedings.<sup>228</sup> Even though the standard laid down by the Convention does not fully meet that of the Trafficking Principles and Guidelines. An important reason behind the Convention's failure to realise a higher human rights standard as originally conceived was the involvement of the European Commission in the negotiations and its efforts to lower the Convention's standard to 'the lowest common denominator of Community law' then manifest in the crime-focused EU Trafficking Framework Decision, in favour of the 22 EU member states at the time.<sup>229</sup><sup>230</sup> As the Parliamentary Assembly of the Council of Europe (PACE) observed, there was no majority position to be taken against the European Commission, and the Committee of Ministers appeared unwilling to take decisive action to amend some of the key provisions of the draft text.<sup>231</sup> For example, the PACE recommended the right to appeal to an independent and impartial body against the decision not to identify a person as a trafficking victim, since correct identification is a prerequisite for support under the COE Trafficking Convention.<sup>232</sup> As mentioned already, the overlapping between situations of trafficking in persons and smuggling of migrants can lead to misidentification, in particular, where the trafficking of a smuggled migrant has yet to take place. The Convention, however, focuses on identification through 'competent authorities' who are trained and qualified to correctly identify victims and immediately upon suspicion that a person may be a trafficking victim to grant leave to remain in the territory and to receive necessary assistance until the identification process is complete.<sup>233</sup> In connection therewith, another rejected recommendation would have granted all victims access to necessary medical care, which is available to only legally resident victims

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<sup>227</sup> *ibid* 336.

<sup>228</sup> Trafficking Principles and Guidelines (n 52) principles 7-8. COE Trafficking Convention (n 23) arts 12(6), 26.

<sup>229</sup> Council Framework Decision 2002/629/JHA on combating trafficking in human beings [2002] OJ L203/1 (EU Trafficking Framework Decision).

<sup>230</sup> PACE Recommendation 1695 (2005) on Draft Council of Europe Convention on action against trafficking in human beings para 6.

<sup>231</sup> *ibid*.

<sup>232</sup> *ibid* para 8(a).

<sup>233</sup> COE Trafficking Convention (n 23) arts 10(1)-(2).

under the Convention so that all victims are entitled to only emergency medical treatment.<sup>234</sup> However, effective medical assistance, particularly for psychological recovery, can be long-term depending upon the damage suffered, and an abrupt ending following a decision that the detected person is not a trafficking victim and should be repatriated can negatively impact on that victim's recovery process.

At the same time, some of the PACE's key recommendations have been incorporated into the final text of the Convention, such as a 30-day recovery and reflection period during which time the identified victim cannot be removed from the territory so as to make an informed decision away from the influence of the trafficker on whether to cooperate in the trafficking proceeding as a necessary witness.<sup>235</sup> It is expressed that a longer period of at least 90 days, in fact, is necessary to recover and escape the trafficker's influence.<sup>236</sup> States have consequently adopted different grace periods of between 30 and 90 days as seen in relation to the case studies below. Nonetheless, its very inclusion in the Convention is viewed by Gallagher who participated in the negotiations of the UN Trafficking Protocol as a major achievement, since '[t]hose lobbying at the Trafficking Protocol negotiations would never have even bothered to seriously push for a mandatory recovery and reflection period'.<sup>237</sup> While others note the overall modernity of the Convention, in particular, measures to discourage the demand that fosters all forms of exploitation under article 6, taking into account that the Convention was adopted just five years later and there was no prospect of political interests having matured to realise a human rights perspective to the trafficking problem.<sup>238</sup>

Although, as rightly argued by Scarpa, the whole incorporation of the PACE's recommendations would have transformed the COE Trafficking Convention into a 'model convention' for applicable member states and other regional systems.<sup>239</sup> Yet, the Convention in important ways expands the scope of application and clarifies some of the definitional and conceptual ambiguities found in the UN Trafficking Protocol. For example, in applying the Protocol's definition, the Convention expands its scope of application to domestic trafficking

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<sup>234</sup> *ibid* art 12(1)(b). See PACE Recommendation 1695 (n 230) para 8(c).

<sup>235</sup> *ibid* art 13(1). See PACE Recommendation 1695 (n 230) para 8(d).

<sup>236</sup> Amnesty International and Anti-Slavery International, *Council of Europe: Recommendations to Strengthen the December 2004 Draft of the European Convention on Action against Trafficking in Human Beings* (IOR 61/001/2005, Amnesty International 2005) 11.

<sup>237</sup> Anne T Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163, 187.

<sup>238</sup> Federico Lenzerini, 'International Legal Instruments on Human Trafficking and A Victim-Oriented Approach: Which Gaps Are to be Filled?' (2009) 4 *Intercultural Human Rights Law Review* 205, 220.

<sup>239</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (OUP 2008) 145-146, 159.

and removes the requirement of an involvement in organised crime.<sup>240</sup> There is disagreement over whether the trafficking act requires cross-border movement or movement of some sort, or if merely ‘harbouring’ is sufficient.<sup>241</sup> The specific reference to both transnational and domestic trafficking in the Convention clarifies this disagreement as movement is not required to determine the ‘act’ of trafficking. Similarly, removing the connection with organised crime recognises acts committed by traffickers individually, such as by a relative or partner, even across borders.<sup>242</sup>

Additionally, the Convention defines the term ‘victim’ to facilitate correct identification and guarantee to the identified victim the protections under the Convention.<sup>243</sup> The construction of the ‘ideal’ victim in national responses is a serious impediment to victim support as it ignores a whole group of victims who do not conform to this idealisation. With reference to the TIP Report, Wilson and O’Brien explain how the ‘littering’ of victims’ stories throughout the annual reports ‘helps to build and perpetuate a specific picture of the “typical” trafficking victim’ who is weak and blameless by focusing on age, gender, origin country, and sexual exploitation.<sup>244</sup> In turn, these constructions contribute to policy responses that prioritise border security and law enforcement over human rights. Moreover, the case studies below illustrate that the stigma around prostitution and the ethnic discrimination of Roma victims provides an obstacle to their correct identification and subsequent assistance.<sup>245</sup> At the same time, the Convention adopts a gender perspective to its priority-matters of prevention, prosecution, and protection, therewith, removing from its title a specific mention to women and children as in the Protocol so as not to ignore male victims, while integrating into all anti-trafficking efforts a particular focus on the increased vulnerabilities of disadvantaged women.<sup>246</sup>

Within the COE context and discussions of normative development in the field, an interesting study is the jurisprudence of the European Court of Human Rights (ECtHR) on trafficking in persons under article 4 of the ECHR on slavery and forced labour.<sup>247</sup> First, it

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<sup>240</sup> COE Trafficking Convention (n 23) arts 2, 4(a).

<sup>241</sup> Prabha Kotiswaran, ‘Protocol at the Crossroads: Rethinking Anti-trafficking Law from an Indian Labour Law Perspective’ (2015) 4 *Anti-Trafficking Review* 33, 40.

<sup>242</sup> UNODC (2016) (n 25) 27.

<sup>243</sup> COE Trafficking Convention (n 23) art 4(e).

<sup>244</sup> Michael Wilson and Erin O’Brien, ‘Constructing the Ideal Victim in the United States of America’s Annual Trafficking in Persons Reports’ (2016) 65(1-2) *Crime, Law and Social Change* 29, 30-31.

<sup>245</sup> See COE Trafficking Convention (n 23) art 3.

<sup>246</sup> *ibid* art 1.

<sup>247</sup> As of March 2017, the ECtHR has considered 18 applications by persons alleging a violation of trafficking-related exploitation under articles 3 and 4 of the ECHR and by convicted traffickers in relation to an expulsion

should be mentioned that the ECHR does not explicitly mention trafficking in persons as it was inspired by the Universal Declaration of Human Rights,<sup>248</sup> which itself made no express mention of trafficking in 1948.<sup>249</sup> Even though both instruments explicitly prohibit slavery as the more well-known exploitation form at the time. Thus, in just two cases, the former concerning domestic servitude and forced labour of a Togolese girl for families in France<sup>250</sup> and the latter involving sex trafficking of a Russian women to Cyprus on an ‘artiste’ visa who was found dead under suspicious circumstances,<sup>251</sup> the ECtHR has determined that trafficking-related exploitation falls within the scope of article 4,<sup>252</sup> and by removing the need to assess which of the three types of conduct of slavery, servitude, and forced or compulsory labour under article 4 are engaged, that ‘trafficking’ as defined in the COE Trafficking Convention and the UN Trafficking Protocol *itself* falls within the scope of article 4.<sup>253</sup> Some have interpreted the ECtHR’s normative development as paying heed to scholarly criticism that its reading in the former case was traditional and narrow and had produced a ‘schism’ between international human rights and criminal law following a wider reading of slavery by the International Criminal Tribunal for the former Yugoslavia, which requires the exercise of *powers attached to the right of ownership*,<sup>254</sup> rather than the exercise of the right of ownership over an individual to reduce them to the status of an ‘object’.<sup>255</sup> A major contention of a narrower reading of slavery relates to possible difficulties in future interpretations of trafficking situations where a distinction between the three types of article 4 conduct cannot be clearly determined upon the case facts.<sup>256</sup> In particular, as the distinction between article 4 conducts, according to the ECtHR, is one of degree, with slavery at one extreme and linked to servitude as an aggravated form of forced or compulsory labour,<sup>257</sup> which is distinguishable from servitude by the victim’s feeling that his or her condition is permanent and the situation is unlikely to change.<sup>258</sup>

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order and the confiscation of proceeds of crime under article 8 of the ECHR and article 1 of the ECHR’s Protocol (1952) respectively. 10 of the considered application were inadmissible or struck out. In only five applications was an article 4-violation established. Additionally, three trafficking cases are pending. See appendix I below.

<sup>248</sup> (adopted 10 December 1948) UNGA Res 217 A(III) art 4.

<sup>249</sup> *Rantsev* (n 153) para 277.

<sup>250</sup> *Siliadin v France* App no 73316/01 (ECHR, 26 July 2005).

<sup>251</sup> *Rantsev* (n 153).

<sup>252</sup> *Siliadin* (n 250) paras 112-129.

<sup>253</sup> *Rantsev* (n 153) para 281.

<sup>254</sup> Jean Allain, ‘The Definition of Slavery in International Law’ (2009) 52 *Howard Law Journal* 239, 242-243.

<sup>255</sup> *Siliadin* (n 250) paras 115-129.

<sup>256</sup> Piotrowicz (n 115) 189.

<sup>257</sup> *Siliadin* (n 250) paras 115-117, 122-124.

<sup>258</sup> *CN and V v France* App no 67724/09 (ECHR, 11 October 2012) para 91 (concerning two French girls originally from Burundi, the ECtHR noting that only the situation of the first applicant amounted to domestic servitude and

Now that trafficking in persons directly falls within the scope of article 4 of the ECHR without the need to distinguish between the different article 4 conduct the group of victims to receive protection under the ECHR has widened. For example, in *Siliadin*, the ECtHR concluded that the treatment suffered by the applicant amounted to servitude and forced and compulsory labour but fell short of slavery because the case facts did not suggest that the applicant's employers had exercised a genuine right of legal ownership over her, thus, reducing her status to that of an object, according to the 'classic' meaning of slavery.<sup>259</sup> Even though the ECtHR recognised that the applicant was clearly deprived of her personal autonomy.<sup>260</sup> Thus, the ECtHR's current position on trafficking itself falling within the ambit of article 4 is important for the countless ways in which trafficking can take place using more or less subtle forms of coercion and deception for existing and emerging forms of exploitation. For example, Kotiswaran identifies at least sixteen different trafficking situations based on strong or weak coercion and exploitation, the legality of the means of entry, and the legality of the sector in which the trafficked labour is carried out, which would implicate anti-trafficking law but only a minute fraction of which the law actually targets based on the Protocol's (and Convention's) definition.<sup>261</sup> That the ECtHR has not had many opportunities to consider trafficking offences is an important reason behind the limited but substantial normative development of the ECHR around trafficking.

A serious implication of the conflation of trafficking in persons and slavery is a 'muddying' of the normative waters as both crimes exist in their own right under international law.<sup>262</sup> That the ECtHR refers to trafficking as the modern form of slavery based on the need to interpret the ECHR in light of present-day conditions is considered by some as a failure of the ECtHR to engage correctly with the legal distinction between both crimes.<sup>263</sup> In particular, as the ECtHR does not engage with the constituent elements of what constitutes trafficking, namely its methods, means, and purposes. Slavery properly defined under the Slavery Convention<sup>264</sup> is only one form of exploitation explicitly listed under the umbrella term 'trafficking in persons' in both the UN Trafficking Protocol and the COE Trafficking

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forced labour because unlike her elder sister the second applicant attended school and could not prove that without her hard work the employers would have had to employ a housemaid).

<sup>259</sup> *Siliadin* (n 250) para 122.

<sup>260</sup> *ibid.*

<sup>261</sup> Kotiswaran (n 241) 43-44.

<sup>262</sup> *Allain* (n 56) 557.

<sup>263</sup> *ibid.*

<sup>264</sup> Slavery Convention, signed at Geneva on 25 September 1926 and amended by the Protocol (adopted 7 December 1953, entered into force 7 July 1955) 212 UNTS 17 art 1(1).

Convention.<sup>265</sup> While all slavery and slavery-like practices amount to trafficking, not all trafficking constitutes slavery properly defined. The importance of this conflation in early anti-trafficking efforts is evident as the moral language around slavery provided the necessary impetus for international action culminating in the ‘white slave traffic’ instruments based on a term that distinguished female sexual slavery from transatlantic slavery.<sup>266</sup> Certainly, the legal force of the prohibition on slavery under the ECHR as an absolute and non-derogatory right can propel that of trafficking in persons as a fundamental human rights violation.<sup>267</sup> This conflation has its proponents among scholars and states, such as the US, with its current efforts to redefine the trafficking problem as modern-day slavery using this terminology in more recent TIP Reports.<sup>268</sup> From a legal perspective, however, the conflation will influence the consideration of non-labour forms of exploitation, as well as, lead to a reconstruction of the ‘ideal’ victim as ‘slaves’ ‘who, like trans-Atlantic slaves, must have been kidnapped or otherwise brought to the destination countries against their will’.<sup>269</sup> It is difficult to see how either position conflating trafficking and prostitution or slavery is favourable from the perspective of the victim, in particular, those who do not fall into either category, such as victims of trafficking for the removal of organs as an often overlooked group.

At the same time, the ECtHR has clarified the different obligations of states, whether positive, operational, or procedural, in establishing an appropriate legislative and administrative anti-trafficking framework for rapid and correct identification of trafficking victims,<sup>270</sup> protecting victims by removing them from their trafficking situations or the real and immediate risks of trafficking upon becoming aware or having credible suspicion of trafficking,<sup>271</sup> and investigating potential situations once the matter has come to the attention of the authorities.<sup>272</sup> Even though Stoyanova, for example, observes that an appropriate legislative and administrative anti-trafficking framework need exist only *de jure*, which is, then, a shallow and unsatisfactory positive obligation for states, such as Greece, where the law on

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<sup>265</sup> UN Trafficking Protocol (n 1) art 3(a); COE Trafficking Convention (n 23) art 4(a).

<sup>266</sup> Chuang (2010) (n 9) 1656.

<sup>267</sup> Maria Eriksson, ‘The Prevention of Human Trafficking: Regulating Domestic Criminal Legislation through the European Convention on Human Rights’ (2013) 82 *Nordic Journal of International Law* 339, 350.

<sup>268</sup> Chuang (2014) (n 154) 623-625.

<sup>269</sup> *ibid* 636.

<sup>270</sup> *Siliadin* (n 250) paras 112, 144. See *CN and V* (n 258) paras 105-108; *CN v the United Kingdom* App no 4239/08 (ECHR, 13 November 2012) paras 70-82.

<sup>271</sup> *Rantsev* (n 153) paras 286-287.

<sup>272</sup> *ibid* paras 288-289. See *M and Others* App no 40020/03 (ECHR, 31 July 2012) paras 167-170.



the books does not translate into the law in action.<sup>273</sup> Yet, by developing a due diligence regime around trafficking the ECtHR effectively pierces the veil of state sovereignty that so far has allowed states to hide behind the ambiguous obligations of the UN Trafficking Protocol and, to a lesser extent, the COE Trafficking Convention. In particular, this regime applies to Russia as the only non-signatory to the Convention, since ratification of the ECHR is a prerequisite for COE accession.

Russia was also party to an application alleging a violation of trafficking-related exploitation under article 4 of the ECHR for its failure to protect the applicant's daughter from being trafficked and to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there.<sup>274</sup> Having regard to the due diligence regime just outlined above, first, the ECtHR held that Russia had in place an appropriate legal and administrative framework to ensure the applicant's daughter's practical and effective protection.<sup>275</sup> Even though Russian criminal law did not specifically provide for the trafficking offence at the material time and the conduct of which the applicant complained fell within the definitions of other offences.<sup>276</sup> Again, bolstering Stoyanova's argument of a shallow positive requirement. Second, the ECtHR decided that the circumstances had not given rise to an operational obligation for Russia to protect the applicant's daughter as there was no evidence that the Russian authorities were aware of her circumstances giving rise to 'a credible suspicion of a real and immediate risk' prior to her departure for Cyprus.<sup>277</sup> The ECtHR clarified that Russia's positive obligation in this regard was limited to acts occurring on its own territory and that a general awareness of transnational sex trafficking in Russian women did not trigger Russia's operational obligation.<sup>278</sup> Finally, the ECtHR concluded that Russia had breached its procedural obligation to investigate the recruitment aspect of the applicant's daughter's alleged trafficking, in particular, those involved in the recruitment and the methods of recruitment, even after her subsequent death and the resulting mysteries around her departure from Russia.<sup>279</sup> The ECtHR clarified that both the UN Trafficking Protocol and the COE Trafficking Convention explicitly include the recruitment of victims and that 'a full and effective

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<sup>273</sup> Vladislava Stoyanova, 'L.E. v. Greece: Human Trafficking and States' Positive Obligations' (*Strasbourg Observers*, 2 February 2016) <<https://strasbourgobservers.com/2016/02/02/l-e-v-greece-human-trafficking-and-states-positive-obligations/>> accessed 31 May 2016.

<sup>274</sup> *Rantsev* (n 153) para 253.

<sup>275</sup> *ibid* para 303.

<sup>276</sup> *ibid* para 301.

<sup>277</sup> *ibid* paras 305-306.

<sup>278</sup> *ibid* paras 304-305.

<sup>279</sup> *ibid* paras 308-309.

investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable', particularly when the recruitment occurs on its own territory so that it is best placed to conduct an effective investigation.<sup>280</sup> Thus, an effective investigation within the state's own territory is an important element of cooperation in transnational trafficking cases.

### 2.3.2. The EU Trafficking Directive: Adopting an 'Integrated, Holistic, and Human Rights' Perspective to Trafficking in the EU Area

Like the COE, the European Union (EU) has been involved in the fight against trafficking in persons as early as the 1990s. However, by contrast to the COE's objective of human rights protection of victims, the EU's objective centred on facilitating an area of freedom, security, and justice within the EU through a common immigration policy.<sup>281</sup> Thus, the trafficking problem had a predominantly crime-fighting perspective. With the adoption of the Charter of Fundamental Rights of the European Union, trafficking in persons is additionally a violation of fundamental human rights.<sup>282</sup> Unlike the UN Trafficking Protocol and the COE Trafficking Convention that are cast in stone upon adoption, EU anti-trafficking instruments are regularly updated in light of legislative procedural developments. Thus, between 1997 and 2011, the EU adopted three specific anti-trafficking instruments, namely the Joint Action 97/154/JHA,<sup>283</sup> the Framework Decision 2002/629/JHA,<sup>284</sup> and the EU Trafficking Directive. The Directive is the most recent EU response to trafficking in the EU and as such applies to the limited group of 28 member states that are also members of the COE. Denmark is the only member state to which the EU Trafficking Directive does not apply as it does not take part in the adoption of any Council measures with respect to an area of freedom, security, and justice, also known as Title V measures.<sup>285</sup> While Ireland<sup>286</sup> and the UK<sup>287</sup> that also do not take part in Title V measures have opted into adopting the EU Trafficking Directive as part of their involvement in the fight

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<sup>280</sup> *ibid* para 307.

<sup>281</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU) art 79(1).

<sup>282</sup> [2012] OJ C326/391 (EU Rights Charter) art 5(3).

<sup>283</sup> adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children [1997] OJ L63/2.

<sup>284</sup> on combating trafficking in human beings [2002] OJ L203/1.

<sup>285</sup> EU Trafficking Directive (n 24) preamble para 36.

<sup>286</sup> *ibid* para 34.

<sup>287</sup> Commission Decision 2011/692/EU of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L271/49 art 1. For the time being, the UK remains a full member of the EU and rights and obligations continue to fully apply in and to the UK. See European Commission Statement STATEMENT/16/2329 (24 June 2016).

against trafficking, as well as, the benefits to approximating criminal provisions around trafficking for effective cooperation with other EU member states, many of which are major origin countries for trafficking into the UK, such as Romania.<sup>288</sup>

The adoption of a directive to deal with the EU trafficking problem has important implications for anti-trafficking efforts because of the enhanced legal status of a directive compared to a framework decision that has virtually no judicial oversight and does not directly confer effective rights on individuals. In particular, certain provisions of a directive can have vertical direct effect in national law, if they are unconditional and sufficiently precise, and the deadline for its transposition into the domestic legal system has passed.<sup>289</sup> Even though member states have an obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under EU law, in cases of failure to do so within the prescribed period individuals can directly rely on that directive before domestic courts.<sup>290</sup> Additionally, they can bring actions against the state for damages suffered as a direct consequence of that state's transposition failure.<sup>291</sup> The failure to transpose a directive in time and to notify the European Commission of said transposition is an overall challenge for member states. In the present case, 13 infringement proceedings were initiated against non-transposing member states, including the Netherlands, for delayed or non-communication of transposition measures under the EU Trafficking Directive.<sup>292</sup> However, all proceedings were closed at an early stage by the European Commission that has an overall responsibility for monitoring the effectiveness of EU law.<sup>293</sup> The early closure of proceedings is instructive of the inherently political manner in which the European Commission conducts its monitoring given the need for flexibility based on the different legal systems and capacities of member states, particularly following the enlargement of the EU in 2004 to reunite Central European states.<sup>294</sup> This issue is considered more appropriately in the next chapter in the context of the transposition challenges of the EU Trafficking Directive and chapter 5 in relation to the impact of the Commission's monitoring work under the Directive.

Within what is best described as an ambitious anti-trafficking framework, the EU Trafficking Directive effectively establishes minimum rules on the definition of criminal

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<sup>288</sup> TIP Office (2017) (n 28) 414.

<sup>289</sup> Joined Cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357 paras 11-12.

<sup>290</sup> *ibid* paras 31-32.

<sup>291</sup> *ibid* paras 34-36.

<sup>292</sup> See (n 57).

<sup>293</sup> TEU (n 281) art 17(1).

<sup>294</sup> Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (OUP 2012) 18.

offences and sanctions around trafficking-related exploitation, as well as, common provisions based on a gender perspective like the COE Trafficking Convention to strengthen prevention and protection.<sup>295</sup> It is in many respects an improvement to the EU Trafficking Framework Decision, which it supersedes, by moving away from a predominantly crime-fighting focus towards ‘an integrated, holistic, and human rights approach’ that gives effect to the fundamental prohibition on trafficking under the EU Rights Charter.<sup>296</sup> For example, Obokata argues that the minimal prevention and protection measures under the EU Trafficking Framework Decision had forced a reassessment of the EU’s anti-trafficking policies.<sup>297</sup> The EU Trafficking Directive, then, is supported by two existing instruments, the former dealing with the issuance of residence permits to non-EU nationals who are trafficking victims<sup>298</sup> and the latter concerning the sanctioning of employers of illegally staying non-EU nationals.<sup>299</sup> Trafficking victims are, thus, at the forefront of EU anti-trafficking efforts. This indicates that the political interests of EU states, which prevented the adoption of a higher human rights standard under the COE Trafficking Convention, have finally matured to acknowledge the primacy of human rights in all anti-trafficking efforts. This also means that EU institutions with a human rights focus, such as the CJEU and the European Parliament, which previously were not sufficiently involved in the fight against trafficking because of the dominance of EU institutions with a crime focus, such as Eurojust, can contribute more effectively now to knowledge production and EU governance in the field. As Berman and Friesendorf observe, the focus on criminality and security often occluded other important measures, such as regulation of the labour market, gender discrimination, and human rights, and the involvement of predominantly human rights institutions.<sup>300</sup>

A notable feature of the EU Trafficking Directive is its definition. In applying the definition set forth in the UN Trafficking Protocol, the Directive significantly widens the list of exploitation forms now constituting a trafficking offence. This includes, in addition to sexual

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<sup>295</sup> EU Trafficking Directive (n 24) art 1.

<sup>296</sup> *ibid* preamble paras 7, 33.

<sup>297</sup> Tom Obokata, ‘EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal’ (2003) 40(4) *Common Market Law Review* 917, 927-928, 935.

<sup>298</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19.

<sup>299</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24.

<sup>300</sup> Jaqueline Berman and Cornelius Friesendorf, ‘EU Foreign Policy and the Fight against Human Trafficking: Coercive Governance as Crime Control’ (2008) 13 *European Foreign Affairs Review* 189, 195.

exploitation, forced labour, slavery, and the removal of organs, the exploitation of criminal activities as a notion having the effect of transforming the set of categories listed in the Protocol's definition to a concept in fact and law.<sup>301</sup> In particular, the Directive explicitly mentions forced begging as a form of forced labour, and pick-pocketing, shop-lifting, and drug trafficking as forms of exploitation of criminal activities, as well as, illegal adoption and forced marriage as violations of human dignity and physical integrity.<sup>302</sup> Thus, rather than outline what constitutes 'exploitation' by referring to established forms as done in the UN Trafficking Protocol, the Directive explains that the term 'exploitation' constitutes any criminal activity that is subject to penalties and implies financial gain, and for which the 'victim', a term not explicitly defined as in the COE Trafficking Convention, is exploited, whether intended or actual, using some form of coercion or deception.<sup>303</sup>

On the one hand, the expansion of the Protocol's definition, facilitated by its failure to precisely delimit the term 'exploitation', has had the positive effect of 'giving previously moribund prohibitions a new lease of life' at both the national and international levels.<sup>304</sup> Many of the trafficking forms explicitly listed in the Directive, such as forced marriage, are already subject to international prohibition. However, the absence of effective international scrutiny has meant that states are rarely held accountable for such practices. Their inclusion within a broader understanding of trafficking gives these previously moribund practices new impetus for focusing law, public attention, and resources where it is most needed. On the other hand, there is the risk of what Chuang labels 'exploitation creep' as recasting more forms of exploitation as 'trafficking' complicates law enforcement efforts, particularly in states with limited capacities.<sup>305</sup> Thus, deflecting attention from previously narrow legal categories reserved for the worst forms of exploitation that attract the greatest amount of public opprobrium.<sup>306</sup> The inclusion of forced begging in the Directive's definition provides a case in point. The EU argues that the broader concept of trafficking, which includes forced begging, takes into account recent developments in EU trafficking.<sup>307</sup> In practice, there is a fine distinction between consensual and forced begging, the latter defined in the Directive as a form of forced labour under the ILO Convention concerning Forced or Compulsory Labour<sup>308</sup> when

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<sup>301</sup> Allain (2014) (n 32) 130.

<sup>302</sup> EU Trafficking Directive (n 24) preamble para 11.

<sup>303</sup> *ibid.*

<sup>304</sup> Gallagher (2015) (n 41) 30.

<sup>305</sup> Chuang (2014) (n 154) 611.

<sup>306</sup> *ibid.*

<sup>307</sup> EU Trafficking Directive (n 24) preamble para 11.

<sup>308</sup> ILO Convention C029: Forced Labour Convention (14th ILC Session Geneva 28 Jun 1930).

all the elements of forced labour or service occur.<sup>309</sup> These elements centre on the requirement of ‘the menace of any penalty’.<sup>310</sup> But in forced begging menace does not typically occur at the place of work so that it is uncertain whether the menace of which the victim complains actually amounts to forced labour.<sup>311</sup>

Naturally linked to the inclusion of the term ‘exploitation of criminal activities’ in the Directive’s definition is the requirement of non-prosecution or non-application of penalties to identified victims for their involvement in criminal activities.<sup>312</sup> Paradoxically, however, this provision remains optional for states, taking into account the basic principles of their own legal systems. For the same reason, the Directive explicitly defines the term ‘position of vulnerability’ as ‘a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved’.<sup>313</sup> It was one of the contentions around the definitional ambiguities that the UN Trafficking Protocol does not define this term, which is particularly relevant to situations of trafficking typically committed by a relative or partner outside an organised criminal group. While its broad construal in the travaux préparatoires on the Protocol along the lines of the current formulation in the Directive was considered to offer little direction ‘[i]n a world economy that is rife with precarious labour’.<sup>314</sup> In particular, as a broad understanding enables domestic courts to characterise prostitution and economic-related exploitation of poor migrants as trafficking.<sup>315</sup> The explanatory report of the COE Trafficking Convention also uses a similar expression, adding that vulnerability can be of any kind, whether physical, psychological, emotional, family-related, social or economic, owing to victims’ different factual and legal positions in society.<sup>316</sup>

Nonetheless, the EU Trafficking Directive effectively raises the human rights standard laid down by both the UN Trafficking Protocol and the COE Trafficking Convention in three important ways. First, it sets penalties of five years of imprisonment for trafficking offences and 10 years of imprisonment for aggravated trafficking.<sup>317</sup> Like the Convention,<sup>318</sup> the former

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<sup>309</sup> EU Trafficking Directive (n 24) preamble para 11.

<sup>310</sup> ILO Convention C029 (n 308) art 2(1).

<sup>311</sup> Charles P Kirchofer, ‘Organised Begging in Vienna, Austria: Right-Wing Propaganda, Benevolent Necessity, Illicit Business, Human Smuggling, or Human Trafficking?’ (*Webster University*, 18 February 2010) <[http://webs.schule.at/website/Texte\\_online/Organized\\_Begging.pdf](http://webs.schule.at/website/Texte_online/Organized_Begging.pdf)> accessed 7 June 2016.

<sup>312</sup> EU Trafficking Directive (n 24) art 8.

<sup>313</sup> *ibid* art 2(2).

<sup>314</sup> Kotiswaran (n 241) 40-41.

<sup>315</sup> Gallagher (2015) (n 41) 29.

<sup>316</sup> Explanatory Report (n 185) para 83.

<sup>317</sup> EU Trafficking Directive (n 24) arts 4(1)-(2).

<sup>318</sup> COE Trafficking Convention (n 23) art 23(1).

Framework Decision, which the Directive supersedes, called for ‘effective, proportionate and dissuasive’ penalties for trafficking offences, in addition to, imprisonment of not less than eight years for aggravated trafficking.<sup>319</sup> Penalties serve a dual role of punishing traffickers and deterring potential traffickers, which means they must be serious enough to fully acknowledge the gravity of trafficking. However, this is arguably not the case here. For example, the US prescribes a maximum term of imprisonment of 20 years or more for crimes of trafficking with respect to peonage, slavery, involuntary servitude, or forced labour.<sup>320</sup> Second, the Directive additionally offers mandatory assistance to victims with special needs associated with pregnancy, their health, a disability, a mental or psychological disorder, or a serious form of psychological, physical, or sexual violence that they have suffered.<sup>321</sup> Such assistance goes well beyond any emergency medical treatment offered by the Convention.<sup>322</sup> Finally, the Directive requires member states to additionally establish extraterritorial jurisdiction based on the principles of nationality and passive personality.<sup>323</sup> The former principle reflects the current position of some member states, including Austria, Denmark, and Ireland,<sup>324</sup> while the latter acknowledges the victimisation of EU citizens as part of trafficking within the EU area.<sup>325</sup>

### 2.3.3. Preliminary Conclusions

The European examination draws three preliminary conclusions. First, there is harmony between the responses of the Council of Europe and the European Union in relation to normative developments at the international level as those are rooted in the UN Trafficking Protocol. Second, the political priorities of states have matured from the crime-fighting focus of the UN Trafficking Protocol and early responses of the EU as illustrated by the human rights perspective of the COE Trafficking Convention, the expansion of the scope of article 4 of the ECHR to cover trafficking-related exploitation, and the integrated, holistic, human rights approach of the EU Trafficking Directive. Third, the term ‘trafficking in persons’ is a concept rather than a set categories of exploitation for sex, labour, and the removal of organs, as illustrated by the Directive’s expansion of the international definition to include any exploitation of criminal activities that are subject to penalties and imply financial gain.

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<sup>319</sup> EU Trafficking Framework Decision (n 229) art 3.

<sup>320</sup> TVPRA 2008 (n 47) s 222(a)(6)(D).

<sup>321</sup> *ibid* art 11(7).

<sup>322</sup> COE Trafficking Convention (n 23) art 12(b).

<sup>323</sup> EU Trafficking Directive (n 24) arts 10(1)-(2) cf COE Trafficking Convention (n 23) art 31(1).

<sup>324</sup> Obokata and Payne (n 84) 305.

<sup>325</sup> EU Trafficking Directive (n 24) art 10(2).

## 2.4. National Responses

By way of example of the anti-trafficking responses of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, this section examines progress in the global fight against trafficking in women for sexual exploitation. As the first measure of progress, this section focuses on the extent of harmonisation of national responses with international and European anti-trafficking norms and standards. Section 2.4.1 outlines the current status of ratification and transposition of the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive. Sections 2.4.2 to 2.4.5 examine the individual components of national responses, namely the definition of trafficking in persons and the specific measures around prevention, prosecution, and protection respectively. Section 2.4.6 considers the extent to which those components promote cooperation, whether bilateral or multilateral, as the primary objective of legal harmonisation. The four preliminary conclusions to this core section are outlined in section 2.4.7.

### 2.4.1. Ratification and Transposition

Ratification in the international context<sup>326</sup> and transposition in the EU context<sup>327</sup> are critical for the effectiveness of the instrument and the institution under which it was developed as state consent remains the cornerstone of subsequent compliance. A specific national response is deemed ‘effective’ when the provisions of the instrument are fully implemented or transposed into the domestic laws of states. Given the differences in domestic legal systems, implementation and transposition typically transpire in different ways as it entails determining the most appropriate form and method for achieving the intended outcome. Thus, instruments are binding as to their object and purpose.<sup>328</sup> One factor that will influence the process is the status of the supra-territorial law in the domestic legal system.<sup>329</sup> Civil law states tend to follow a monist approach based on the idea that international and national law are two components of the same legal system. Belgium, the Czech Republic, the Netherlands, and Romania have a monist system of international law, thus, international instruments as customary rules or general principles of law form part of the domestic system, take primacy over domestic law,

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<sup>326</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 14.

<sup>327</sup> TFEU (n 72) art 291(1).

<sup>328</sup> VCLT (n 326) arts 26, 31(1); TFEU (n 72) art 288.

<sup>329</sup> EU Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the domestic laws of member states under certain conditions, see Case 6/641 *Flaminio Costa v ENEL* [1964] ECR 585.



and can be invoked before domestic courts. The most common technique for ratification of international instruments is an incorporation clause in the constitution. For example, the Czech<sup>330</sup> and Dutch<sup>331</sup> incorporation clauses declare that international law becomes part of the domestic system upon its entry into force.

By contrast, Finland and Sweden have a dualist system of international law that considers international and national law as two separate legal systems with different legal subjects and different sources. Thus, international instruments as sources of international law do not directly apply within the domestic system and for their provisions to have domestic effect they need to be transformed or adapted into domestic law through incorporation, with or without substantive modifications, into a statute or another source of domestic law. However, irrespective of the status of international law states cannot invoke the provisions of their domestic laws as justification for their failure to perform an international instrument.<sup>332</sup>

Another factor influencing the process is the instrument itself, in particular, the nature of the provisions, such as the number of mandatory provisions versus optional provisions. The implementation and transposition of optional provisions typically depend upon the administrative and financial capacities of individual states. Cho and Vadlamannati argue that provisions that trigger less domestic resistance and political costs are most effectively implemented or transposed.<sup>333</sup>

Ratification and transposition are typically lengthy processes, even when this entails only amendment(s) to existing laws. Thus, there can be a significant gap between signature and ratification, or adoption of the instrument and its transposition. Although the EU Trafficking Directive requires transposition within 2 years from the date of its adoption, thus, by 6 April 2013.<sup>334</sup> This is the typical length of the prescribed period for transposition of EU directives. All transposing measures must be transmitted to the European Commission<sup>335</sup> and non-communication will trigger an infringement proceeding.<sup>336</sup> The same happens in the case of late transposition. Similarly, measures of ratification of the UN Trafficking Protocol<sup>337</sup> and the COE Trafficking Convention<sup>338</sup> must be deposited with the Secretary General of the respective

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<sup>330</sup> Constitution 1992 (revised 2013) *Ústava České republiky* art 10.

<sup>331</sup> Constitution 1814 (revised 1983) *Grondwet voor het Koninkrijk der Nederlanden* art 93.

<sup>332</sup> VCLT (n 326) art 27.

<sup>333</sup> Cho and Vadlamannati (n 51) 257.

<sup>334</sup> EU Trafficking Directive (n 24) art 22(1).

<sup>335</sup> *ibid* art 22(2).

<sup>336</sup> TFEU (n 72) art 258.

<sup>337</sup> UN Trafficking Protocol (n 1) art 16(3).

<sup>338</sup> COE Trafficking Convention (n 23) art 42(2).

institution. There is an added difficulty to the ratification of the Protocol as the provisions of the parent instrument, namely the UNCTOC, apply *mutatis mutandis* to the Protocol<sup>339</sup> and in order to become a party to the Protocol the state must already be a party to the UNCTOC.<sup>340</sup> Thus, ratification of the Protocol entails ratification of the UNCTOC.<sup>341</sup>

As illustrated in the table below, the case studies are all parties to the three preeminent instruments, namely the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive. As the Protocol's ratification is linked to that of the UNCTOC, the dates of signature and ratification of instruments are specified in the table. The Czech Republic is the most recent case study to ratify both the Protocol and the Convention as a result of the absence of domestic laws to define criminal liability of legal persons for specific offences, including trafficking in persons.<sup>342</sup> Since 2012, the criminal liability of legal persons is set out in a separate law with subsidiary application of the Criminal Code and Criminal Procedure Code.<sup>343</sup> It was one of the few European states that had not domestically defined criminal liability of legal persons, which also posed a challenge for acts to be criminalised under EU law.<sup>344</sup>

The signing of the Protocol and the Convention correspond with the dates on which either instruments were adopted, namely 15 November 2000 and 16 May 2005 respectively. This is typically interpreted as a good signal of future compliance as it entails first and foremost an intention to do something about the trafficking problem. In the present case, early signature also indicates the need for international cooperation through legal harmonisation of national responses, since the effectiveness of responses in transit and destination countries necessarily depends upon countermeasures in origin countries.<sup>345</sup>

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<sup>339</sup> UN Trafficking Protocol (n 1) art 1(2).

<sup>340</sup> UNCTOC (n 14) art 37(2).

<sup>341</sup> *ibid* art 36(3).

<sup>342</sup> UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) UN Doc CEDAW/C/GC/28 para 97.

<sup>343</sup> Law 418/2011 *Zákon o trestní odpovědnosti právnických osob a řízení proti nim*.

<sup>344</sup> Monika Rutland, 'Criminal Liability of Legal Entities: Crimes, Sanctions, International Context' (*Rutland Ježek*, 27 March 2012) <<http://www.rutlandjezek.com/gb/menu/12/news/clanek-112-criminal-liability-of-legal-entities-crimes-sanctions-international-context/>> accessed 12 March 2017.

<sup>345</sup> Schönhofer (n 58) 5.

Table 2. Dates of signature, ratification, and transposition of the preeminent instruments.<sup>346</sup>

	UNCTOC/ UN Trafficking Protocol		COE Trafficking Convention		EU Trafficking Directive
	Signature	Ratification	Signature	Ratification	Transposition
<b>Belgium</b>	12.12.00/ 12.12.00	11.08.04/ 11.08.04	17.11.05	27.04.09	31.05.16
<b>Czech Republic</b>	12.12.00/ 10.12.02	24.09.13/ 17.12.14	02.05.16	29.03.17	03.12.15
<b>Finland</b> (acceptance)	12.12.00/ 12.12.00	10.02.04/ 07.09.06	29.08.06	30.05.12	12.06.15
<b>Netherlands</b> (acceptance)	12.12.00/ 12.12.00	26.05.04/ 27.07.05	17.11.05	22.04.10	06.11.13
<b>Romania</b>	14.12.00/ 14.12.00	04.12.02/ 04.12.02	16.05.05	21.08.06	07.05.15
<b>Sweden</b>	12.12.00/ 12.12.00	30.04.04/ 01.07.04	16.05.05	31.05.10	01.11.15

The deadline for the transposition of the Directive was 6 April 2013. According to the date of adoption of the most recent transposing measure as communicated by the member state to the European Commission, timely transposition was a serious challenge for all case studies. In fact, the Netherlands was one of 13 member states to which the Commission issued a formal notice under the infringement procedure but the proceeding was closed on 16 December 2014.<sup>347</sup>

The Commission takes very seriously the transposition duty of member states, which is, therefore, a priority-matter of its work, since late transposition leads to inconsistent application of EU law and ‘the continued existence of discriminatory practices’.<sup>348</sup> There are many reasons for late transposition. König and Luetgert observe that the timely transposition of EU law more generally depends upon ‘member-state willingness (or national preferences) and strategic choice, on the one hand, and capacity (or administrative restrictions and resources) or legal complexity and ambiguity, on the other’.<sup>349</sup> According to qualitative compliance studies, the capacity of individual states depends upon the organisation of the executive and the involvement and independence of national administrative authorities.<sup>350</sup> An

<sup>346</sup> Data source: UN Depository, chapter XVIII, 12 and 12.a; EUR-Lex, document 32011L0036. The date of transposition reflects the date of adoption of the most recent transposing measure as communicated by the member state to the European Commission.

<sup>347</sup> See infringement of EU Home Affairs law on trafficking in human beings by the Netherlands (2013/0242).

<sup>348</sup> Thomas König and Brooke Luetgert, ‘Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives’ (2009) 39(1) *British Journal of Political Science* 163, 164.

<sup>349</sup> *ibid* 165.

<sup>350</sup> *ibid* 167.

additional factor that can influence member-state willingness is domestic political opposition from constituents, as well as, the Commission's role in encouraging enforcement through the threat of an infringement proceeding.<sup>351</sup> In particular, the 'goodness of fit' theory purports a consideration of both the policy instrument and the extent of convergence between EU policy objectives and the national status quo. The latter, however, is only relevant in relation to domestic political opposition from constituents who can influence policy change and delay subsequent transposition. A further strand of the goodness of fit theory mentions the national administrative culture as an additional factor. This refers to the overall compliance culture of individual states so that states with an ingrained compliance culture will more likely comply with EU law in a correct and prompt manner.<sup>352</sup> These explanatory factors are revisited in the next chapter in relation to the systemic challenges to transposing the EU Trafficking Directive.

#### 2.4.2. Definition

A common definition of trafficking in persons is a prerequisite for state cooperation as states must speak to each other in the same language both literally and figuratively.<sup>353</sup> Figuratively, as their jurisdictions are not truly compatible with each other, thus, when they speak of 'trafficking' they often speak of different forms of exploitation. In the context of the term 'exploitation of the prostitution of others' this may entail consensual prostitution, which, in turn, affects the ability of states to cooperate as the crime must be common to both jurisdictions. Thus, rendering unworkable international cooperation based on the provisions on extradition and extraterritorial jurisdiction in the preeminent instruments. As Allain observes, by off-loading to domestic legislators the need to define key operational terms, the UN Trafficking Protocol has raised more questions than it answers because 'the definition is a flawed piece of drafting'.<sup>354</sup> Then, the challenge to cooperation is heightened in jurisdictions that copy verbatim the Protocol's definition into domestic laws and subsequently depend upon domestic courts for interpretation.

Prior to the UN Trafficking Protocol, the trafficking definitions of all case studies focused on the exploitation of the prostitution of others in accordance with early understandings of the trafficking problem manifest in white slave traffic instruments and the 1950 Trafficking

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<sup>351</sup> *ibid* 165-166.

<sup>352</sup> *ibid* 166.

<sup>353</sup> Allain (2014) (n 32) 112.

<sup>354</sup> *ibid* 119.

Convention. In particular, their domestic legislations focused on the transnational dimension of trafficking. For example, Belgium introduced the trafficking offence in 1995 to deal with transnational trafficking in foreign nationals.<sup>355</sup> There was an implied focus on prostitution-related trafficking as the other provisions of the legislation concerned prostitution and child pornography.<sup>356</sup> Sweden also criminalised only transnational sex trafficking in 2002.<sup>357</sup> The criminalisation of sex trafficking in the Netherlands until 2005 was associated with the policy on prostitution, which aimed at reducing the dependence of migrant women upon criminals by legalising migration for sex work.<sup>358</sup> This means that sex trafficking was already criminalised in all case studies. It also means that the UN Trafficking Protocol was a major impetus for expanding the umbrella term of trafficking to include additional forms of exploitation, such as labour exploitation and the removal of organs, which constitutes the contemporary understanding of the trafficking problem.

The Czech Republic<sup>359</sup> and Romania<sup>360</sup> were the first case studies to criminalise ‘trafficking in persons’ in 2002, followed by Finland<sup>361</sup> and Sweden<sup>362</sup> in 2004, and Belgium<sup>363</sup> and the Netherlands<sup>364</sup> in 2005. Their latest anti-trafficking laws<sup>365</sup> reflect the most recent expansion of the Protocol’s definition manifest in the EU Trafficking Directive, according to which trafficking consists of *acts* of recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by *means* of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of

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<sup>355</sup> Law 15 December 1980 *Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen* arts 77-77sexies.

<sup>356</sup> A Aronowitz, G Theuermann and E Tyurykanova, *Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime* (OSCE 2010) 76.

<sup>357</sup> Law 2002:436 *Lag om ändring i brottsbalken* chpt 4, s 1(a).

<sup>358</sup> Vanessa E Munro, ‘Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution’ (2006) 46 *British Journal of Criminology* 318, 320.

<sup>359</sup> Law 40/2009 *trestní zákoník* s 168.

<sup>360</sup> Law 678/2001 *privind prevenirea și combaterea traficului de personae*.

<sup>361</sup> Criminal Code 1889/39 *Rikoslaki* chpt 25, s 3.

<sup>362</sup> Law 2004:406 *Lag om ändring i brottsbalken* chpt 4, s 1(a).

<sup>363</sup> Law 10 August 2005 *Wet tot wijziging van diverse bepalingen met het oog op de versterking van de strijd tegen mensenhandel en mensensmokkel en tegen praktijken van huisjesmelkers* arts 10-14.

<sup>364</sup> Law 1881/BWBR0001854 *Wetboek van Strafrecht, Wet van 3 maart 1881* art 273(f).

<sup>365</sup> Law 24 June 2013 *Wet houdende bestraffing van de exploitatie van bedelarij en van prostitutie, mensenhandel en mensensmokkel in verhouding tot het aantal slachtoffers* arts 5-8 (Belgium); Law 141/2014 *kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim, ve znění zákona č. 105/2013 Sb., 19. června 2014* art II(7) (Czech Republic); Criminal Code 1889/39 (n 361) chpt 25, s 3 (Finland); Law 6 November 2013 *Wet van 6 november 2013 tot implementatie van de richtlijn 2011/36/EU van het Europees Parlement en de Raad inzake voorkoming en bestrijding van mensenhandel, de bescherming van slachtoffers ervan, en ter vervanging van kaderbesluit 2002/629/JBZ van de Raad (PbEU L 101) art I(C)(2)* (Netherlands); Law 187/2012 *pentru punerea în aplicare a Legii nr.286/2009 privind Codul penal* art 245(21) (Romania); Law 2010:371 *Lag om ändring i brottsbalken* chpt 4, s 1(a) (Sweden).

the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the *purposes* of exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.<sup>366</sup>

The acts of recruitment, transportation, transfer, harbouring, or reception of persons are explicitly included in the domestic definitions. However, the Czech, Dutch, Romanian, and Swedish definitions do not explicitly refer to ‘the exchange or transfer of control’, which are generally included as part of the term ‘reception of persons’. The means of threat or use of force or other forms of coercion, as well as, abuse of a position of vulnerability are explicitly included in the definitions of all case studies but the Czech and Finnish definitions do not explicitly mention abduction and fraud. Only the Dutch and Swedish definitions include explicit references to all purposes of exploitation. Forced begging is not explicitly mentioned in the Czech definition, slavery and practices similar to slavery in the Belgian definition, exploitation of criminal activities in the Finnish and Romanian definitions, and the removal of organs in the Swedish definition. In the specific case of Sweden, an all-inclusive provision covers forced begging, slavery, practices similar to slavery, servitude, the exploitation of criminal activities, and the removal of organs. Similarly, in the specific case of Romania, an all-inclusive term ‘with the intent of exploiting’ covers the listed forms other than sexual and labour exploitation. Interestingly, both the Czech and Swedish definitions go beyond the minimum exploitation forms laid down by the Directive to additionally include forced service in the armed forces and/or the production of pornography, taking into account their domestic situations. The Belgium definition also takes as a minimum the Directive’s definition as it aims to apply a more severe definition so as to incriminate a broader range of trafficking-related exploitation. However, the complexity of the Belgian definition makes its interpretation particularly in relation to the means of trafficking incidental to a judge’s guilty verdict in a trafficking case.<sup>367</sup> Thus, it follows that the case studies have chosen to apply the Directive’s definition to varying extents and using different techniques as some have incorporated the definition almost verbatim, while others have introduced an all-inclusive term to incorporate the newer means and forms of exploitation. This necessarily complicates state cooperation.

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<sup>366</sup> EU Trafficking Directive (n 24) art 2.

<sup>367</sup> Bressan (n 88) 147.

### 2.4.3. Prevention

Prevention is a key interest for the vast majority of states involved in the fight against trafficking and according to empirical studies prevention measures are least likely to trigger domestic resistance and, thus, entail the least political costs to implement.<sup>368</sup> For this reason, ‘ratification leads to the strongest effect on compliance with the prevention policy’.<sup>369</sup> However, prevention policies that typically centre on addressing the root causes of victims’ vulnerabilities are also the most difficult to enforce because it requires that states tackle issues, such as poverty, gender and ethnic discrimination, societal marginalisation, and illegal migration, which lie at the heart of the structural substratum of states. Moreover, an effective prevention policy will likely draw on other policy areas, such as the prosecution of traffickers and the protection of victims.

Prevention measures are not typically incorporated into domestic anti-trafficking legislations but into national plans of action, strategies, and programmes around trafficking, which take into account the constantly evolving nature of trafficking. The typical length of an action plan, strategy, or programme around trafficking is between two and four years. The most recent action plans of Belgium<sup>370</sup> and Romania<sup>371</sup> will expire after four years, those of the Czech Republic,<sup>372</sup> the Netherlands,<sup>373</sup> and Sweden<sup>374</sup> after three years, and that of Finland<sup>375</sup> after two years. The prevention policies are a good indication of states’ priorities in the fight against trafficking both domestically and internationally as they reveal the key actors involved in the fight, their responsibilities, and the extent of coordination at the ministerial level. However, there is often a delay in the adoption of a new action plan upon the former’s expiry and it is expressed that certain proposed measures remain unimplemented following the expiry of an action plan, or their implementation carries on even after the expiry of the relevant action plan. For example, the Finnish National Rapporteur on trafficking had repeatedly recommended that government update its 2008 action plan following expiry in 2011 and new proposals by a steering group based on a final report on the effectiveness of implemented

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<sup>368</sup> Cho and Vadlamannati (n 51) 257.

<sup>369</sup> *ibid.*

<sup>370</sup> Action Plan 2015-2019 *Actieplan Strijd tegen mensenhandel 2015-2019*.

<sup>371</sup> National Strategy 2017-2022 *Strategia națională de prevenire și combatere a traficului de ființe umane pentru anii 2017-2022*.

<sup>372</sup> Government Resolution 360/2016 *Národní strategie boje proti obchodování s lidmi v České republice na období 2016-2019*.

<sup>373</sup> The current national action plan covers the period 2014 to 2017. TIP Office (2017) (n 28) 298.

<sup>374</sup> National Strategy 2016/17:10 *En nationell strategi för att förebygga och bekämpa mäns våld mot kvinnor*.

<sup>375</sup> Government Programme 29/2016 *Valtioneuvoston ihmiskaupan vastainen toimintaohjelma 2016–2017*.

measures.<sup>376</sup> The Rapporteur had also noted that the steering group's proposals were too general and that the absence of a coordinated follow-up on the implemented measures had influenced the incidence and spreading of trafficking.<sup>377</sup> A new action plan was adopted only in 2016, even though the 2008 action plan continued to be implemented in 2013.<sup>378</sup> While Sweden is currently without an action plan that explicitly deals with trafficking in persons.<sup>379</sup> Trafficking for sexual exploitation in women is covered by the action plan on men's violence against women, taking into account the need for an overall national strategy on women's issues for the period 2017 to 2026.<sup>380</sup> It is also observed that the Dutch anti-trafficking action plan is classified and only the main priorities are publically accessible, taking into account the sensitivity of information, particularly on on-going criminal investigations.<sup>381</sup>

Prevention in the EU Trafficking Directive centres on measures, such as training and education through awareness-raising.<sup>382</sup> The regular training of officials who are most likely to come into contact with potential victims is important as a means of deterrence of traffickers who rely on inadequate border controls and identification procedures, as well as, for providing identified victims with the necessary protection and assistance. Correct identification of persons crossing borders can in certain instances prevent the trafficking from occurring in the first place where the exploitation has yet to take place. At the same time, given the complexity of trafficking processes and the overlapping with related crimes, such as smuggling of migrants, an adequate understanding of the nature and forms of trafficking is critical for identifying 'signs' of trafficking. Thus, the prevention policy of Belgium, for example, considers training of immigration officers, judges, and employees of different ministries. While the Czech prevention policy additionally mentions training of labour inspectors and army officers participating in missions abroad. Similar references to training of judges, prosecutors, and law enforcement bodies also exist in the Swedish and Dutch prevention policies.

Raising awareness of trafficking-related exploitation entails both short-term and long-term measures. Short-term measures include campaigns to reduce the demand for commercial

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<sup>376</sup> Eva Biaudet, *National Rapporteur on Trafficking in Human Beings: Report 2014* (Ombudsman for Minorities 2014) 53, 124.

<sup>377</sup> Eva Biaudet, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2013* (Ombudsman for Minorities 2013) 37.

<sup>378</sup> *ibid.*

<sup>379</sup> P Cederlöf, ES Ribeiro, C Lyckner, *Nationella riktlinjer: för arbetet mot prostitution och människohandel för sexuella ändamål* (Länsstyrelsen i Stockholms län 2011) 14.

<sup>380</sup> National Strategy 2016/17:10 (n 374) s 5.1.

<sup>381</sup> TIP Office (2017) (n 28) 298.

<sup>382</sup> EU Trafficking Directive (n 24) art 18.



sex in Romania through theatrical plays,<sup>383</sup> an anti-trafficking campaign at a Finnish film festival, distribution of brochures to prevent sex tourism at an annual travel show in Finland, and a government-run hotline in Romania that informs nationals about working abroad safely. Even though the operation of the hotline is restricted to standard business hours. As a major origin country, Romania introduced into its Criminal Code a prohibition on Romanian-based recruitment companies that facilitates the exploitation of nationals abroad.<sup>384</sup> However, so far no recruitment company has been punished for trafficking-related crimes.

Short-term measures cannot adequately tackle the root causes of victims' vulnerabilities, while they can inform both victims and the public about trafficking, making them vigilant to trafficking-related exploitation. As Bailey rightly argues, preventive strategies should focus beyond public awareness campaigns on 'boosting the economy, increasing access to secondary education, and facilitating dialogue about how to promote legal immigration avenues'.<sup>385</sup> An informed society can, in turn, exert the necessary pressure on government to strengthen anti-trafficking efforts. Simmons uses the example of litigation as a political strategy to mobilise political movements as the publicity of cases, in particular, the moral outrage can cause social mobilisation that forces governments as political actors and representatives of the people to show greater concern for what groups in society 'want'.<sup>386</sup> For example, the framing of prostitution as violence against women mobilised political movement that led to the banning of sex-buying, and an evaluation report on the ban found that public support for the ban had increased, particularly among young people.<sup>387</sup>

Finland and Sweden as major destination countries have adopted some notable long-term measures, such as the assignment of law enforcement officials to Finnish embassies to assist in trafficking prevention and victim identification during the visa application process. Moreover, institutional changes were made in Finland to develop a new government-wide coordination structure with trafficking prevention offices in each ministry that also cooperate with NGOs that provide victim support. While Sweden increased overall funding for its anti-

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<sup>383</sup> 'Ad-hoc Query on Websites and Prevention Campaigns of THB' (*European Commission*, 3 July 2014) <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/566\\_emn\\_ahq\\_websites\\_prevention\\_campaigns\\_thb\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/566_emn_ahq_websites_prevention_campaigns_thb_en.pdf)> accessed 11 June 2016.

<sup>384</sup> Law 678/2001 (n 360) art 6(3).

<sup>385</sup> Stephanie L Bailey, 'A Microsimulation Model to Assess the Impact of Prevention Efforts to Combat Sex Trafficking out of Five Eastern European States' (2015) 1(2) *Journal of Human Trafficking* 167, 167.

<sup>386</sup> Simmons (n 38) 132.

<sup>387</sup> Government Report 2010:49 *Förbud mot köp av sexuell tjänst En utvärdering 1999-2008* 37.

trafficking action plans to strengthen prevention efforts, such as programs for victim rehabilitation and development funds for national authorities and NGOs.<sup>388</sup>

Surprisingly, there are no prevention efforts in the Czech Republic to address the particular vulnerability of Roma women, since about 20 percent of Roma persons are trafficked from the Czech Republic, even though the Roma community constitutes only about three percent of the Czech population.<sup>389</sup> This means that the proportion of Roma persons trafficked from the Czech territory is greater than the proportion of Roma in the Czech population. The Roma community is the largest ethnic minority group in Europe as they suffer, in particular, from poverty and social exclusion, ethnic and gender discrimination, lack of education, domestic violence, and substance abuse.<sup>390</sup> It is expressed that the Czech government fails to provide adequate prevention measures to integrate the Roma community into its society.<sup>391</sup> For example, the Czech National Roma Integration Strategy between 2015 and 2020 that aims to address the vulnerabilities of the Roma community through EU funding does not include anti-trafficking measures, despite being a recognised problem.<sup>392</sup> Even more specific strategies, such as the National Strategy to Combat Trafficking in Human Beings between 2016 and 2019 neither mention the Roma community nor explicitly focus on trafficking.<sup>393</sup> Instead, the Strategy refers to a generic term of ‘socially excluded localities’ in which there is an increased risk of trafficking.<sup>394</sup>

A more recent development within prevention efforts is taking measures to establish as a criminal offence the use of services, which are the objects of exploitation with the knowledge that the person is a victim. Preventing trafficking by discouraging demand is explicitly mentioned in the EU Trafficking Directive that asks member states to consider such possibility.<sup>395</sup> The European Commission under its reporting duties in relation to the Directive has already assessed the impact of existing national laws to this end, with a view to providing

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<sup>388</sup> Law 2007/08:167 *Handlingsplan mot prostitution och människohandel för sexuella ändamål*.

<sup>389</sup> Robert Kushen (ed), *Breaking the Silence: Trafficking in Romani Communities* (European Roma Rights Centre 2011) 33-34.

<sup>390</sup> *ibid* 41-56.

<sup>391</sup> ‘ERRC Submission to UN CEDAW on the Czech Republic (September 2010)’ (*European Roma Rights Centre*, 22 September 2010) <<http://www.errc.org/cms/upload/file/cedaw-trafficking-in-human-beings-czech-republic.pdf>> accessed 2 June 2016.

<sup>392</sup> See Government Resolution 2014 *Strategie romské integrace do roku 2020*.

<sup>393</sup> See Government Resolution 360/2016 (n 372).

<sup>394</sup> *ibid* para 5.4.

<sup>395</sup> EU Trafficking Directive (n 24) art 18(4).

adequate proposals at the EU level.<sup>396</sup> Its assessment will influence EU policy on prostitution and draw an intrinsic link between sex trafficking and consensual prostitution, thus, piercing the veil of states' sovereign prerogatives to determine what constitutes 'sex trafficking'.

According to the Commission's report, 10 member states, including Romania, have already established as a criminal offence the intentional use of services performed by victims for all exploitation forms, while 15 member states, including Belgium, the Czech Republic, and the Netherlands, have no explicit domestic provisions to this end.<sup>397</sup> Even though these states have established a similar offence in relation to the Directive sanctioning employers of illegally staying non-EU nationals mentioned above as part of the Trafficking Directive's integrated, holistic, and human rights framework.<sup>398</sup> However, the Commission notes that criminalisation under that Directive is insufficient given its limited application to third country nationals illegally staying in the EU, thus, excluding victims who are EU nationals and third country nationals lawfully residing in the EU.<sup>399</sup> Moreover, Belgium argues that the provisions relating to sexual offences or child sexual exploitation can be relied upon to this end.<sup>400</sup>

Finland and Sweden are among the fewer states with domestic legislation that targets the use of services provided by trafficking victims for specific exploitation forms, namely sexual exploitation. In fact, the criminalisation of the use of trafficking-related services takes inspiration from the Swedish criminalisation of the purchase of sexual services rather than its sale in 1999.<sup>401</sup> Sweden previously permitted self-employed prostitution<sup>402</sup> and the proposal to criminalise sex-buying was part of a government bill on violence against women that argued prostitution was shameful and unacceptable in society.<sup>403</sup> Finland followed suit with a similar criminalisation targeting only the use of trafficking victims for sexual exploitation.<sup>404</sup> Since

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<sup>396</sup> Commission Report assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, in accordance with Article 23(2) of the Directive 2011/36/EU COM(2016)719 final.

<sup>397</sup> *ibid* 3.

<sup>398</sup> Directive 2009/52/EC (n 299).

<sup>399</sup> Commission Report (2016c) (n 396) 5.

<sup>400</sup> *ibid* 4.

<sup>401</sup> Law 1998:408 *Lag om förbud mot köp av sexuella tjänster*; Law 2005:90 *Lag om ändring i brottsbalken* chpt 6 s 11.

<sup>402</sup> S-Y Cho, A Dreher and E Neumayer, 'Does Legalized Prostitution Increase Human Trafficking' (2013) 41 *World Development* 67, 75.

<sup>403</sup> Government Bill 1997/98:55 *Kvinnofrid* 22.

<sup>404</sup> Law 743/2006 *Laki rikoslain 1 ja 20 luvun muuttamisesta*.

then five more states, namely Norway,<sup>405</sup> Iceland,<sup>406</sup> Canada,<sup>407</sup> Northern Ireland,<sup>408</sup> and France,<sup>409</sup> have jumped on the bandwagon of the Swedish model around prostitution.

Impact studies on the criminalisation of sex-buying were conducted in both Sweden and Finland. A government commissioned report in Sweden concluded that street prostitution had reduced by half following the ban,<sup>410</sup> which, therefore, was ‘an effective barrier against the establishment of traffickers in Sweden’.<sup>411</sup> Further research appears to support this finding.<sup>412</sup> However, as Cho, Dreher, and Neumayer rightly argue the unavailability of nationwide statistics prior to the Swedish criminalisation in 1999 makes a direct comparison between the pre and post-criminalisation periods impossible.<sup>413</sup> While the Finnish commissioned research found that very few cases of abuse of a victim of sex trade had been detected, investigated, prosecuted, and punished.<sup>414</sup> An important reason behind the inadequate application of the ban was the difficulty in establishing intent. Sex buyers tend to avoid gaining any knowledge of the prostitute’s circumstances, even though as the Finnish Supreme Court notes it is difficult for a buyer to completely exclude the possibility of procuring and trafficking.<sup>415</sup> Thus, the research recommended a full criminalisation of sex-buying to prevent sex trafficking and protect victims of the sex trade.<sup>416</sup>

The difficulty of building evidence around the requirement of intent was also noted by other member states in the Commission’s report as the burden of proof typically lies with the prosecutor based on the principle of the presumption of innocence.<sup>417</sup> Only in Ireland is the burden of proof shifted to the defendant to prove that he or she had no reasonable grounds for believing that the person was in fact a trafficking victim. However, the Commission clarified that the difficulty of finding evidence was not a conclusive argument for not treating a certain conduct as a criminal offence, and that states should closely consider the level of knowledge

<sup>405</sup> Law 8/2008-2009 *Vedtak til lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.)* s 202(a).

<sup>406</sup> Law 19/1940 *Almenn hegningarlög* (nr.) art 206.

<sup>407</sup> Protection of Communities and Exploited Persons Act (S.C. 2014, c. 25) s 286(1).

<sup>408</sup> Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 chpt 2 s 15.

<sup>409</sup> Criminal Code (Version of 16 July 2016) art 225(12)(1).

<sup>410</sup> Government Report 2010:49 (n 387) 34.

<sup>411</sup> Gunilla S Ekberg and Kajsa Wahlberg, ‘The Swedish Approach: A European Union Country Fights Sex Trafficking’ (2011) 2(2) Solutions <<http://www.thesolutionsjournal.com/node/895>> accessed 28 April 2015.

<sup>412</sup> Charlotta Holmström and May-Len Skilbrei, *Prostitution in the Nordic Countries: Conference Report, Stockholm, October 16-17, 2008* (Nordic Council of Ministers 2009).

<sup>413</sup> Cho, Dreher and Neumayer (2013) (n 402) 75.

<sup>414</sup> Biaudet (2014) (n 376) 99.

<sup>415</sup> *ibid* 100.

<sup>416</sup> *ibid* 102.

<sup>417</sup> Commission Report (2016c) (n 396) 7.

required for this offence.<sup>418</sup> The Commission finally concluded that the legal landscape on the issue of demand was too diverse to effectively contribute to discouraging demand of services provided by trafficking victims so that states must strengthen their efforts to ensure a more unified and dissuasive action for the accountability of perpetrators, both traffickers and intentional users.<sup>419</sup>

#### 2.4.4. Prosecution

As a serious crime that is often committed within the framework of organised crime, combating trafficking in persons is a priority for the vast majority of states. The priority-areas in combating trafficking are investigation, prosecution, and conviction. In addition to reducing crime, there is a pragmatic reason behind focusing on these areas, namely that they produce quantifiable indicators of state progress.<sup>420</sup> Even though scholars remain critical of the overarching dominance of the crime-fighting perspective of anti-trafficking policies, which can lead to ‘simplistic notions of the circumstances, mind-sets and needs of those defined as victims’.<sup>421</sup> It would also explain the overwhelming focus of prosecution on sexual exploitation.

Due to the lack of reliable data in the field, the numbers of investigations, prosecutions, and convictions provide at least a glimpse of the domestic realities on the ground. They also provide useful indicators for cross-country comparisons to measure global anti-trafficking efforts, which appear to indicate a worldwide decrease in law enforcement efforts, especially compared to the generally accepted size of the trafficking problem.<sup>422</sup> It is a major contention that very few traffickers are brought to justice and very few victims are able to benefit from the criminal justice system. Ending the high levels of impunity for traffickers and guaranteeing justice to victims requires vigorous prosecution of trafficking crimes. However, it would appear that the pressure to prosecute, particularly on underdeveloped criminal justice systems, has inversely led to poor quality prosecutions that target low level perpetrators, unfair and unsafe prosecutions that do not respect basic criminal justice standards, and disproportionate and politically motivated targeting of certain sectors, such as the sex industry.<sup>423</sup> In particular, there

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<sup>418</sup> *ibid* 8.

<sup>419</sup> *ibid* 10.

<sup>420</sup> Anette Brunovskis and May-Len Skilbrei, ‘Two Birds with One Stone? Implications of Conditional Assistance in Victim Protection and Prosecution of Traffickers’ (2016) 6 *Anti-Trafficking Review* 13, 17.

<sup>421</sup> *ibid* 18.

<sup>422</sup> UNODC (2016) (n 25) 51.

<sup>423</sup> Anne T Gallagher, ‘Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending Impunity and Securing Justice’ (2016) 6 *Anti-Trafficking Review* 1, 3.

is an unnecessary pressure on victim cooperation as primary witnesses in criminal proceedings. Even though the link between victim cooperation and victim support is strongly discouraged in the preeminent instruments, and the Trafficking Principles and Guidelines identify the link as contrary to the promotion of their human rights.<sup>424</sup>

Moreover, it would appear that the lack of detailed information on criminal justice responses, in particular, the process and quality of prosecutions has less to do with an overall shortage of primary information on prosecutions, which tend to focus on sexual exploitation in women, based on general understandings of the problem. But with states being less eager to share detailed information other than on protection and prevention because ‘it reveals information that could reflect badly on the state concerned and thereby compromise relationships’.<sup>425</sup> Gallagher believes that such concern is aggravated by the threat of a low ranking in the TIP Report and the subsequent effect on states’ international reputation in combating trafficking.<sup>426</sup>

As illustrated in the table below, there is great divergence in the number of prosecutions, convictions, and penalties for trafficking in persons among the case studies. Belgium, the Netherlands, and Romania have comparably higher numbers of prosecutions than the Czech Republic, Finland, and Sweden. Even though the ratio of prosecutions to convictions is highest for the Czech Republic, Finland, and Sweden. The higher numbers of prosecutions in Romania and the Netherlands necessarily correlate with them being major origin countries for trafficking, thus, there being a heavier flow of victims and traffickers in these territories. While Belgium reports a high volume of Romanian nationals being trafficked into its territory, although the information on prosecutions for Belgium is not conclusive. Despite the high number of prosecutions in Belgium, only a third had resulted in successful convictions. A possible reason behind the low number of convictions is that trafficking was not considered a priority by the Federal Prosecutor’s Office until the issue was explicitly included in the action plan covering the period 2012 to 2014.<sup>427</sup> Another reason is that detailed information on trafficking-related convictions has become available only since 2010, since the previous codification of offences did not distinguish between trafficking in persons and smuggling of

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<sup>424</sup> Trafficking Principles and Guidelines (n 52) principle 8.

<sup>425</sup> Gallagher (2016) (n 423) 6.

<sup>426</sup> *ibid.*

<sup>427</sup> GRETA ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium: First evaluation round’ (25 September 2013) GRETA(2013)14 para 217.

migrants.<sup>428</sup> As convictions are registered manually, there is a possibility that some records are still missing.<sup>429</sup> However, this does not explain why 52 of the 88 sentences in Belgium were suspended entirely or partially. Although the Czech Republic also suspended 7 of the 19 sentences. The information on prosecutions for the Czech Republic is not conclusive. The overall average sentence was between one and five years of imprisonment. Sweden is the only state to impose a fine in addition to a prison sentence, and both convicted traffickers were deported upon serving their sentences. In Finland, the prison term for sex trafficking was twice as high as for labour trafficking. A possible reason behind the lower sentence may be an unfamiliarity with labour-related exploitation as the first conviction for labour exploitation was only pronounced in 2012.<sup>430</sup> In particular, extortionate work discrimination as a related crime is punished by a fine.<sup>431</sup>

Table 3. Number of prosecutions, convictions, and sentences for the basic offence of trafficking in persons in 2015.<sup>432</sup>

	<b>Prosecutions</b>	<b>Convictions</b>	<b>Sentences</b>
<b>Belgium</b>	299	93	88 (ave. 1-5 years; 52 suspended)
<b>Czech Republic</b>	12	19	19 (5: 1-5 years; 7: 5-15 years; 7 suspended)
<b>Finland</b>	4	4	4 (32-46 months for sex trafficking; 12-20 months for labour trafficking)
<b>Netherlands</b>	189	139	n/a
<b>Romania</b>	480	331	225 (ave. 1-5 years)
<b>Sweden</b>	2	2	2 (26 months; 30 months) & SEK 82,200 & deportation after term

The number of prosecutions and convictions for each case study is still low considering the generally accepted size of the trafficking problem. This can be for a variety of reasons, including but not limited to, first, the different position of states in the international criminal

<sup>428</sup> *ibid* para 220.

<sup>429</sup> *ibid* para 222.

<sup>430</sup> GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Finland: First evaluation round' (4 June 2015) GRETA(2015)9 para 215.

<sup>431</sup> *ibid* para 216.

<sup>432</sup> Data source: TIP Office (2016) (n 74).

network of trafficking. Second, the variable size of their populations and the corresponding number of potential victims and traffickers. Romania with a population of over 21 million inhabitants will more likely identify and subsequently prosecute more traffickers than, for example, Finland with a population of 5.5 million inhabitants. Third, the complexity of the anti-trafficking laws will influence the possibilities of investigations leading to prosecutions and successful convictions. For example, the previous overlapping of Finnish penal provisions on trafficking and procuring meant that the authorities were using laws on pandering, discrimination, and usury to investigate and prosecute suspected traffickers, while the higher threshold of the trafficking offence meant less broad use by the courts to capture subtler forms of coercion used in trafficking situations.<sup>433</sup> Fourth, the data collection and analysis methodology of individual countries is an important consideration, particularly whether they refer to the number of traffickers, victims, or cases, since they may consider the number of investigations, convictions, or both. Whether a country is an origin, transit, or destination also influences the number of registered cases, since transit countries may find it difficult to prove the trafficking offence where the suspected trafficker is caught at the border before the exploitation occurs typically in the destination country. Consequently, many trafficking cases may be recognised incorrectly as smuggling of migrants because the distinction is less clear on the ground. Finally, many trafficking cases do not reach the authorities because of mistrust by victims and fear of retaliation by traffickers. Even when they do, there may be confusion about the distinction between trafficking in persons and migrant smuggling, or a lack of knowledge about the elements of trafficking and the profile of potential victims.<sup>434</sup> As investigations and criminal proceedings are often very lengthy and may not garner the expected outcome, this may be a disincentive for initiating investigations in the first place. For example, an international investigation led by the Netherlands and involving Nigeria, Italy, France, Belgium, Spain, and the UK resulted in the arrest of 24 suspected traffickers. However, Dutch police officers involved in the investigation that lasted almost two years were disappointed with the outcome of convictions as a number of suspects were convicted for smuggling of migrants rather than trafficking in persons.<sup>435</sup> In particular, the victim statements were excluded

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<sup>433</sup> Eva Biaudet, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2012* (Ombudsman for Minorities 2012) 11-12.

<sup>434</sup> See Susan Mapp and others, 'Local Law Enforcement Officers' Knowledge of Human Trafficking: Ability to Define, Identify, and Assist' (2016) 2(4) *Journal of Human Trafficking* 329.

<sup>435</sup> Brenda Carina Oude Breuil and others, 'Human Trafficking Revisited: Legal, Enforcement and Ethnographic Narratives on Sex Trafficking to Western Europe' (2011) 14(1) *Trends in Organized Crime* 30, 39.



as evidence because of improper police registration and insufficient monitoring by the public prosecutor.

In addition to the number of prosecutions, convictions, and sentences, the levels of penalty for the crime of trafficking in persons provide a good indication of the gravity accorded to the crime by individual states. Higher levels of penalty can act as better deterrents of crime. The EU Trafficking Directive prescribes a maximum penalty of at least five years of imprisonment, which is met by the case studies as illustrated in the table below.<sup>436</sup>

Table 4. Levels of penalty for the basic offence of trafficking in persons.<sup>437</sup>

	<b>Trafficking in Persons by Individuals</b>	<b>Trafficking in Persons by Organised Criminals</b>
<b>Belgium</b>	1-5 years & EUR 500-50,000	n/a
<b>Czech Republic</b>	2-10 years	10-18 years
<b>Finland</b>	4 months-6 years	n/a
<b>Netherlands</b>	max. 12 years	max. 15 years & EUR 82,000
<b>Romania</b>	3-10 years	n/a
<b>Sweden</b>	2-10 years max. 4 years (less grievous)	n/a

Belgium and Finland have opted for maximum sentences at the lower threshold set by the Directive, namely a maximum of 5 and 6 years of imprisonment respectively. The Czech Republic, the Netherlands, Romania, and Sweden have opted for comparably higher prison sentences of maximum 10 years, or 12 years in the specific case of the Netherlands. However, the European Commission's report on transposition of the EU Trafficking Directive notes that some European states have penalties carrying a maximum imprisonment of 20 years, which is a better indicator of the gravity of the trafficking offence that effectively deprives victims of their liberty.<sup>438</sup> Belgium has additionally chosen to apply a maximum fine of EUR 50,000. Two states, namely the Czech Republic and the Netherlands maintain the distinction between individual traffickers and individuals involved in an organised criminal group, which according

<sup>436</sup> EU Trafficking Directive (n 24) art 4(1).

<sup>437</sup> Data source: Law 10 August 2005 (n 363) art 10 (Belgium); Law 141/2014 (n 365) art II(7) (Czech Republic); Criminal Code 1889/39 (n 361) chpt 25, s 3 (Finland); Law 2013/84 *Wet van 28 februari 2013 inzake partiële wijziging van het Wetboek van Strafrecht en enkele andere wetten in verband met de aanpassing van het materieel strafrecht aan recente ontwikkelingen* art I(D) (Netherlands); Law 187/2012 (n 365) art 210 (Romania); Law 2010:371 (n 365) chpt 4, s 1(a) (Sweden).

<sup>438</sup> Commission Report assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23(1) COM(2016)722 final 5.

to the definition in the UNCTOC entails a structured group of three or more persons.<sup>439</sup> While the UN Trafficking Protocol because it was adopted within a transnational organised crime framework restricts its scope of application to offences that are transnational in nature and involve an organised criminal group,<sup>440</sup> the COE Trafficking Convention effectively removes this requirement to acknowledge domestic trafficking and exploitation by individual traffickers.<sup>441</sup> However, due to the severity of trafficking that involves organised criminals given its geographical scope and the number of victims exploited, trafficking by organised criminals carries heavier penalties. The Netherlands in addition to a maximum prison term of 15 years also imposes a fine of EUR 82,000. Together, the penalty for organised criminals is considered to take into account the gravity of trafficking, especially if the penalty is supported by the confiscation of proceeds of crime.

When the penalties prescribed by law are compared to the sentences in trafficking cases in both tables, a convergence is found in all but one case study, namely Romania, where the lowest sentence of one year of imprisonment is below the minimum penalty of two years of imprisonment as stipulated by the domestic anti-trafficking law. It is important that judges adhere to the minimum levels of penalty prescribed by law to maintain the gravity of the trafficking offence. Otherwise, it leans towards relative impunity for traffickers. At the same time, it will influence the willingness of police officers to start an investigation that is both complex and dependent on valuable police resources, since '[c]ourt verdicts serve as beacons for the police in this matter'.<sup>442</sup>

#### 2.4.5. Protection

The protection of victims is the most contested of priority-areas for states involved in the fight against trafficking, especially when protection is not directly beneficial to prosecution efforts. A narrow understanding of protection centres on retribution or intimidation from traffickers, while a broader understanding underpins victims' access to social, legal, and medical assistance.<sup>443</sup> The latter addresses harm, including physical and psychological harm, and the socio-economic vulnerabilities that are likely to leave victims at risk of continued exploitation and/or re-trafficking. More recent instruments, such as the COE Trafficking Convention and

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<sup>439</sup> UNCTOC (n 14) art 2(a).

<sup>440</sup> UN Trafficking Protocol (n 1) art 4.

<sup>441</sup> COE Trafficking Convention (n 23) art 2.

<sup>442</sup> Breuil and others (n 435) 39.

<sup>443</sup> Brunovskis and Skilbrei (n 420) 14.

the EU Trafficking Directive, require states to provide unconditional assistance to victims at least during the reflection period.<sup>444</sup> A person should receive assistance and support as soon as there is a reasonable ground for suspecting that he or she is a victim of trafficking, irrespective of his or her willingness to act as a witness. It follows that during the reflection period the person cannot be removed from the territory of the state and must be in receipt of safe accommodation, medical assistance, and legal assistance.<sup>445</sup> The period serves to free the victim from the influence of the trafficker so that he or she can make a consensual and informed choice on cooperating with authorities. However, victims remain necessary witnesses in criminal proceedings due to the lack of evidence and the complexity of investigations so that often states continue to link victim cooperation with victim assistance. There is a further enticement of residency as cooperating victims have improved chances of receiving residency in the destination country.<sup>446</sup> This has become particularly problematic from a due process perspective as it questions the veracity of victim testimonies.<sup>447</sup> As victims have something to gain from testifying, there is a credible possibility that their testimonies are exaggerated. In particular, where their stories do not support an ‘ideal’ victimhood to appear credible in court. For example, in Romania forcing ‘innocent’ women into prostitution is a crime but the same act when committed by a sex worker amounts to pandering.<sup>448</sup> Thus, in the former instance, the ‘victim’ is entitled to protection and assistance but in the latter instance the person is viewed as a ‘perpetrator’ deserving of prosecution and punishment. The link between victim cooperation and victim support, thus, has the effect of weeding out useful witnesses with valuable information. Thus, the common notion is not that protection leads to cooperation but that cooperation leads to protection. As Brunovskis and Skilbrei argue, ‘[t]his distinction in terms of its impact on victims’ decision-making and well-being, is an important one’.<sup>449</sup>

In relation to the case studies, only the Netherlands, Romania, and Finland explicitly require that assistance and support should be provided as soon as there is a reasonable ground for suspicion that the person is a victim of trafficking.<sup>450</sup> Romania additionally includes a list of indicators outlining ‘reasonable grounds’ and the main differences between trafficking in persons and smuggling of migrants, which are available to police officials and immigration

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<sup>444</sup> COE Trafficking Convention (n 23) art 12(6); EU Trafficking Directive (n 24) art 11(3).

<sup>445</sup> EU Trafficking Directive (n 24) art 11(5).

<sup>446</sup> Council Directive 2004/81/EC (n 298).

<sup>447</sup> Brunovskis and Skilbrei (n 420) 18-19.

<sup>448</sup> Wijers (2015) (n 13) 74.

<sup>449</sup> Brunovskis and Skilbrei (n 420) 20.

<sup>450</sup> Commission Report (2016b) (n 438) 8.

officials.<sup>451</sup> The unconditionality of victim assistance is provided for in the domestic anti-trafficking laws, although information for Belgium is not conclusive as to whether such provision exists and is applicable for victims irrespective of nationality. A further indication of unconditionality is the transposition of the Council Directive 2004/81/EC on the issuance of residence permits to third country nationals who are victims of trafficking by the case studies.<sup>452</sup> This Directive forms part of the integrated, holistic, and human rights approach envisaged by the EU Trafficking Directive. However, the Directive does not specify the duration of the reflection period, which is therefore without prejudice to the individual capacities of states. The explanatory report of the COE Trafficking Convention mentions at least 30 days.<sup>453</sup> While NGOs providing victim support recommend a period of not less than 90 days.<sup>454</sup> Sweden's reflection period lasts 30 days, Belgium's 45 days, the Czech Republic's 60 days, both the Netherlands' and Romania's 90 days, and Finland's between 30 days and six months. Thus, only the latter three states provide grace periods that are truly reflective of victims' needs and particularities. In particular, where victims develop an emotional bond with their traffickers akin to the Stockholm syndrome that makes it difficult for them to act as witnesses in proceedings against their traffickers.

In relation to appropriate and safe accommodation, the provision of specialised shelters for trafficking victims in Belgium,<sup>455</sup> the Czech Republic,<sup>456</sup> the Netherlands,<sup>457</sup> and Romania<sup>458</sup> is noted. Sweden accommodates trafficked women in shelters for female victims of violence and child and young person victims of sexual abuse, substance abuse, and psychological difficulties.<sup>459</sup> However, such shelters will most likely fail to address the specificities of trafficking victims' harms, as a result of psychological, physical, and/or sexual abuse, forced or coerced use of drugs or alcohol, social restrictions and emotional manipulation, economic exploitation and debt bondage, legal insecurity, and abusive working

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<sup>451</sup> GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania: First evaluation round' (31 May 2012) GRETA(2012)2 para 118.

<sup>452</sup> Council Directive 2004/81/EC (n 298).

<sup>453</sup> Explanatory Report (n 185) para 173.

<sup>454</sup> Amnesty International and Anti-Slavery International (n 236) 11.

<sup>455</sup> GRETA (2013) (n 427) para 144.

<sup>456</sup> Department of Security Policy and Crime Prevention, *2014 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2015) 47.

<sup>457</sup> GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands: First evaluation round' (18 June 2014) GRETA(2014)10 paras 17, 35.

<sup>458</sup> GRETA (2012) (n 451) para 38.

<sup>459</sup> GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden: First evaluation round' (27 May 2014) GRETA(2014)11 para 146.

conditions.<sup>460</sup> Like Sweden, Finland accommodates trafficking victims in shelters for migrant women along with victims of domestic violence.<sup>461</sup> Besides the inadequacy of support measures, there will most likely be an issue of bed space, which implies a selective screening process to determine priority-victims. The lack of space is a wider problem. For example, in Belgium, the three specialised reception centres assisting victims, including accommodation, have a total of 50 places for the three facilities, thus, victims are also housed in transit flats and other accommodation for a stay of typically between five and six months depending upon their individual needs.<sup>462</sup>

The number of residence permits issued or renewed by the case studies in any given year varies considerably. Belgium has by far issued and renewed the most number of permits, totalling 552 permits in 2015, followed by the Netherlands with 251 temporary permits in 2014 for a period of three or more years.<sup>463</sup> The Netherlands is one state to grant to cooperating victims permanent residency following a successful conviction. Romania makes no provision for permanent permits, only renewable six-month temporary permits.<sup>464</sup> The information on the number of permits issued is not conclusive. In Finland, the misidentification of trafficking victims as witnesses in trafficking-related cases, such as pimping, inversely affected their eligibility for a residence permit.<sup>465</sup> Thus, only two temporary and nine permanent residence permits were granted in 2015. Like the Netherlands, Sweden grants to cooperating victims and witnesses residency following a successful conviction. On this basis, in 2015, 12 trafficking victims and 29 witnesses received temporary residence permits of at least six months. A serious obstacle to the issuance of Swedish residence permits is that only an investigating police officer or prosecutor can file an application for residency, which means that temporary residence permits are typically only available to victims who are already in contact with law enforcement officials. Moreover, in the specific case of Sweden, the Group of Experts on Action against Trafficking in Human Beings observed that uncooperative victims were immediately repatriated following the expiry of their reflection period without a proper assessment of

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<sup>460</sup> For a list of abuse, health risks, and potential health consequences associated with trafficking in persons, see C Zimmerman, M Hossain and C Watts, 'Human Trafficking and Health: A Conceptual Model to Inform Policy, Intervention and Research' (2011) 73 *Social Science and Medicine* 327, 331-333.

<sup>461</sup> GRETA (2015) (n 430) paras 152, 154.

<sup>462</sup> GRETA (2013) (n 427) para 144.

<sup>463</sup> Law 2000/BWBR0012289 *Vreemdelingencirculaire 2000 (B)* chpt B9(3).

<sup>464</sup> Emergency Order 194/2002 *Ordonanței de urgență a Guvernului privind regimul străinilor în România* art 100(1).

<sup>465</sup> GRETA (2015) (n 430) para 215.

possible risks of repatriation to these victims.<sup>466</sup> This observation bolsters the notion that cooperation and protection are intrinsically linked.

The intent to protect victims has not transpired with the same rigour into practical action, whether due to the absence of political will or administrative and financial resources to offer the necessary support. The political, social, and economic developments in Romania and the Czech Republic do not compare to those in Belgium, the Netherlands, Finland, and Sweden. This suggests immediate differences in the abilities of the former group of states to offer victim support on a par with the latter group of states that generally follow a tradition of equality policy and respect for human rights, which, in turn, implies a greater willingness to provide victim assistance and support. Even though it cannot be said on the basis of information available that the latter group of states provides comparably better protection to victims. An important reason behind the overall inadequacy of protection is the optional nature of protection provisions compared to the mandatory nature of prosecution. While the optional nature of protection necessarily takes into account the different capacities of individual states, it affords states maximum protection from being accountable to precise obligations. A further reason lies in the structural substratum of states and the bias and stigma that authorities hold in relation to victims and specific exploitation forms. For example, it was mentioned already that the majority of victims in the Czech Republic belong to the Roma community and that prevention policies largely ignored persons belonging to this ethnic group. The same is true in relation to their protection as very few Roma women benefit from the Support and Protection of Victims of Trafficking in Human Beings Programme established in 2005 for foreign and Czech victims. This Programme offers important protection to victims, such as non-prosecution of criminal activities committed as part of their trafficking. The ethnic prejudice against Roma victims often leads to their exclusion from such programmes, who are blamed by authorities and victim service providers for their vulnerability.<sup>467</sup> While, in Finland, negative attitudes towards prostitutes means sex trafficking victims are less likely to enter the victim assistance system.<sup>468</sup> The Finnish victim reception centre, therefore, plays a crucial role in identifying and caring for victims ignored by national authorities.<sup>469</sup> However, such care occurs through general rather than specialised shelters for trafficking victims.

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<sup>466</sup> GRETA (2014) (n 459) para 185.

<sup>467</sup> 'ERRC Submission to UN CEDAW on the Czech Republic (September 2010)' (n 391).

<sup>468</sup> Sari Latomaa, 'Human Trafficking in Finland' (2014) 9 Intercultural Human Rights Law Review 229, 239.

<sup>469</sup> Law 17.6.2011/746 *Laki kansainvälistä suojelua hakevan vastaanotosta sekä ihmiskaupan uhrin tunnistamisesta ja auttamisesta* ss 38-38a.

Thus, the protection of victims continues to have a strong link with victim cooperation in criminal proceedings, and outside this framework protection does not appear to amount to any meaningful measure that addresses the specific needs of trafficking victims and reduces the risks of harm to continued exploitation and/or re-trafficking based on the broader understanding of protection.

#### 2.4.6. Cooperation

Cooperation, whether bilateral or multilateral, is the paramount objective of states becoming parties to international and regional anti-trafficking instruments. Cooperation is necessary for both law enforcement and information exchanges as the crime manifests itself in different forms and using different methods in both domestic and transnational contexts. Above all, cooperation is crucial for upholding the rule of law. The fragmented nature of anti-trafficking efforts provides high levels of impunity for traffickers and does not secure justice for those who have been trafficked. In particular, respect for the principles of sovereign equality and territorial integrity, as well as, non-intervention in the domestic affairs of other states restrict the exercise of jurisdiction and the performance of functions that are reserved exclusively for the authorities of that other state by its domestic law.<sup>470</sup> While the absence of international scrutiny of anti-trafficking efforts allows those states to disregard their commitments, either partially or fully, when compliance is not necessarily in their interest or capacity. This creates an ambivalent attitude towards cooperation in matters of prevention, prosecution, and protection.

Institutions at the international and regional levels are, therefore, tasked with facilitating cooperation through technical assistance.<sup>471</sup> However, these institutions report that state cooperation is minimal. For example, Eurojust works at the EU level with judicial and law enforcement authorities of the involved states to facilitate the exchange of information, support mutual legal assistance measures, coordinate ongoing investigations and prosecutions, and detect, prevent, or resolve conflicts of jurisdiction or *ne bis in idem*-related issues.<sup>472</sup> Thus, between 2012 and 2016, Eurojust, with significant participation from Europol, held 121 coordination meetings on trafficking cases as a priority-area of its general casework.<sup>473</sup>

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<sup>470</sup> UNCTOC (n 14) art 4.

<sup>471</sup> See *ibid* art 32(3)(a).

<sup>472</sup> Eoghan Hughes and Chiara Talerico (eds), *Implementation of the Eurojust Action Plan against THB 2012-2016: Final Evaluation Report* (Eurojust 2017) 5.

<sup>473</sup> *ibid*.

However, its resources, including the 28 anti-trafficking coordination centres, were sparsely used by cooperating states in transnational trafficking cases. Only one trafficking case concerning sex trafficking in women in Romania and France benefitted from a coordination centre in relation to arrests and confiscation of proceeds of crime.<sup>474</sup> In particular, member states have a reporting obligation to Eurojust of a minimum level of information in specific circumstances so that Eurojust can contribute in a meaningful way to cooperation efforts.<sup>475</sup>

According to Eurojust, states are cooperating bilaterally and multilaterally at the EU level, even though multilateral cooperation is comparably less (15 percent).<sup>476</sup> Both the Czech Republic and Romania as major origin countries are seen to actively cooperate with other EU states under the coordination of Eurojust. For example, combined efforts in the Czech Republic and Sweden resulted in five convictions for child pornography with sentences from 2 to 12 years of imprisonment, as well as, the confiscation of proceeds of crime and victim compensation.<sup>477</sup> The Czech Republic has also worked with Ireland and the UK against forced marriages.<sup>478</sup> While Romania has cooperated with both France and Denmark in sex and labour trafficking cases respectively. In the former case, 25 suspects were arrested and proceeds of crime confiscated.<sup>479</sup> In the latter case, a multidisciplinary approach among NGOs, tax departments, immigration services, and law enforcement agencies put an end to the exploitation of about 300 victims and proceeds of crime totalling EUR 7.2 million were confiscated.<sup>480</sup>

In the specific cases of Belgium and the Netherlands, as well as, Sweden and Finland cooperation is further facilitated through the Benelux Union and the Council of the Baltic Sea States (CBSS) respectively. The Benelux Union has established a cross-border framework for the identification and protection of trafficking victims in relation to criminal proceedings, residency, and repatriation.<sup>481</sup> The framework provides information on authorities who are most likely to come into contact with victims, the domestic anti-trafficking laws in Belgium, the Netherlands, and Luxembourg, and the national referral mechanisms and other support service providers. While the CBSS through its anti-trafficking task force contributes to state

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<sup>474</sup> *ibid* 6.

<sup>475</sup> Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14 art 13.

<sup>476</sup> Hughes and Talerico (n 472) 17.

<sup>477</sup> *ibid* 19-20.

<sup>478</sup> *ibid* 21.

<sup>479</sup> *ibid* 6.

<sup>480</sup> *ibid* 20.

<sup>481</sup> Benelux Working Group on Trafficking in Human Beings (eds), *Informatiebrochure Omtrent de Benelux-samenwerking ter Bejegening van Slachtoffers van Mensenhandel* (Benelux Union 2015) 5.



cooperation by facilitating the exchange of information. For example, the ‘trafficking as a criminal enterprise’ project developed state-of-the-art knowledge on ‘the activities of the perpetrators by developing an understanding of the structure, social relationships, modus operandi, travel routes, and technologies’ associated with different exploitation forms.<sup>482</sup> One of the notable partners in the project is the National Agency against Trafficking in Persons as the national rapporteur on trafficking in Romania. Due to the sensitivity of information, the findings of the project are not publically accessible.

Within discussions on state cooperation, a number of obstacles are identified in relation to effective investigations and prosecutions. For example, investigating officials make incorrect distinctions between trafficking in persons and smuggling of migrants because often the exploitation does not occur until after the person is smuggled into the EU. Thus, it is important ‘to assess all stages of the smuggling/trafficking in order to identify the correct legal definition of the conduct’.<sup>483</sup> As otherwise the foreign victim cannot receive protection from prosecution or penalisation for illegal entry that was committed as part of his or her trafficking.

Eurojust also notes as obstacles to effective cooperation the admissibility of evidence provided by victims, the conflict of jurisdiction, the execution of European arrest warrants, and proving money laundering.<sup>484</sup> In one trafficking case, the conflict of jurisdiction was resolved using a video conference to facilitate the hearing of a witness before the issuance of a European arrest warrant, in accordance with Romanian procedural law.<sup>485</sup> In another case, the Netherlands observed that traffickers were laundering proceeds not only through banks but also financial service providers, such as Western Union and Money Gram, thus, providing valuable insight into newer modi operandi of traffickers.<sup>486</sup> Two further examples underline the challenges to transposition of the EU Trafficking Directive that contains the most recent obligations in relation to enhancing cooperation.<sup>487</sup> The differences in domestic legislation in relation to wiretapping hindered a joint investigation involving Bulgaria where wiretapping can only be conducted for a maximum period. However, article 9(4) of the Directive requires member states to provide officials with effective investigation tools, including for the

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<sup>482</sup> See EU funded project FP7-SEC-2-13-607669 ‘Trafficking as a Criminal Enterprise (TRACE)’ <[https://ec.europa.eu/anti-trafficking/eu-projects-and-funding/trafficking-criminal-enterprise-trace\\_en](https://ec.europa.eu/anti-trafficking/eu-projects-and-funding/trafficking-criminal-enterprise-trace_en)> accessed 21 September 2017.

<sup>483</sup> Hughes and Talerico (n 472) 16.

<sup>484</sup> *ibid* 18.

<sup>485</sup> *ibid* 22.

<sup>486</sup> *ibid* 39.

<sup>487</sup> *ibid* 18.

interception of communications.<sup>488</sup> Also, the use of trafficked persons for drug trafficking between states with different drug laws constitutes trafficking in persons for the exploitation of criminal activities under article 2(3) of the Directive.<sup>489</sup> In such cases, international and regional coordination institutions have an important role to play in mitigating the divergence in substantive and procedural laws. These examples also underline that a successful harmonisation of national responses has not taken place with a view to enhancing cooperation.

#### 2.4.7. Preliminary Conclusions

The national exploration draws four preliminary conclusions. First, the ratification of the UN Trafficking Protocol and the COE Trafficking Convention and the transposition of the EU Trafficking Directive are major push-factors for wide and effective cooperation in matters of prevention, prosecution, and protection. Second, there is overall compliance on the books with international and European obligations with a view to harmonising national responses. Third, there still remains significant room for improvement with regard to prevention, prosecution, and protection, in practice and to a lesser extent on the books, so that the harmonisation project has not yet come to fruition. Fourth, cooperation efforts are minimal compared to the generally accepted size of transnational trafficking, in part, due to the differences in domestic anti-trafficking laws.

### 2.5. Conclusions

The international community has made great strides in combating trafficking in persons through knowledge production and international regulation. The UN Trafficking Protocol, the Trafficking Principles and Guidelines, the CEDAW, the COE Trafficking Convention, and the EU Trafficking Directive have contributed significantly to normative development in the field towards a preferred general direction of national responses. Current responses to the trafficking problem are rooted in the Protocol, examined in section 2.2.1, which has had a critical role in defining ‘trafficking in persons’ and establishing minimum standards on prevention, prosecution, and protection, with a view to promoting state cooperation through harmonised responses. While the Convention and the Directive, studied in sections 2.3.1 and 2.3.2, provide a contextual understanding of trafficking in Europe.

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<sup>488</sup> *ibid.*

<sup>489</sup> *ibid.*

According to the most recent formulation of the trafficking problem manifest in the Directive, trafficking is a concept of exploitation of criminal activities that are subject to penalties and imply financial gain. This has opened up the umbrella term of trafficking, originally concerning only sexual and labour exploitation and the removal of organs, to forms unnamed or unforeseen during the Protocol's negotiations, such as forced begging. However, widening the scope of the Protocol's definition from a set of categories to a concept creates uncertainty in the implementation process as illustrated by the inclusion of exploitation forms not explicitly mentioned in any of the preeminent anti-trafficking instruments, such as forced service in the armed forces, in Sweden and the Czech Republic. While there is a serious possibility that widening the Protocol's definition will give new life to previously moribund prohibitions in international law, such as forced marriage, there is a significant risk of deflecting attention from previously narrow legal categories reserved for the worst forms of exploitation, such as prostitution and slavery-related trafficking. In particular, the conflation of trafficking in persons and slavery by the ECtHR, reviewed in section 2.3.1, by bringing trafficking within the scope of article 4 of the ECHR adds to the normative complexities of this crime. As different understandings of the trafficking problem encourage different approaches to prevention, prosecution, protection, thus, rendering state cooperation unworkable.

The human rights perspective to the trafficking problem most prominently espoused by the Trafficking Principles and Guidelines and the CEDAW, considered in section 2.2.2, and the Convention, appraised in section 2.3.1, has removed the overwhelming focus on the transnational and organised crime dimensions of the problem, in favour of victims who are increasingly visible as subjects whose human rights have been violated by traffickers. This has also been important for the development of regulation in the field in terms of designing more appropriate responses. However, as illustrated by the case studies, in section 2.4, in practice, protection remains linked to prevention and prosecution to the detriment of victim assistance and support, based on a broader understanding of protection as tackling the risks of harm to continued exploitation and/or re-trafficking. There is still significant room for improvement in terms of formal and practical compliance with international and European anti-trafficking obligations. Even though the greatest divergence in national responses associates with the law in action, and to a lesser extent the law on the books. This divergence influences cooperation efforts and explains, in part, the reason behind minimal cooperation, especially multilateral.

The open threat posed by the TVPA, scrutinised in section 2.2.3, to normative development in field, especially when there appears to be a preferred general direction of

national responses, cannot be downplayed. It is no secret that the US is using the extraterritorial scope of the TVPA as a veil for worldwide criminalisation of consensual prostitution as a form of prostitution-related trafficking. Even though the Protocol intentionally leaves undefined the respective term ‘exploitation of the prostitution of others’, taking into account the different approaches to prostitution in individual states. Using the TIP Report as a tool to shame states around the globe not only to comply with the minimum standards for eliminating ‘trafficking’, which were unilaterally developed and adopted by the US, but also to include within national responses efforts to reduce the demand for commercial sex acts. Thus, drawing an intrinsic link between trafficking in persons and prostitution. It is this credible threat to normative development that begs the all-important question of effectiveness of current anti-trafficking responses, in particular, the usefulness of international and European anti-trafficking instruments that appear unable to hold states accountable to precise obligations around prevention, prosecution, and protection, not least a common definition as the prerequisite for cooperation.

As will become apparent in the next chapter the definitional, conceptual, and practical uncertainties raised here by these very instruments touch on the systemic limitations of the institutions tasked with managing cooperation through the design of appropriate responses.

## **The Main Systemic Challenges to Implementation of the Legal Framework of Sex Trafficking: Institutionalism and Issues of Compliance**

### **3.1. Introduction**

States have developed and accepted within the formal processes of international and European law a number of anti-trafficking instruments, which underline the importance of cooperation in matters of prevention, prosecution, and protection. In the context of trafficking in women for sexual exploitation in Europe, the previous chapter examined the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive as the preeminent instruments in the field. Additional instruments that are directly or indirectly relevant to normative development in the field, namely the Trafficking Principles and Guidelines, the CEDAW, and the TVPA were also examined with regard to their influence on current understandings of the trafficking problem. That subsequent international and regional responses are rooted in the Protocol illustrates the preferred general direction of national responses. Even though there are significant gaps in compliance with international and European anti-trafficking norms and standards in the case studies of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden. Thus, leading to conclude that the harmonisation project that is critical for effective and wide cooperation, in relation to trafficking with transnational and/or organised crime dimensions, has not yet come to fruition.

The definitional, conceptual, and practical uncertainties found in the anti-trafficking instruments probe the effectiveness of current national responses based on international and regional understandings of the trafficking problem. In order to make sense of the inadequacy of current responses, this chapter argues it is necessary to look at the systemic limitations of the institutions tasked with managing the trafficking problem and coordinating cooperation among involved states. As this chapter demonstrates, the ineffectiveness of current responses to promote cooperation are rooted in the limitations of the formal processes of law to define

the problem and establish minimum standards around prevention, prosecution, and protection, which take into account the interests of all involved states.

The trafficking problem is complex and manifests itself in different forms and to different extents in individual states. Moreover, the underlying issues, in particular, illegal migration and border security, gender discrimination and gender-based violence, prostitution, and organised crime and the rule of law, will influence the approaches of individual states to the trafficking problem. For example, the vast majority of states draw an intrinsic link between the exploitation of the prostitution of others as a form of trafficking and consensual prostitution. The latter, however, is addressed differently among states and there are broadly-speaking four typologies of prostitution regimes, namely abolitionism, prohibitionism, regulation, and neo-abolitionism. A state that abolishes or prohibits prostitution as gender-based violence is most likely to consider consensual prostitution within the anti-trafficking framework. For example, Sweden and Finland criminalise sex-buying to reduce the demand for exploitable services provided by trafficking victims. By contrast, the Netherlands regulates prostitution as employment and affords sex workers the rights and guarantees of labour contracts, thus, reducing the demand for exploitable services provided by trafficking victims through a legalised sex market. While Sweden and Finland link their approaches to forced and consensual prostitution, the Netherlands distinguishes between both categories of prostitution. It is, therefore, evident that different definitions of trafficking-related exploitation will impede cooperation, which depends upon a common anti-trafficking framework in the jurisdictions of cooperating states.

That states are able to define the trafficking problem for themselves is a weakness of the international and European anti-trafficking instruments that leave the term ‘exploitation of the prostitution of others’ intentionally undefined. On the one hand, to accommodate the different interests of states without whose involvement trafficking cannot be combated effectively. On other hand, to create an illusion of consensus, which in reality is lacking to encourage the development of a common definition and minimum standards for effective and wide cooperation. Thus, there have been increasing efforts of international institutions and one specific state, namely the US, to redefine the trafficking problem outside the formal processes of international law. For example, the Trafficking Principles and Guidelines have rather successfully raised the human rights standard of national responses as manifest in the adoption of certain principles in the COE Trafficking Convention and subsequently the EU Trafficking Directive. At the same time, US unilateralism in the field threatens the fragile consensus

formed around the trafficking problem. However, so far, the international community has been unable to challenge the hegemonic position of the US in the field. This is seen as one of the many systemic limitations of international law to adequately address the trafficking problem.

The ensuing challenges to cooperation form the basis of this chapter. These are appropriately considered through a functional comparative methodology that looks at the operating institutions to explicate the law in action. Thus, section 3.2 deals with international institutions, namely the United Nations, within which the UN Trafficking Protocol, the Trafficking Principles and Guidelines, and the CEDAW were developed and accepted by involved states. Again, the TVPA is placed within the international examination to illustrate the hegemonic position of the US in the international anti-trafficking discourse. Section 3.3 concerns the European institutions, namely the Council of Europe within which both the COE Trafficking Convention and the ECHR were developed and accepted by involved states, as well as, the European Union that adopts the EU Trafficking Directive as part of the Title V measures, which involved states have opted to transpose. Additionally, a historical comparative methodology is used to understand how the policies around prostitution and its link to sex trafficking have developed in relation to the case studies, in section 3.4. This examination serves to explicate the divergence in the law on the books and the law in action as observed in the previous chapter, and on the basis of which the compliance behaviours of the case studies can be divided into different ‘worlds of compliance’. Finally, the core conclusions of this chapter are laid out in section 3.5.

### **3.2. International Responses**

The section begins by assessing the implications of UNGA-involvement as a facilitator of a transnational cooperation forum for the development and adoption of the UN Trafficking Protocol. It is followed in section 3.2.2 by an exploration of the changing role of the UN’s human rights system in normative development around the trafficking problem. Finally, section 3.2.3 evaluates the value, if any, of the hegemonic position of the US through the extraterritorial scope of the TVPA on the anti-trafficking discourse. The four preliminary conclusions to this core section are laid out in section 3.2.4.

### **3.2.1. The UN Trafficking Protocol: Elaborating a Transnational Criminal Law Instrument through Widespread Participation and Consensus Decision-Making**

The previous chapter touched on three systemic limitations to enforcement of the UN Trafficking Protocol. First, cooperation agreements as commitment devices depend for their effectiveness on national implementation, which is imperfect. Second, cooperation agreements as representative of the interests of all involved states require negotiating venues that reflect universal or quasi-universal membership. However, power in international negotiations is asymmetric. Third, the swiftness in adopting cooperation agreements is indicative of normative convergence but only by weakening their content. This section considers each of these limitations in turn to understand why the UN Trafficking Protocol was the most appropriate option and outcome at the time.

The previous chapter already delved into the inappropriateness of criminalising transnational trafficking in persons under international criminal law. During the Rome Statute's finalisations states distinguished between transnational crimes of international concern and the most serious crimes of concern to the international community as a whole, also known as *delicta juris gentium*. Thus, trafficking falls within the scope of article 7 of the Rome Statute only when committed as part of a widespread or systematic attack directed against any civilian population. Otherwise, it is a jurisdictional matter for national courts based on the concept of complementarity.

Transnational criminal law provided a useful framework for international cooperation that would allow states to combine their efforts and resources to combat transnational crimes.<sup>490</sup> Developing states despite a desire to tackle trafficking lacked the necessary technical capacities to fight transnational organised crime, and developed states depended on the former's cooperation as common origin countries. Moreover, due to the multiplicity of trafficking flows bilateral agreements were deemed inadequate. The crime focus and the reluctance of states to view trafficking as a human rights problem naturally lent support to the use of 'suppression conventions' under transnational criminal law that serve three crime purposes. First, they criminalise the transnational crime and stipulate punishment that is commensurate to the gravity of the offence under national law.<sup>491</sup> Second, they establish territorial and

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<sup>490</sup> Boister (n 141) 13.

<sup>491</sup> See UN Trafficking Protocol (n 1) art 5(1); UNCTOC (n 14) art 11(1).



extraterritorial jurisdiction to protect national sovereignty prerogatives.<sup>492</sup> Third, they enhance international cooperation in matters of investigation, prosecution, and conviction as the paramount objective of lifting trafficking to the lofty heights of international regulation.<sup>493</sup> Thus, suppression conventions adequately address the transnational nature of the crime because they emphasise the role and significance of international cooperation. In connection with cooperation, such conventions also underline the need for harmonisation of national laws to make domestic criminal justice systems more consistent and compatible with each other. Suppression conventions, thus, create cooperative frameworks at the international level that leave the actual criminal prohibition of individuals to the domestic systems. This is important because of differences in the political interests and priorities providing impetus for the regulation of the crime, including the contentious policy issues at the heart of trafficking. Another important reason for the utility of suppression conventions, particularly in respect of developing states, is that suppression conventions help to build the rule of law domestically because criminalisation and prosecution happen at a level closer to the crime and its victims.

During negotiations of the UN Trafficking Protocol, states had considered the feasibility of existing instruments on, or related to, trafficking and the possibility of updating them in relation to organised crime.<sup>494</sup> This included the 1950 Trafficking Convention, which as explained in the previous chapter was the preeminent anti-sex trafficking instrument at the international level. However, updating an instrument that was not widely ratified, outdated, and insufficiently comprehensive to combat the multidimensional nature of trafficking was difficult. By contrast, a single new instrument could save time and resources as opposed to negotiating a series of instruments to address each specific category of criminal conduct. Moreover, it could save time and resources involved in renegotiating common provisions, such as extradition and mutual legal assistance, thus, mitigating possible implementation problems.<sup>495</sup> This is important because the Protocol itself does not contain any cooperation measures, such as on extradition and mutual legal assistance, which are, therefore, included in the UNCTOC and apply *mutatis mutandis* to the Trafficking Protocol.<sup>496</sup> Thus, by omitting the elaboration of cooperation measures in the Protocol, in fact, in all three additional protocols to

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<sup>492</sup> UNCTOC (n 14) art 15.

<sup>493</sup> UN Trafficking Protocol (n 1) arts 10(1), 11(6); UNCTOC (n 14) arts 16, 27.

<sup>494</sup> UNGA 'Report of the Third Committee' (12 December 1997) 52<sup>nd</sup> Session (1997) UN Doc A/52/635 29-39.

<sup>495</sup> *ibid* 37.

<sup>496</sup> UN Trafficking Protocol (n 1) art 1.

the UNCTOC, states saved time and resources over needless renegotiation of common provisions.

The negotiating venue was also reflective of a political choice to ensure wide participation of states based on a critical realisation that trafficking as a global challenge required a global response with all involved states. The UNGA was one forum based on universal or quasi-universal membership of 185 member states at the time, which, in turn, raised its perceivable legitimacy and that of the legal instruments it endorsed. In fact, the UNGA had adopted a host of cooperation agreements as the default system for managing international law-making of collective action problems.<sup>497</sup> Some scholars argue that international institutions are indispensable as a means of cooperation because they provide channels for communication, offer an administrative machinery for elaborating cooperation decisions, and, thus, help to settle differences and find compromises to minimise conflict effects.<sup>498</sup>

In particular, UN sponsored forums prefer consensus decision-making to majority voting. Despite their inherent flaws in compelling only basic agreement, such forums offer developing countries relative parity with their developed counterparts. This is particularly important because the initial push for the elaboration of a transnational organised crime framework that included trafficking came from developing states. On the one hand, developing states lacked the capacity to address an influx of transnational criminal groups and the UNGA had adopted a Statement of Principles and Programme of Action that provided assistance to member states.<sup>499</sup> On the other hand, developing states lacked the resources and negotiating power to influence existing regional and bilateral cooperation agreements on criminal matters, most notably developed by Western European states.<sup>500</sup> However, Western states remained reluctant to broach a subject as ‘thorny’ as organised crime because of the conceptual and legal difficulties, and the possibility that a new transnational organised crime convention could weaken or jeopardise existing agreements.<sup>501</sup> However, globalisation had resulted in the mass movement of persons across states and regions, and trafficking as an inadvertent effect of globalisation, which required an international rather than regional or bilateral response.

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<sup>497</sup> See Paulette Lloyd and Beth A Simmons, ‘Framing for a New Transnational Legal Order: The Case of Human Trafficking’ in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015) 418.

<sup>498</sup> Gerd Oberleitner, *Global Human Rights Institutions* (Polity Press 2007) 8.

<sup>499</sup> Lloyd and Simmons (n 497) 419-420.

<sup>500</sup> *ibid* 420.

<sup>501</sup> Vlassis (n 26) 85.

However, Western states could not risk placing the future of international regulation of transnational organised crimes in the hands of weaker states, particularly given different political interests and priorities. In particular, the contentious policy issues around trafficking, such as prostitution. As explored in detail in the next section, such policy issues, particularly respect of women, traditionally fell within the purview of individual states. This had also become evident with failed attempts to end brothel licensing under the 1950 Trafficking Convention as already observed. By throwing their support behind a transnational cooperation agreement, developing states essentially forced their developed counterparts to jump on the bandwagon. However, once this happened, the balance of power completely shifted in favour of larger, more powerful states. Two examples are instructive of the power imbalances during negotiations. First, there was disagreement between origin countries and destination countries over the inclusion of a provision on victims' repatriation to their origin countries and states, such as China, initially abstained from signing the Protocol for this reason.<sup>502</sup> Although the provision remains intact, it places a financial and administrative burden on origin countries to facilitate victims' repatriation.<sup>503</sup> China had proposed that destination countries should provide the necessary facilities for returning victims, which destination countries opposed.<sup>504</sup> Second, Western countries with commercial sex markets, including Canada and the Netherlands, successfully opposed the firmer abolitionist position of the US on prostitution. Their opposition is the main reason that the proper term of sex trafficking, namely 'exploitation of the prostitution of others', remains undefined in the Protocol.<sup>505</sup>

The negotiations within a universal forum, therefore, demonstrated the domination of preferences held by the powerful, larger states over the weaker, smaller states. This is precisely because the powerful and influential set the benchmark for universalism.<sup>506</sup> Wielding power by influencing decisions is, therefore, a key incentive for state participation.<sup>507</sup> While increased participation, at the very least, addresses illegitimacy, incompleteness, ineffectiveness, and exclusion concerns faced increasingly by the UN system.<sup>508</sup> Thus, the UN celebrated that

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<sup>502</sup> Anthony M DeStefano, *The War on Human Trafficking: US Policy Assessed* (Rutgers University Press 2007) 26-27.

<sup>503</sup> See UN Trafficking Protocol (n 1) art 8(4).

<sup>504</sup> UNODC (2006) (n 100) 386.

<sup>505</sup> *ibid* 347.

<sup>506</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 106.

<sup>507</sup> Oberleitner (n 498) 9.

<sup>508</sup> See Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press 2016) 111.

negotiations of the Protocol had garnered participation of about 120 country representatives from different regions of the world, alongside representatives from UN organisations and of the Missions of Permanent Observers, IGOs, NGOs, and institutes of the UN Crime Prevention and Criminal Justice Program network.<sup>509</sup> However, wide participation had serious consequences for the consequent outcome as highlighted in the previous chapter. The Protocol suffered from an ambiguous international definition and little human rights protection. The apparent normative convergence that led to the swift adoption of the Protocol in just two years rests on the failure of states to agree on the key operational terms of the Protocol. Leaving such determinations to individual states has significantly weakened the content of the Protocol. As scholars continue to debate the correct interpretation of key operational terms, while compliance gaps continue to widen because states determine for themselves what constitutes ‘trafficking’.

Thus, in reality, consensus decision-making creates nothing more than a deceptive atmosphere of basic agreement based on the lowest common denominator of international cooperation. When states must consider the exact parameters of international cooperation, they weigh these against the sensitive policy issues at the core of trafficking, thereby, continuing to weaken the content of the agreement until consensus forms.<sup>510</sup> Normative convergence must not be mistaken for normative imprecision. The latter is an important tool for states to ‘exercise control over the international political and legislative process’.<sup>511</sup> As the uncertainty of obligations means states cannot be accountable to clear and measurable expectations. The Protocol is, therefore, a victim of its own success as the wide participation that was necessary to establish a global response ultimately hampered the conclusion of any meaningful consensus and precise obligations for states.

### **3.2.2. The 1950 Trafficking Convention, the CEDAW, and the Trafficking Principles and Guidelines: Undermining the Consent-Based System of International Law through Reservations and Soft Law**

Under the newly established UN system, trafficking in women for sexual exploitation was first a human rights violation. Human rights was spreading globally in the wake of the atrocities of the Second World War and sex trafficking was recognised to be ‘incompatible with the dignity and worth of the human person’ under the 1950 Trafficking Convention.<sup>512</sup> However, the

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<sup>509</sup> Lloyd and Simmons (n 497) 421.

<sup>510</sup> Guzman (n 54) 751.

<sup>511</sup> Gallagher (2010) (n 40) 7.

<sup>512</sup> 1950 Trafficking Convention preamble.

Convention itself contained very few provisions on human rights protection because it primarily aimed to criminalise prostitution and end brothel licensing. In fact, it largely ignored victim support and the need to address the socio-economic root causes of sexual exploitation for effective prevention as one of the primary concerns of contemporary responses.<sup>513</sup> Moreover, it served a questionable utility in the wake of colonisation once the demand for prostitution had naturally reduced. The explicit criminalisation of brothel ownership meant that states that sought to fight sex trafficking within their commercial sex markets could not become parties to the Convention. The Convention also inadvertently hampered detailed coverage of sex trafficking in the CEDAW that addresses the trafficking problem as part of the discrimination against women.

The CEDAW was one of the most controversial instruments to be adopted under the UN's human rights system. But it reflected the growing sophistication of the international system around the protection and promotion of women's human rights in comparative terms to men's. The distinction in the traditional literature between public and private spheres of law explains that matters, such as sex and the family, traditionally fell outside the regulatory ambit of governments.<sup>514</sup> This also explicates why the right to equality in marriage and the family, or the abolition or modification of customs and laws perpetuating discrimination proved especially controversial.<sup>515</sup> In particular, as such matters were regarded as more appropriately governed by the values and cultures of society.<sup>516</sup> Even today, women's rights link to the religious values of states and Islamic states observe a conflict between the notion of sexual equality under articles 9, 15, and 16 of the CEDAW and their state laws or constitutions that enshrine religious law. For this reason, the CEDAW is among the most heavily reserved against human rights treaties.

On a fundamental level, these reservations attack the universal notions of human rights that claim that international human rights are and must be the same everywhere. However, cultural relativism argues that notions of universal human rights are largely representative of Western values and beliefs, which, therefore, conflict with the values of non-Western states. Thus, to the relativist, 'universality may suggest primarily the arrogance or "cultural

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<sup>513</sup> Roberta Avellino, 'Trafficking in Persons: A Contemporary Threat to Human Dignity' (2011) 1 ELSA Malta Law Review 46, 49.

<sup>514</sup> Chuang (2010) (n 9) 1695.

<sup>515</sup> UNGA, 'Report of the Committee on the Elimination of Discrimination against Women' (1998) UN Doc A/53/38/Rev.1 47.

<sup>516</sup> Dina F Haynes, 'Human Trafficking and Migration' in Alice Bullard (ed), *Human Rights in Crisis* (Ashgate 2008) 125.

imperialism” of the West, given the West’s traditional urge – expressed for example in political ideology (liberalism) and in religious faith (Christianity) – to view its own forms and beliefs as universal, and to attempt to universalise them’.<sup>517</sup> Moreover, universalistic conceptions impede on the ability of non-Western states to comply fully with the human rights espoused by a single treaty, particularly when the subject of women links fundamentally to the value system of the state. For this reason, reservations are arguably an important tool for states to signal credible commitment and respect for human rights, as well as, a desire to remain within the dialogue of human rights issues, even if they cannot fully commit with human rights norm-settings.<sup>518</sup> As Milanovic and Sicilianos argue, reservations represent a progressive shift ‘from a rigid system of law requiring unanimous acceptance of reservations by all treaty parties, to a more flexible one that would accommodate differences between states and facilitate as broad a membership of multilateral treaties as possible without sacrificing their object and purpose’.<sup>519</sup>

However, the issue of reservations is more controversial in relation to the CEDAW because of early concerns that some reservations to the CEDAW were not entered to analogous provisions in other human rights treaties.<sup>520</sup> Currently, 57 state parties having entered also general or multiple reservations to one or more provisions and human rights issues in the CEDAW.<sup>521</sup> Such efforts to keep the CEDAW in a side-lined position through a large number of substantive reservations forces the argument that states were fearful of the CEDAW’s ‘radical potential’.<sup>522</sup> In this sense, reservations may allow repressive states to ‘join treaties by eviscerating a treaty’s effectiveness and enforceability’.<sup>523</sup> There is no criteria for determining the incompatibility of a reservation beyond article 28(1) of the CEDAW that permits ratification subject to reservations that are not incompatible with the ‘object and purpose’ of the CEDAW. In fact, states that submitted statements of objection to the Islamic reservations

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<sup>517</sup> HJ Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008) 517-518.

<sup>518</sup> Linda Camp-Keith, ‘Human Rights Instruments’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 365.

<sup>519</sup> Marko Milanovic and Linos-Alexander Sicilianos, ‘Reservations to Treaties: An Introduction’ (2013) 24(4) *European Journal of International Law* 1055, 1056.

<sup>520</sup> UNGA (1998) (n 515) 47.

<sup>521</sup> See UN Committee for the Elimination of All Forms of Discrimination against Women, ‘Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women’ (1 March 2010) UN Doc CEDAW/SP/2010/2 annex III.

<sup>522</sup> Loveday Hodson, ‘Women’s Rights and the Periphery: CEDAW’s Optional Protocol’ (2014) 25(2) *European Journal of International Law* 561, 566.

<sup>523</sup> Camp-Keith (n 518) 365.

conceived them to be incompatible with the overall object and purpose of the CEDAW.<sup>524</sup> Unfortunately, the CEDAW Committee that reviews national implementation of the CEDAW, and, therewith, the extent of reservations has no competence to reject incompatible reservations. Even if it has on many occasions questioned the representatives of state parties about their reservations.<sup>525</sup> Similarly, state parties have taken no action in the UN biennial meetings to obtain an authoritative determination on the compatibility of reservations to the CEDAW.<sup>526</sup>

No state has entered a reservation to article 6 on sex trafficking, which, therefore, underlines the CEDAW's potential to establish a minimum standard for an anti-discrimination approach to sex trafficking. The rationale behind the inclusion of article 6 within the CEDAW centres on the wealth and gender disparities caused by globalisation. As a result of gender disparities, globalisation is also termed the 'feminisation of poverty'.<sup>527</sup> Gender discrimination is a characteristic of sex trafficking and reliable sources indicate that the majority of identified trafficking victims are women and girls.<sup>528</sup> Moreover, gender discrimination forces women into gender-specific exploitative labour, such as forced prostitution and domestic work, and gender-specific trafficking harms, such as unwanted pregnancy, forced abortion, and sexually transmitted diseases. Sex trafficking is, therefore, worthy of criminalisation under the CEDAW. As Chuang argues, 'the [CEDAW's] identification of trafficking as a problem rooted in discrimination is an important paradigm for exploring the root causes of the phenomenon'.<sup>529</sup> However, reservations to trafficking-related issues, such as gendered and stereotypical prejudices, customs, and practices under article 5(a) indirectly weaken this paradigm as they impact on modifications of the social and cultural patterns that allow the commodification of women for sex trafficking. For example, India maintains its reservation to article 5(a) based on its policy of non-interference in the personal affairs of any Community without its initiative

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<sup>524</sup> *ibid* 33-36. See also UN Committee for the Elimination of All Forms of Discrimination against Women, 'Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (10 April 2006) UN Doc CEDAW/SP/2006/2 35-46.

<sup>525</sup> See UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 4' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II) 319, 336-337, 344-345.

<sup>526</sup> See *ibid* 633.

<sup>527</sup> *ibid* 171.

<sup>528</sup> UNODC, *Global Report on Trafficking in Persons* (UN 2014) 10.

<sup>529</sup> Janie Chuang, 'Article 6' in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 172.

and consent. However, the majority of trafficking victims in India are from the most disadvantaged social strata, namely lowest caste Dalits.<sup>530</sup>

Nowhere is the contention of human rights more visible than within the UN's human rights system. On the one hand, states have adopted within its consent-based system the CEDAW to address gender discrimination. However, within this system states have come up with ways to weaken the effectiveness of the treaty by bombarding it with reservations, some perceived to be contrary to the object and purpose of the CEDAW. On the other hand, the UN's human rights system frustrated by states' disinterest in human rights protection during negotiations of the Protocol rushed to elaborate a soft law instrument that aspires to a much higher human rights standard than found in the Protocol, namely the Trafficking Principles and Guidelines.

The elaboration of the Trafficking Principles and Guidelines involved only a select group of UN officials and expert groups and it was never submitted to states for their consideration or approval, even though it is regularly referred to by the Human Rights Council.<sup>531</sup> More recently, certain principles, such as the non-conditionality of victim assistance on their cooperation with authorities and non-prosecution for criminal activities committed as part of their trafficking, have found their way into legally binding instruments, such as the COE Trafficking Convention and the EU Trafficking Directive. However, the Trafficking Principles and Guidelines themselves do not impose legal obligations on states and another construal could distort their legal weight. As they are non-binding on states and no states were consulted during their drafting, there is a legitimacy concern over the extent to which states are accountable to integrate into their national responses the espoused principles. Within their limits, then, soft law instruments of this kind can play an important role in helping states to identify or confirm legal developments around the trafficking problem. In particular, as they seek to clarify the ambiguous obligations of states under the UN Trafficking Protocol from a human rights perspective. The Trafficking Principles and Guidelines are, thus, viewed as grafting onto the skeleton of the Protocol a body of human rights.<sup>532</sup>

Scholars recognise that the focus on consent in international law creates a cumbersome status quo bias because states can choose their commitments, thereby, withholding consent to any instrument that is not in their interest.<sup>533</sup> This has created a consent problem in international

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<sup>530</sup> TIP Office (2017) (n 28) 208.

<sup>531</sup> Gallagher (2010) (n 40) 140.

<sup>532</sup> Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 14, 20.

<sup>533</sup> Guzman (n 54) 751.



law, which due to the limited means to circumvent this problem encourages the use of soft law. There is no single definition of soft law but it commonly refers to quasi-legal rules that do not bind states, yet are more than ‘mere’ politics.<sup>534</sup> Legal positivists dismiss soft law altogether in the same vein that they perceive sublegal obligations as neither hard nor soft law because the circumvention of formalities makes them insufficiently accountable.<sup>535</sup> However, soft law also receives recognition from scholars because it offers many of the advantages of legally binding commitments without the costs associated with their adoption.<sup>536</sup> Most importantly, soft law affects the behaviour of states, which, in turn, may be ‘a way station to harder legalization’.<sup>537</sup>

However, the absence of formal procedures also makes it more difficult to determine its impact on states, particularly whether states actually refer to the Trafficking Principles and Guidelines when developing their domestic responses. Dottridge argues this is less likely because formal acceptance makes states targets of greater scrutiny by human rights actors.<sup>538</sup> Those who consider the utility of international law based on the legal form of the instrument argue that whether an instrument is hard-binding law or soft-nonbinding law may influence how states perceive the effectiveness of international law.<sup>539</sup> This, in turn, may indicate the extent to which they actually implement their obligations. Scholars argue that compliance is typically higher with state-consented instruments where states must relinquish some of their sovereignty for expected long-term benefits because at all other times they are ‘anxious to shake off the restraining influence that international law might have upon their foreign policies’.<sup>540</sup> Yet, international human rights law serves precisely to limit state sovereignty, ‘even within the state’s own jurisdiction, for the sake of individuals themselves’.<sup>541</sup> Although the extent to which the international human rights system actually constrains states is debatable, it has significant moral costs. Powerful states may misuse the system to pursue their own geopolitical objectives, or the system may offer soft law instruments, such as the Trafficking Principles and Guidelines, the global moral lingua franca through which they may become a focal point for effective political action. Thus, ‘because of its saliency, its relative

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<sup>534</sup> *ibid* 783.

<sup>535</sup> Allen E Buchanan, *The Heart of Human Rights* (OUP 2013) 7.

<sup>536</sup> J Pauwelyn, RA Wessel and J Wouters (eds), *Informal International Lawmaking* (CUP 2012) 15.

<sup>537</sup> Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *International Organization* 421, 423.

<sup>538</sup> Mike Dottridge, ‘Introduction’ in Bandana Pattanaik (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007) 6.

<sup>539</sup> Emilie M Hafner-Burton, Brad L LeVeck and David G Victor, ‘How Activists Perceive the Utility of International Law’ (2015) 78(1) *Journal of Politics* 167, 171.

<sup>540</sup> Simmons (n 38) 115.

<sup>541</sup> Buchanan (n 535) 23.

determinateness, and the prestige it enjoys, international human rights law serves as a moral standard that can be employed for political mobilization to change the behaviour of states'.<sup>542</sup>

### **3.2.3. The US TVPA's Global Engagement against Trafficking: Responding to the UN Trafficking Protocol through Hegemonic Position and Unilateralism**

It was observed in the previous chapter how the US had placed itself at the forefront of international regulation both in financial and legal terms. The US is the largest bilateral donor in the field and its unilateral sanctions regime withdraws foreign assistance to any state not making adequate progress against trafficking. The regime determines the adequacy of state progress using four minimum standards for the elimination of trafficking<sup>543</sup> and 12 criteria as indicia of serious and sustained efforts to eliminate severe forms of trafficking.<sup>544</sup> However, the minimum standards and criteria are unilaterally developed and applied by the US through the extraterritorial scope of the TVPA. Thus, the US relies on domestic standards to determine the international progress of states, most of which are parties to the UN Trafficking Protocol. Despite recent efforts to bring the TVPA's standards and criteria in accordance with the Protocol,<sup>545</sup> it remains questionable why the US has chosen domestic standards for monitoring. The most logical conclusion given its concomitant goal of global eradication of commercial and non-procreative sex is to serve a narrow self-interest. Thus, the US example is instructive of a state choosing to go beyond what the international legal framework of sex trafficking requires for parallel interpretation, ostensibly with the aim of reinforcing the framework, when actually its actions do not advance international standards further.

US unilateralism, therefore, raises profound problems for the consent-based system of international law. Despite the contradictory political reality, the consent system is indispensable as a means of cooperation and safeguard from individual states encroaching too heavily on the sovereignty of other states. Thus, the US' hegemonic position underlines the inability of international law to constrain hegemonic powers from acting unilaterally at its pleasure.<sup>546</sup> Scholars often note how the US acts both as a world leader within the international order and the world's chief locus of resistance against the same order on the basis that

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<sup>542</sup> *ibid* 26.

<sup>543</sup> TVPA (n 47) s 108(a).

<sup>544</sup> *ibid* s 108(b).

<sup>545</sup> Gallagher (2011) (n 93) 385-387.

<sup>546</sup> Simmons (2009) (n 38) 5.

international law lacks real democratic legitimacy.<sup>547</sup> In the past, superpowers, such as the UK, have used their hegemonic position to advance international standards and the UK's 'dominance of the seas [that] allowed it to precipitate the end of the slave trade at sea' is an instructive example.<sup>548</sup> Nonetheless, the US' self-proclaimed role as international 'watchdog'<sup>549</sup> and 'global sheriff'<sup>550</sup> remains controversial because the US seeks to promote narrow self-interest rather than international solidarity as a key value of the international community.

The Clinton administration originally opposed the unilateral sanctions regime conceived as contrary to the Protocol's objective of enhancing international cooperation.<sup>551</sup> In fact, by nature, scholars consider unilateralism to be an unfriendly act that might escalate disputes or enable stronger states to bully weaker states.<sup>552</sup> Along these lines, the objection to unilateralism rests on the choice of unilateral economic sanctions as a matter of foreign policy, rather than a contention that resort to unilateralism violates international law principles of non-intervention and territorial jurisdiction. Economic intervention in the affairs of foreign states is a violation of neither customary international law nor the UN Charter.<sup>553</sup> Scholars would agree that unilateralism is lawful as an enforcement tool, particularly in the absence of an international coercive alternative, to make effective again the ineffective law. Even if it undercuts state sovereignty or the rule of law generally, unilateralism may be justified if the purpose of bringing a noncompliant state into compliance rests on an internationally recognised obligation rather than national interest.<sup>554</sup> As Hakimi argues, the use of unilateralism in international law-making serves to 'help keep international law relevant by instigating or giving effect to collective decisions'.<sup>555</sup> In fact, the US justifies unilateralism because of the absence of an effective enforcement mechanism to review implementation of the Protocol,<sup>556</sup>

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<sup>547</sup> Jed Rubenfeld, 'Commentary: Unilateralism and Constitutionalism' (2004) 79(6) *New York University Law Review* 1971, 1978.

<sup>548</sup> Allain (2013) (n 5) 360.

<sup>549</sup> Sarah Leevan, 'Comparative Treatment of Human Trafficking in the United States and Israel: Financial Tools to Encourage Survivor Rehabilitation and Prevent Trafficking' (2008) 6 *Cardozo Public Law, Policy and Ethics Journal* 773, 775.

<sup>550</sup> Janie Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) 27(2) *Michigan Journal of International Law* 437, 449.

<sup>551</sup> Chuang (2014) (n 154) 617.

<sup>552</sup> Monica Hakimi, 'Unfriendly Unilateralism' (2014) 55(1) *Harvard International Law Journal* 105, 117.

<sup>553</sup> Chuang (2006) (n 550) 458.

<sup>554</sup> Hakimi (n 552) 106.

<sup>555</sup> *ibid* 110.

<sup>556</sup> See UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its first session, held in Vienna from 28 June to 8 July 2004' (23 September 2004) UN Doc CTOC/COP/2004/6 para 32.

and some would argue that the US has become the de facto treaty-monitoring body of the Protocol, which currently lacks an effective review mechanism.

Unilateral economic sanctions can be effective tools in the hands of the superpower to create real normative change in faraway places. As Hacker argues, the TVPA's minimum standards, particularly in relation to victim protection, 'are general and vague enough to allow the nation state wide discretion in designing the exact form of compliance'.<sup>557</sup> Thus, weaker countries can use the discretion granted by the TVPA to alleviate possible tensions between external pressures and their own foreign interests. This is important because a major problem in pursuing the objectives of the Protocol is that its key operational terms, whether the international definition or the specific implementation measures on protection and prevention, are undefined internationally.

The unilateral sanctions regime has attracted both proponents and opponents to US unilateralism in the field. Supporters underline how the ranking system through which the US measures foreign progress and ranks states to identify noncompliant states has raised awareness of trafficking and encouraged the adoption of appropriate national legal responses in accordance with the TVPA's minimum standards.<sup>558</sup> There is even talk about how the system encourages more convictions globally,<sup>559</sup> further substantiated by empirical studies based on official US documents, interviews with US government officials, and trafficking statistics.<sup>560</sup> Although recent empirical research indicates that prosecutions have dropped globally due to the negligence of law enforcement. An important indication of its overall positive impact is the promotion of low-ranked countries to higher 'tier' placements because of the viable threat of sanctions.<sup>561</sup> However, in reality such claims cannot be validated because of the lack of reliable data on the hidden population of trafficking victims. As Gallagher and Chuang observe, in reality, 'the limited research undertaken thus far provides little useful guidance on this point'.<sup>562</sup>

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<sup>557</sup> Daphna Hacker, 'Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law' (2015) 28 *Harvard Human Rights Journal* 11, 57.

<sup>558</sup> Susan W Tiefenbrun, 'Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad' (2005) 11(3) *William and Mary Journal of Women and the Law* 317, 359-78

<sup>559</sup> Frances P Bernat and Tatyana Zhilina, 'Trafficking in Humans: The TIP Report' (2011) 5(5) *Sociology Compass* 452, 457-458.

<sup>560</sup> Susan W Tiefenbrun, 'The Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?' (2005) 2 *Loyola University Chicago Law Journal* 193, 217-218.

<sup>561</sup> Melissa Holman, 'The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively' (2009) 44(1) *Texas International Law Journal* 99, 113.

<sup>562</sup> Gallagher and Chuang (n 220) 341.

At the same time, the US' unilateral regime receives immense scrutiny for its politicised nature.<sup>563</sup> There is no adequate explanation of the methodology employed for ranking<sup>564</sup> and foreign states with poor human rights records and high trafficking numbers still receive high rankings. An important reason for such selectivity is that these states are politically important to the US.<sup>565</sup> A study on enforcing the TVPA in emerging markets, such as those of India and China, illustrates how the US is unwilling to employ sanctions against emerging markets with opportunities for exchange of raw materials, regardless of their deplorable human rights records and consistently low ranking in respect of trafficking.<sup>566</sup> Since 2010, the US subjects itself to ranking alongside foreign states. Unsurprisingly, it ranks among the highest that comply with the TVPA standards and make significant progress in this regard, despite being an origin, transit, and destination country for trafficking. Bernat and Zhilina argue that the US' consistently high ranking is evocative of the fact that even these states are not free of trafficking.<sup>567</sup> Finally, the threat of unilateral economic sanctions may force countries with severe trafficking situations to mask their domestic realities to attract higher rankings and continuous US foreign assistance. Manipulations of this sort to the information provided to the US for ranking purposes inadvertently removes from the trafficking radar the very victims whom the US seeks to protect through global monitoring.<sup>568</sup>

Despite its many weaknesses, the US' unilateral sanctions regime attracts immense international attention as a controversial but somewhat successful international enforcement mechanism. The international attention is important to induce states to take action against trafficking by attacking their international reputations as deviant states. Within the institutionalist theory of compliance, reputation acts as 'the primary anchor of compliance for all but those countries for which compliance is costless'.<sup>569</sup> In fact, 'naming and shaming' deviant states is a tested and proven strategy in international human rights law, particularly in the contexts of landmine use and trade, recruitment or use of child soldiers, and environmental

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<sup>563</sup> H Richard Friman, 'Numbers and Certification: Assessing Foreign Compliance in Combating Narcotics and Human Trafficking' in Peter Andreas and Kelly M Greenhill (eds), *Sex, Drugs and Body Counts: the Politics of Numbers in Global Crime and Conflict* (Cornell University Press 2010) 76.

<sup>564</sup> Bernat and Zhilina (n 559) 455-457.

<sup>565</sup> Dina F Haynes, '(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act' (2007) 21 *Georgetown Immigration Law Journal* 337, 362.

<sup>566</sup> Mary Catherine Hendrix, 'Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China' (2010) 43 *Cornell International Law Journal* 173, 194.

<sup>567</sup> Bernat and Zhilina (n 559) 458.

<sup>568</sup> Jonathan Todres, 'Law, Otherness, and Human Trafficking' (2009) 49 *Santa Clara Law Review* 605, 623-631.

<sup>569</sup> Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111(8) *Yale Law Journal* 1935, 1951-1952.

protection.<sup>570</sup> In the context of foreign assistance and investments, scholars argue this strategy is particularly effective if it affects the credit or country risk ratings, which help investors determine whether their investment will fail, due to the ‘failure of the host country to pay its debts, enforce agreements, or maintain adequate control of its territory’.<sup>571</sup>

In the absence of more effective enforcement mechanisms, examined in the next chapter, scholars consider not only improving the current US regime<sup>572</sup> but also extending its extraterritorial reach. In relation to global under-prosecution of trafficking, Meron proposes extending US domestic laws to prosecute traffickers for trafficking offences committed in foreign countries should they fail to take action.<sup>573</sup> This proposal examines the TVPA’s extraterritorial applicability based on the principle of universal jurisdiction, which finds support domestically in the US Foreign Relations Law that authorises universal jurisdiction based on the nature of the crime.<sup>574</sup> However, the justification for the exercise of universal jurisdiction under international law is questionable. On the one hand, the crime must be heinous to the international community, and no other state willing or able to prosecute the offence. On the other hand, either a treaty or custom must establish universal jurisdiction over the crime. Although universal jurisdiction may exist through customary international law if trafficking qualifies as slavery<sup>575</sup> or a crime against humanity,<sup>576</sup> neither the UNCTOC nor the UN Trafficking Protocol provide clear universal jurisdiction provisions.<sup>577</sup> Meron’s proposal only heightens concerns about the possible effects of US unilateralism on the international anti-trafficking discourse. Particularly, as scholars are already theorising how to side-line the Protocol and deem irrelevant the consent-based system from which it emanates.

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<sup>570</sup> Matthew Krain, ‘J’accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?’ (2012) 56(3) *International Studies Quarterly* 574; Emilie M Hafner-Burton, ‘Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem’ (2008) 62(4) *International Organization* 689; James Meernik and others, ‘The Impact of Human Rights Organizations on Naming and Shaming Campaigns’ (2012) 56(2) *Journal of Conflict Resolution* 233; Jacqueline HR DeMeritt, ‘International Organizations and Government Killing: Does Naming and Shaming Save Lives?’ (2012) 38(5) *International Interactions* 597.

<sup>571</sup> Hendrix (n 566) 202.

<sup>572</sup> See *ibid* 197.

<sup>573</sup> Sonia Merzon, ‘Note: Extraterritorial Reach of the Trafficking Victims Protection Act’ (2007) 38 *George Washington International Law Review* 887, 902.

<sup>574</sup> Restatement (Third) of the Foreign Relations Law of the United States s 404 (1987).

<sup>575</sup> See Stephen Macedo and others (eds), *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs 2001) 29.

<sup>576</sup> See Rome Statute art 7(1)(c).

<sup>577</sup> The vaguely formulated article 15(4) of the UNCTOC may permit extension of universal jurisdiction over trafficking offences, which applies *mutatis mutandis* to the Protocol.

### **3.2.4. Preliminary Conclusions**

The international study draws four preliminary conclusions. First, consensus decision-making creates nothing more than a deceptive atmosphere of basic agreement based on the lowest common denominator of international cooperation. Second, reservations weaken the effectiveness of legal instruments, even if they are necessary for states with conflicting cultural norms to remain within the dialogue of human rights issues. Third, soft law instruments that are adopted outside the formal processes of international law can, nonetheless, help states to identify or confirm their ambiguous obligations, and through increased reference find their way into legally binding instruments. Fourth, US unilateralism demonstrates the inability of international law to constrain hegemonic powers from acting unilaterally at their pleasure.

### **3.3. European Responses**

This section considers in greater detail how the two regional institutions operating within different contexts, namely the Council of Europe from a predominantly human rights perspective and the European Union from a predominantly crime-fighting perspective, manage cooperation in anti-trafficking efforts with a view to avoiding double standards in relation to common member states. Section 3.3.1 considers, in particular, the hypocrisy behind the ‘silencing’ of the Parliamentary Assembly’s voice on raising the human rights standard in the COE Trafficking Convention, as well as, the casuistic judging style of the European Court of Human Rights in trafficking cases. While section 3.3.2 associates late transposition of the EU Trafficking Directive by a number of member states, including the Netherlands, with the ambitious nature the EU anti-trafficking framework proposed by the Parliament and the Council and enforced by the Commission. The three preliminary conclusions to this core section are outlined in section 3.3.3.

#### **3.3.1. The COE Trafficking Convention and the ECHR System: Legally Binding Human Rights Protection and the Under-Developed ECHR Jurisprudence on Trafficking in Persons**

The negotiations of the COE Trafficking Convention are another instructive example of the asymmetric power in international human rights law-making in the European context. These have hampered rather than promoted the human rights standard around trafficking. It is a systemic limitation of the COE legal system that it cannot constraint the will and want of more powerful states, particularly when the latter’s serve an evident attempt to escape the scrutiny of the COE and its higher human rights ideals. Two thirds of the amendments proposed by the

Parliamentary Assembly (PACE) to the draft Convention were rejected at the initiative of the European Commission. The Commission acting on behalf of its 22 member states at the time systematically objected to the inclusion of more effective and sufficient victim protection.<sup>578</sup> Without the incorporation of the PACE's proposed amendments, therefore, the draft text largely echoed rights already granted to victims under the ECHR that was adopted 55 years earlier without any explicit mention of trafficking in persons.

In fact, the PACE observed how the provisions on human rights had weakened over the course of the negotiations to reflect the overall desire of member states to protect themselves from illegal migration'.<sup>579</sup> In the context of the traditional international legal order, Buchanan identifies the control of immigration as a key norm of sovereignty that confers 'dangerous' powers and privileges on states to treat 'individuals as if they were of consequence only so far as the interests affected the interests of states'.<sup>580</sup> This norm of sovereignty is so severe that it makes the international human rights system morally unjustifiable. It is, in fact, a disturbing reality that most individuals are not the subjects of international human rights but the objects of human rights discourses. In the context of trafficking, therefore, the human rights approach underlines that victims should be visible as subjects 'whose basic rights have been violated by exploiters and whose rights can also be violated in the process of implementing anti-trafficking measures'.<sup>581</sup> The shift in attention from states' right to control to victims' humanity and states' obligation to protect, thus, emphasises 'victims' need for *and* entitlement to respect'.<sup>582</sup> A similar rationale underpinned the drafting of the Convention and formed the basis for subsequent criticism by the PACE that the insufficiency of rights protection in the draft text was contrary to the objective pursued.<sup>583</sup>

A further example of power asymmetries and its potential for creating double standards in human rights protection between COE/EU member states and other COE member states is the 'disconnection clause' incorporated into the Convention at the Commission's behest.<sup>584</sup> In short, this clause asserts that in the case of overlapping between the Convention and EU anti-trafficking law the latter takes precedence over the former. The Commission argued that the clause was necessary for its accession to international conventions because of the transfer of

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<sup>578</sup> PACE (n 230) para 4.

<sup>579</sup> Committee on Equal Opportunities for Women and Men Report 10397 (2005) on Draft Council of Europe Convention on action against trafficking in human beings para 8.

<sup>580</sup> Buchanan (n 535) 122-123.

<sup>581</sup> Askola (n 119) 133.

<sup>582</sup> *ibid.*

<sup>583</sup> PACE (n 230) para 5.

<sup>584</sup> COE Trafficking Convention (n 23) art 40(3).



sovereign powers in certain fields from member states to the European Community.<sup>585</sup> The Commission also clarified that the clause does not aim to reduce the rights or increase the obligations of non-EU states vis-à-vis the Community and its member states, ‘inasmuch as the latter are also parties to this Convention’.<sup>586</sup> A regional report supported the Commission’s claim, arguing that the clause does not affect the scope of the obligations but simply its implementation modalities to ensure integration of the Convention within the Union.<sup>587</sup>

However, the International Law Commission reached a different conclusion, noting the multitude of EU disconnection clauses of varying extents in many international treaties. It argued that the effect of disconnection clauses is to replace treaty rules wholly or partially with Community rules in relation to its member states. In doing so, it creates uncertainty because Community rules are subject to change. Thus, even if it is permissible because they are initially agreed by all parties to the Convention, their potential to ‘create double standards, be politically incorrect or just confusing’ is real.<sup>588</sup> There is heightened concern in relation to Belarus as the only party to the Convention that is a member of neither the COE nor the EU, and where non-EU membership will most certainly lead to double standards in human rights protection.

The second instrument of relevance within the COE context is the ECHR that grants to citizens of member states within the *espace juridique* fundamental human rights protection. Although not explicitly covered by the ECHR, the ECtHR more recently brought trafficking in persons within the scope of article 4. As examined in the previous chapter, the ECtHR has developed an interesting jurisprudence on trafficking in persons even though it has not had many occasions to do so. This jurisprudence expands the principle of state responsibility to prevent human rights violations by non-state actors by placing on states positive, operational, and procedural obligations. However, the underdeveloped nature of this due diligence regime presents a challenge to its effective enforcement under article 4 of the ECHR.

As mentioned already, the ECtHR requires states to adopt an appropriate legislative and administrative framework that must afford effective protection to victims through correct identification, removal from exploitative situations and risks, and immediate investigation once a matter comes to the attention of national authorities. Yet, the ECtHR remains silent on what it means with ‘effectiveness’. At the basic level, states can measure effectiveness against the

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<sup>585</sup> Explanatory Report (n 185) para 375.

<sup>586</sup> *ibid.*

<sup>587</sup> Scarpa (n 239) 161.

<sup>588</sup> UNGA ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) 58<sup>th</sup> Session (2006) UN Doc A/CN.4/L.682 para 294.

detering effect of a criminal law provision. They can consider the levels of penalty and increase the success rates of prosecutions, without undermining the right to a fair trial. In this context, deterrence focuses on the prevention of trafficking despite its link to the threat of punishment. However, scholars agree that effectiveness in the human rights context should have a more profound goal.<sup>589</sup> Unfortunately, it is common practice for the ECtHR to afford a margin of appreciation to states to determine the specific wording of effective laws.<sup>590</sup> One inference from the trafficking case law is that laws are effective if they mirror the UN Trafficking Protocol, even partly.<sup>591</sup> The absence of further guidance by the ECtHR, however, remains problematic. On the one hand, in light of the few trafficking cases before it, the ECtHR's failure to clarify key terms, such as effectiveness, is a missed opportunity. On the other hand, it points to the ECtHR's 'casuistic judging style' as it prefers to maintain flexibility in national implementation of ECHR rights.<sup>592</sup>

Some scholars argue that the ECtHR, in fact, has no power 'to prescribe to states precisely what needs to be done in order to correct a violation'.<sup>593</sup> This means that the ECHR is 'best understood as *constitution-enhancing* in respect of the specific political and judicial system of each member state'.<sup>594</sup> Certainly, some flexibility is necessary because the ECHR applies to a Eurasian context. Within such context, scholars note 'the ECtHR's stridency and willingness to exceed the status quo in relation to certain institutional arrangements ... as it moves further East'.<sup>595</sup> This willingness most likely recognises criticism by cultural relativists of the universalistic character of international human rights and the shameless expansion of Western ideals.<sup>596</sup>

Nonetheless, clearer guidance on the ECtHR's due diligence regime in respect of trafficking, as Eriksson argues, would lead to greater victim protection across state parties.<sup>597</sup> One particular benefit of uniform application is that it mitigates the potential consequences of Russia's non-ratification of the COE Trafficking Convention in terms of victim protection. Ratification of the ECHR is a prerequisite for COE accession. This means that Russia as the

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<sup>589</sup> Eriksson (n 267) 357.

<sup>590</sup> See *ibid.*

<sup>591</sup> *ibid* 357-358.

<sup>592</sup> *ibid* 358.

<sup>593</sup> Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12(4) Human Rights Law Review 655, 661.

<sup>594</sup> Nehal Bhuta, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016) 7.

<sup>595</sup> *ibid* 8.

<sup>596</sup> Steiner, Alston and Goodman (n 517) 517-518.

<sup>597</sup> Eriksson (n 267) 358.

only member state not to have signed the COE Trafficking Convention still has positive, operational, and procedural obligations to prevent and suppress trafficking under the ECHR. In fact, Russia was party to the very case in which the ECtHR held that trafficking in persons falls within the scope of article 4 of the ECHR.<sup>598</sup> There are, however, limitations to a reliance on the ECtHR to hold Russia, or for this matter any state party, accountable.

ECHR ratification does not guarantee proper application of ECHR rights at the national level, although national authorities are primarily responsible for ensuring respect for ECHR rights in the first place. Moreover, as a court of last resort and in the absence of regular monitoring of state performance, potential implementation challenges become visible only after the ECtHR considers an application alleging an article 4 violation. Even so, these applications represent only the tip of the iceberg, as many cases may never reach the ECtHR and some containing potential implementation challenges may be inadmissible because of a failure to exhaust domestic remedies.<sup>599</sup> In the present context, 10 of the 18 trafficking applications were inadmissible or struck out.<sup>600</sup> Furthermore and relating to the trafficking case against Russia, whether or not a judgment is properly implemented domestically depends upon the willingness and capacity of national institutions, as well as, negotiation with the Committee of Ministers that supervises the execution of the ECtHR's judgments.<sup>601</sup> A final point in this regard is that the ECtHR regularly comes under attack because it is 'less democratically legitimate than domestic legislative and judicial mechanisms' that promote human rights. States question its accountability because the transfer of powers from the state to the ECtHR lacks democratic authorisation in the first place.<sup>602</sup> As compliance often links to a perception of legitimacy, such criticism may affect the proper national implementation of ECHR rulings.

The ECtHR's jurisprudence on trafficking draws an important link between the criminal law and human rights approaches. By establishing positive, operational, and procedural obligations, the ECtHR has dared to pierce the veil of national sovereignty and draw national criminal law into its ambit. However, the exact impact of its jurisprudence remains uncertain.

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<sup>598</sup> *Rantsev* (n 153) para 281.

<sup>599</sup> See ECHR (n 153) art 35(1).

<sup>600</sup> See appendix I.

<sup>601</sup> See ECHR (n 153) art 46.

<sup>602</sup> Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) *European Journal of International Law* 1019, 1020.

### 3.3.2. The EU Trafficking Directive: Late Transposition and the Failure to Notify the European Commission of National Transposition Measures

The most significant challenge to enforcement of the EU Trafficking Directive is its ambitious framework that comprises policies on gender-based violence, victim protection and assistance in legal redress, immigration, and organised crime. These policies are interwoven into the preamble of the Directive with reference to eight additional EU legislative measures, which combined embody the integrated, holistic, and human rights approach to trafficking envisaged by the Directive. Thus, the Directive embodies in one document the breadth of EU measures of direct or indirect relevance to the EU trafficking problem. This is important because it significantly adds to the substantive value and quality of existing provisions in the EU Trafficking Framework Decision, which it replaces.

In December 2016, the European Commission released the first assessment report on national transposition measures of the Directive, in accordance with its responsibilities under article 23(1) of the Directive.<sup>603</sup> Although the deadline for transposition passed in April 2013, almost half of the member states failed to notify the Commission of full transposition within the prescribed period, which, in turn, delayed the preparation of the Commission's report. For this reason, the Commission has not considered Germany's national transposition measures in its report. Some of the measures of member states notified to the Commission date 2016. For example, Belgium's most recent measure dates 31 May 2016.<sup>604</sup> Timely transposition is important for the effectiveness of EU law, even if it does not equate with successful implementation, and even less with real policy and societal change. As Toshkov argues, '[t]ransposition is a necessity but not a sufficient condition for compliance. At the same time, transposition *is* a necessary condition for compliance'.<sup>605</sup>

A further potential challenge in this regard is the number of national transposition measures notified by individual states. In the context of the case studies, Belgium notified six measures; the Czech Republic, 67; Finland, 26; the Netherlands, 2; Romania, 43; and Sweden, 34. However, to what extent does a high number of national transposition measures, such as 67 in the case of the Czech Republic, provide any meaningful insight into the genuine efforts of the state to transpose the Trafficking Directive? Transposition numbers are no indication of

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<sup>603</sup> See Commission Report (2016b) (n 438).

<sup>604</sup> Law 31 May 2016 *Loi complétant la mise en oeuvre des obligations européennes en matière d'exploitation sexuelle des enfants, de pédopornographie, de traite des êtres humains et d'aide à l'entrée, au transit et au séjour irréguliers*.

<sup>605</sup> Dimitar Toshkov, 'Compliance with EU Law in Central and Eastern Europe: The Disaster that Didn't Happen (Yet)' (2012) 2(364) *L'Europe en Formation* 91, 98.

whether the relevant state has effectively catered for the results to be achieved vis-à-vis the Directive.

The transposition of any instrument, even if it aims only to strengthen existing standards and entails a purely technical, bureaucratic exercise of translating and drafting national transposition measures, requires significant legislative action by states.<sup>606</sup> In the present case, the Directive substantively improves the rights protection, or lack thereof, in the EU Trafficking Framework Decision, thus, significant transposition action was expected. The Netherlands was one of fewer states to incorporate the Directive's provisions in just two documents, one being the Dutch Criminal Code that naturally contains extensive criminal provisions. Thus, the choice of legal form is an important consideration for states. This choice depends upon inter alia the comprehensiveness of existing national provisions and how recently the relevant state ratified its other international and regional commitments against trafficking.<sup>607</sup> International ratification that is more recent will most likely speed up the transposition process of the Directive because there will be fewer legal gaps to fill. In relation to the complexity of transposition, scholars also recognise that more recitals in the preamble will attract greater transposition efforts, which, in turn, may lead to longer transposition delays.<sup>608</sup>

The Trafficking Directive has 36 recitals in its preamble that explain its key operational terms and reflect the extensive scope of related but critical policy issues. Typically, EU directives contain between 1 and 50 recitals, which, on the one hand, may entail issues that due to their sensitivity or complexity could not be incorporated into the main text of the document or, on other hand, may be so specific that they reflect a 'third kind of law-making'.<sup>609</sup> This level of issue linkage is also an indication of possible transposition delays as directives bind member states as to 'the results to be achieved', without laying down the means by which those results are to be achieved.<sup>610</sup> Moreover, greater integration of related policy areas requires greater involvement of political and legislative actors at the domestic level, which, in turn, results in a slower transposition process because of the higher likelihood of domestic resistance to any of the issues recited.<sup>611</sup>

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<sup>606</sup> See generally national transposition measures communicated to the European Commission <<http://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32011L0036>> accessed 31 December 2016.

<sup>607</sup> Michael Kaeding, 'Determinants of Transposition Delay in the European Union' (2006) 26(3) *Journal of Public Policy* 229, 236.

<sup>608</sup> *ibid.*

<sup>609</sup> Kaeding (n 607) 236.

<sup>610</sup> *ibid* 235.

<sup>611</sup> *ibid* 237.

The ‘goodness of fit’ theory mentioned in the previous chapter proposes that the transposition process of an EU directive will flow more smoothly where only minor amendments to existing national laws are stipulated.<sup>612</sup> However, as mentioned, this is not the case in relation to the EU Trafficking Directive vis-à-vis the EU Trafficking Framework Decision. To this end, it is important to understand why framework decisions were inadequate for approximating national anti-trafficking law. The focus here is on the choice of legal form rather than its coverage as examined in the previous chapter. Framework decisions became obsolete with the adoption of the Treaty of Lisbon<sup>613</sup> but they were an important legislative tool. Although by contrast, in their adoption the Council had no obligation to amend the proposed legislative measure in accordance with the European Parliament’s opinion. However, the Parliament’s involvement in the Community decision-making process provides more openness and visibility and, thus, some degree of accountability, which is necessary as the Council’s competence grows with the EU’s expanding law and policy environment. In particular, in the sense that the EU is a collection of rules and regulations resting on a community of states, scholars argue that it lacks genuine democratic political legitimacy.<sup>614</sup> If the EU’s existence depends upon the implementation of its rules and regulations, the moment such activity ceases so does the EU. For this reason, compliance issues with EU law attract considerable scholarly attention.

A further weakness of framework decisions is that once adopted the European Commission and the CJEU did not control framework decisions in the same manner as directives that are an enforcement-priority for the Commission. Thus, framework decisions were an ineffective legislative means of ensuring harmonisation, or approximation in the EU context, of criminal law measures, which, in turn, could not ensure a minimum level of protection through EU criminal law. As argued already, a minimum standard is critical to ensure that member states deal with trafficking crimes in a similar fashion and use the same language of cooperation when dealing with its transnational dimension, as well as, to prevent perpetrators from taking advantage of existing gaps between national anti-trafficking laws. However, as evidenced by the replacement of the EU Trafficking Framework Decision, the approximation principle is difficult to implement in practice.<sup>615</sup> On the one hand, growing EU

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<sup>612</sup> *ibid* 238.

<sup>613</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1 (Lisbon Treaty).

<sup>614</sup> Toshkov (2012) (n 605) 91.

<sup>615</sup> Obokata and Payne (n 84) 314-315.

membership requires a wider margin of discretion to reflect growing differences between national legal systems and the manner in which they implement their EU obligations. On the other hand, there remains the need to respect national sovereignty and protect states' security from illegal migration, facilitated partly by the creation of an area of freedom, security, and justice without internal borders.<sup>616</sup>

Genuine compliance is hard to establish and even more complicated to monitor through member states' communications of national transposition measures, particularly when this involves a total of 709 instruments in relation to the EU Trafficking Directive. More importantly, what constitutes correct interpretation and application of EU law is contestable, and the EU legislators have not provided the Commission with any objectives or methodology. The Commission exercises its enforcement powers granted by article 17 of the TEU in the general EU interest.<sup>617</sup> However, as Andersen observes, interpreting the general EU interest is inherently political.<sup>618</sup> Thus, despite the advantages of directives in terms of flexibility, the use of directives also creates potential legal uncertainty for member states in the transposition phase.<sup>619</sup> Absolute rule specificity is rare and unlikely due to the need for flexibility to accommodate 'the different quality and quantity of administrative and financial resources' available to each state to transpose a specific directive.<sup>620</sup> Even directives as the most common EU legislative form, with more or less narrowly defined objectives, leave it to individual states to transpose directives into their national legal systems and, thus, to 'give effect' to them.<sup>621</sup> This may lead to incorrect transposition. While a greater degree of regulatory detail is evocative of a longer transposition phase. Thus, late transposition as in the case of the EU Trafficking Directive is a key trait of EU law enforcement.

### 3.3.3. Preliminary Conclusions

The European examination draws three preliminary conclusions. First, the EU group's domination in the COE law-making process around the Trafficking Convention presents serious power asymmetries to the detriment of non-common COE/EU member states. In this connection, non-ratification by Russia as a COE member state and ratification by Belarus as a

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<sup>616</sup> TFEU (n 72) art 67.

<sup>617</sup> Andersen (n 294) 18.

<sup>618</sup> *ibid.*

<sup>619</sup> Commission Communication Third Strategic Review of Better Regulation in the European Union COM(2009)15 final.

<sup>620</sup> Andersen (n 294) 85.

<sup>621</sup> TFEU (n 72) art 288.

non-COE/EU member state suggest further challenges in harmonising national anti-trafficking laws. Second, ECHR jurisprudence on trafficking in persons is underdeveloped and the due diligence regime outlining positive, operational, and procedural obligations is imprecise because key operational terms, such as effectiveness, remain undefined. Third, issue linkage complicates transposition and leads to delays in timely transposition. At the same time, directives as the most common legislative form leave too much discretion to member states in the transposition process that may undermine the objective of approximation, even if discretion is necessary given the growing differences among the legal systems of member states.

### **3.4. National Responses**

By way of example of the different prostitution regimes in the case studies, this section illustrates how different approaches to consensual prostitution can influence the general direction of national responses to sex trafficking, particularly in states that draw an intrinsic link between forced and consensual prostitution, such as Sweden. The examination provides further insights into current debates at the EU level about reducing the demand for trafficking by criminalising the use of services provided by trafficking victims.<sup>622</sup> The debate is necessarily influenced by early criminalisation of sex-buying in Sweden, where consensual prostitution like forced prostitution constitute violence against women, which cannot be tolerated in a society that is generally accepted to hold women's human rights in high regard. While the EU debate extends to all exploitable services around trafficking, this section focuses on sexual services performed by trafficking victims, taking into account the scope of research.

Moreover, this section aims to tease out some of the more pertinent issues around prostitution that will influence compliance with anti-trafficking norms and standards based on the national observations in the previous chapter. Thus, it follows, in sections 3.4.2 to 3.4.4 respectively, with a categorisation of the case studies into three 'worlds of compliance' as proposed by Falkner and Treib in their analysis of the different compliance behaviours of EU member states with preselected EU directives.<sup>623</sup> Accordingly, Sweden and Finland belong to the group of states for whom respect for the rule of law is part of their ingrained compliance culture. It is acknowledged that transnational crimes, such as trafficking, create growing challenges for national authorities at all levels 'from foreign policy and security establishments,

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<sup>622</sup> See Commission Report (2016c) (n 396).

<sup>623</sup> Gerda Falkner and Olivier Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46(2) *Journal of Common Market Studies* 293, 295.



to law enforcement authorities, to border control officials, to local courts'.<sup>624</sup> Thus, trafficking threatens the rule of law and state sovereignty globally. The Netherlands and Belgium also have a strong compliance culture, however, it is distinguishable from the first group based on their analysis of the costs and benefits of complying with certain norms and standards. For example, it is debated that exploitation increases in the legalised sex market because of the increased demand for cheap sexual services.<sup>625</sup> Even though evidence tends to point to an inadequate comparison of the pre and post-criminalisation periods of sex-buying in Sweden.<sup>626</sup> However, on this basis it can be argued that compliance with European anti-trafficking norms, such as the requirement to consider criminalising the use of sexual services performed by trafficking victims, would suggest that the Netherlands is unable to control and prevent trafficking through the regulation of the legalised sex market, which, moreover, remains a highly profitable market generating high tax revenues. Finally, the Czech Republic and Romania belong to the group of newer entrants to the European Union whose law on the books depicts overall compliance as a prerequisite for EU accession based on the *acquis* incorporation. But whose law in action demonstrates fundamental compliance gaps, particularly in relation to the protection of trafficking victims as national anti-trafficking policies do not appear to tackle the root causes of victims' vulnerabilities, such as ethnic discrimination of Roma women in the Czech Republic, and the penalisation of prostitutes in Romania. The three preliminary conclusions to this core section are outlined in section 3.4.5.

### **3.4.1. Six Approaches to Discourage Demand**

According to the UN Trafficking Protocol, there is a demand 'that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking'.<sup>627</sup> Thus, states are required to adopt or strengthen anti-trafficking measures to discourage demand. However, the Protocol does not mention what constitutes demand in relation to trafficking or the most appropriate measures to discourage demand. More recently, the UNGA refers to anti-trafficking policies addressing demand or the demand-side of trafficking chains in economic terms. Thus, recognising that 'trafficking in supply chains ... needs to be addressed in various economic sectors, including those integrated into global markets ... [as] some of the demand fostering sexual exploitation, exploitative labour and illegal removal of organs is met by

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<sup>624</sup> Lloyd, Simmons and Stewart (n 12) 153-154.

<sup>625</sup> Cho, Dreher and Neumayer (2013) (n 402) 71-72.

<sup>626</sup> *ibid* 75.

<sup>627</sup> UN Trafficking Protocol (n 1) art 9(5).

trafficking in persons'.<sup>628</sup> In this sense, victims are reduced to mere commodities that are bought, sold, transported, and resold according to market forces of supply and demand. Measures and policies around trafficking that aim at reducing the vulnerability of workers by increasing compliance with labour rights are viewed as alternatives to demand-side measures and policies. The requirement under the EU Trafficking Directive that member states consider measures to criminalise the use of services, which are the objects of trafficking-related exploitation, with the knowledge that the person is a trafficking victim is the most recent position on demand-side measures in economic terms.<sup>629</sup> The clearest reference in this context is demand for sexual services or the demand for prostitution in states where prostitution is conflated with sex trafficking.

Specific policies aimed at addressing demand have been triggered most importantly by a specific event in a national context or through policy learning or transfer of policy and policy-copying.<sup>630</sup> Thus, current prostitution policies reflect the most appropriate response to the political, cultural, and religious values of the present society, rather than the most appropriate response to the demand for trafficking-related exploitation. In particular, as the vast majority of states had at one point in time legalised prostitution.

Six main approaches can be distinguished. First, the moral approach that criminalises all forms of prostitution as sex trafficking because the treatment is harmful. Here prostitution is viewed as the oldest oppression and 'a product of lack of choice, the resort of those with the fewest choices, or none at all when all else fails'.<sup>631</sup> While abolition of prostitution appears to be the only way to end sexual exploitation, the most appropriate way to achieve this aim is debated. According to the Swedish model based on a neo-abolitionist approach, the demand for prostitution is most appropriately addressed by criminalising the buyers as the source of demand, as well as, the pimps and traffickers as suppliers, while eliminating any criminal status for prostitutes, and allowing them to choose the services and job training that they want. Even though it is observed that legal sanctions on sex buyers inadvertently cause further harm to prostitutes who are forced into 'worse working conditions, lower pay, greater dependence on

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<sup>628</sup> UNGA Res 23/5 (19 June 2013) UN Doc A/HRC/RES/23/5 para 6.

<sup>629</sup> EU Trafficking Directive (n 24) art 18(4).

<sup>630</sup> Mădălina Rogoz and others, 'Responses to Demand in the Context of Trafficking in Human Beings: Regulatory Measures from Twelve National Contexts' (2016) DemandAT Working Paper 6, 9 <[http://www.demandat.eu/sites/default/files/DemandAT\\_WP6\\_Rogoz\\_April2016\\_FINAL.pdf](http://www.demandat.eu/sites/default/files/DemandAT_WP6_Rogoz_April2016_FINAL.pdf)> accessed 23 September 2017.

<sup>631</sup> Catherine A MacKinnon, 'Trafficking, Prostitution, and Inequality' (2011) 46(2) Harvard Civil Rights-Civil Liberties Law Review 271, 274.

pimps, and higher health risks'.<sup>632</sup> However, a growing number of states follow the neo-abolitionist model pioneered by Sweden, including Finland.

Finland's approach is connected to the moral approach but it primarily views prostitution as a threat to public health and order. Thus, the second approach of public health and order aims to control prostitution through strict regulation using different forms of state control, such as mandatory health checks for prostitutes. Even if the law criminalises both the buying and selling of sex, punishment is typically directed at prostitutes who are morally condoned for spreading sexually transmitted diseases. Thus, clients often escape prosecution by cooperating with local police and giving up the details of prostitutes whose services they have used.<sup>633</sup> Prostitution is tolerated because of the 'inevitable' demand of male clients and justified on grounds of the right to sexual self-determination or autonomy of prostitutes.<sup>634</sup> Even though, its practice is restricted to certain geographical locations within the control of authorities to reduce the nuisance to public order in 'decent' spaces and the perceived threat to women's free movement as a result of street prostitution.<sup>635</sup> Finland, therefore, criminalises only sex-buying from procured prostitutes and trafficking victims to reduce the demand for sexual exploitation.

The third and fourth approaches based on illegal migration and organised crime in connection with trafficking are most commonly followed by states, including Belgium, the Czech Republic, and Romania. Here prostitution is an issue of illegal or 'unorderly' migration that demands more restrictive immigration policies to address the rapid rise in illegal migrants, both sex workers and migrants forced into prostitution, who seek employment abroad. This approach links to the framing of prostitution-related trafficking also as a problem of crime to be solved with heavier punishments, better international cooperation, and effective prosecution as a means of deterrence and accountability for criminals. These two approaches are heavily criticised by human rights scholars, such as Chacon, who argue that anti-trafficking efforts are constrained by the politics and policies of rigid immigration enforcement that 'have the perhaps unintended effect of reinforcing migrants' vulnerability to exploitation'.<sup>636</sup> It follows that the anti-trafficking discourse based on these two approaches rests on 'the myth of migrant

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<sup>632</sup> Janet Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29(2) *Harvard Journal of Law & Gender* 335, 396.

<sup>633</sup> Marjut Jyrkinen, *The Organisation of Policy Meets the Commercialisation of Sex: Global Linkages, Policies and Technologies* (Edita Prima 2005) 111.

<sup>634</sup> Roth (n 94) 184.

<sup>635</sup> Jyrkinen (n 633) 111.

<sup>636</sup> Chacon (n 8) 1615.

criminality' that scrutinises migrant sex workers rather than sex clients who create demand as 'bad actors'.<sup>637</sup> Moreover, for these frames to work the trafficking victim is depicted as 'a woman or (girl) child, needing protection from a barbaric foreign national who has associations with organised crime'.<sup>638</sup> This depiction, according to Anderson, fuels a language of 'harm' in immigration policy that recasts 'enforcement as *protective* of rights, and in particular protective of the human rights of migrants'.<sup>639</sup> However, the harm principle proposed by Mill restricts the rightful exercise of power 'over any member of a civilised community, against his will ... to prevent harm to others'.<sup>640</sup> Mill, therefore, distinguishes between compulsion to prevent harm to others and to the individuals themselves. This means that enforcement is necessary for the good of the community but less so for the good of migrants themselves. Yet, governments use the language of harm to conflate compulsion for the good of others, namely migrants, and compulsion for their own good, namely citizens. Thereby, hiding the role of the state and its restrictive immigration policies in reinforcing dependencies and vulnerabilities that expose migrants to greater bodily and mental harms.<sup>641</sup>

The fifth and sixth approaches are cast within more recent human rights debates around state accountability. Linked to the moral approach, prostitution is recognised as a violation of women's human rights, in particular, as a form of violence against women. These two approaches combined most appropriately capture the Swedish prostitution policy and the intrinsic link that it establishes between forced and consensual prostitution. However, it is possible to approach prostitution from a human rights perspective without linking both forms of prostitution by focusing on the conditions of coercion, abuse, and deceit, rather than prostitution itself. Here the protection of prostitutes is ensured by decriminalising sex work and the sex industry. Thus, within the labour approach, employed by the Netherlands, sexual exploitation is reduced by affording sex workers the rights and guarantees of labour contracts because sex work is legitimate work. By empowering sex workers the stigma and discrimination attached to prostitution can be reduced, which directly and indirectly negatively impact on the physical, sexual, and psychological health of sex workers. This is particularly the case for trafficking victims, according to Zimmerman, Hossain, and Watts, whose health is

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<sup>637</sup> *ibid* 1616.

<sup>638</sup> Bridget Anderson, 'Where's the Harm in That? Immigration Enforcement, Trafficking and the Protection of Migrants' Rights' (2012) 56(9) *American Behavioral Scientist* 1241, 1247.

<sup>639</sup> *ibid* 1242.

<sup>640</sup> *ibid* 1248.

<sup>641</sup> Davies and Davies (n 125) 115.

a neglected policy concern in the public health sector.<sup>642</sup> A legalised sex industry, then, can perhaps help to address physical, sexual and psychological harm, occupational hazards, legal restrictions, and difficulties associated with being marginalised or stigmatised.<sup>643</sup>

It is impossible to tell which of the two models based on human rights as promulgated by Sweden and the Netherlands most appropriately addresses the needs of prostitutes/sex workers, and by extension most appropriately discourages the demand for sexual services performed by trafficking victims. If prostitution-related trafficking is an economic activity driven by profit motives, then it is arguably most prevalent in countries where prostitution is legalised.<sup>644</sup> Like Jakobsson and Kotsadam, Cho, Dreher, and Neumayer also appear to argue that legalising prostitution leads to an expansion of the prostitution market and, thus, an increase in trafficking.<sup>645</sup> At the same time, in order to discourage the demand for exploitable sexual services in the legalised sex markets, Verhoeven, for example, demonstrates the unintended effects that expanding state control to prevent prostitution-related trafficking can have on sex workers, namely control, discrimination, and work restrictions.<sup>646</sup> There appears to be a conflict of interests between the government seeking to preclude the possibility of trafficking victims working in the sex industry and sex workers viewing their situations as a possibility to improve living-conditions. Thus, forcing them to withhold information about pimps and partners from authorities when registering as sex workers and meeting with authorities searching for any signs of trafficking, which can lead to work restrictions. Consequently, sex workers are found to ‘move to work in other cities, and sparingly use the assistance offered by the authorities’.<sup>647</sup>

At the same time, any claim that purports to show that all sex work is inherently oppressive and exploitative is thrashed by Weitzer as the ‘sweeping generalisations’ of nonpeer-reviewed reports with biased data collection procedures yielding warped conclusions.<sup>648</sup> As they ‘tend to select or accent the most disturbing instances of abuse and present them as representative and indicative of intrinsic problems’.<sup>649</sup> It follows that the

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<sup>642</sup> Zimmerman, Hossain and Watts (n 460) 327.

<sup>643</sup> *ibid.*

<sup>644</sup> Jakobsson and Kotsadam (n 102) 102.

<sup>645</sup> Cho, Dreher and Neumayer (2013) (n 402) 76.

<sup>646</sup> Maite Verhoeven, ‘Sex Work Realities Versus Government Policies: Meanings of Anti-Trafficking Initiatives for Sex Workers in the Netherlands’ (2016) *Sexuality Research and Social Policy* 4, 1 <<http://link.springer.com/article/10.1007/s13178-016-0264-7>> 1 January 2017.

<sup>647</sup> *ibid.*

<sup>648</sup> Ronald Weitzer, ‘The Mythology of Prostitution: Advocacy Research and Public Policy’ (2010) 7(1) *Sexuality Research and Social Policy* 15, 18-20.

<sup>649</sup> *ibid* 18.

pragmatism on which anti-prostitution policies, such as the Swedish model, are additionally based suffers greatly from a lack of reliable indicators.<sup>650</sup> Even Cho, Dreher, and Neumayer admit that there is no ‘smoking gun’ to prove that legalised prostitution definitely increases inward trafficking flows.<sup>651</sup> The scholars acknowledge that the use of UNODC data as the most reliable existing data ‘do not capture the number of human trafficking victims because the data are not weighted by the (reported) number of victims’.<sup>652</sup> Similarly, the governmental evaluation report on the banning of sex-buying in Sweden that is often cited as a reliable source that criminalisation reduces sexual exploitation fails to provide sufficient detail about the sampling methods.<sup>653</sup> Weitzer underlines that this is a general problem with data collection procedures in studies based on the oppression paradigm.<sup>654</sup> Thus, the only credible finding in the field is that the clandestine nature of both prostitution and trafficking markets makes it almost impossible to produce evidence-based research. Yet, the Swedish model finds favour among the Nordic countries<sup>655</sup> and the Dutch model among states, such as Germany.<sup>656</sup>

### **3.4.2. Sweden and Finland: An Ingrained Compliance Culture around Women’s Human Rights**

The Swedish and Finnish examples illustrate how two states sharing a political unity of 600 years and shared values on prostitution have come to address prostitution differently. Both approaches emerge from a moral condemnation of prostitution. But while Swedish prostitution policies aim to remove prostituted women from oppressive forms of employment by valuing respect for gender equality, Finnish prostitution policies make no mention of the rights of prostitutes but of women’s human rights in a larger societal context. In both cases, this has been achieved through the socialisation and persuasion of norms and identity. Beliefs about right and wrong become norms, which, in turn, reshape state identities, interests, and behaviour. Thus, through persuasion pro-compliance groups generate appeal ‘by framing issues so that

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<sup>650</sup> See Elżbieta M Goździak and Michan N Bump, ‘Data and Research on Human Trafficking: Bibliography of Research-Based Literature’ (*Institute for the Study of International Migration*, October 2008) <[https://repository.library.georgetown.edu/bitstream/handle/10822/551495/Data\\_research\\_trafficking.pdf?sequence=1](https://repository.library.georgetown.edu/bitstream/handle/10822/551495/Data_research_trafficking.pdf?sequence=1)> accessed 8 February 2016.

<sup>651</sup> Cho, Dreher and Neumayer (2013) (n 402) 76.

<sup>652</sup> *ibid.*

<sup>653</sup> Government Report 2010:49 (n 387). See Cho, Dreher and Neumayer (2013) (n 402) 75.

<sup>654</sup> Weitzer (2010) (n 648) 20.

<sup>655</sup> May-Len Skilbrei and Charlotta Holmström, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies* (Routledge 2016) 38.

<sup>656</sup> Gregor Gall, *Sex Worker Unionization: Global Developments, Challenges and Possibilities* (Palgrave Macmillan 2016) 96.

they resonate with accepted norms and/or evoke strong feelings'.<sup>657</sup> This, in turn, creates an ingrained compliance culture.

In the 1980s, legal feminists and women's movements reframed prostitution as an issue of gender equality that was part of a larger problem of the cultural status of women in society. In particular, as early vagrancy laws depicted prostitutes as 'socially deviant' or 'the fallen' and from whom society needed to be protected by imposing restrictive penalties on prostitutes. Sweden had already reformed its prostitution laws in 1964 and Finland followed suit in 1986. The gap of 22 years of issue framing is considered an important reason why Finnish prostitution laws find it easier to label prostitutes as 'criminals' and, in turn, why their rights are not readily considered as part of prostitution policies.<sup>658</sup>

One of the advantages of the gender equality frame is that it shifts attention from prostitutes and the supply side of prostitution to sex clients and the demand side of prostitution. This means that prostitution is 'the product of market forces' and the only way to end gender inequality, as prostitutes are primarily women and sex clients primarily men, is to discourage the demand for prostitution and place the onus directly on clients to abstain from contributing to women's sexual exploitation in any form.<sup>659</sup> Under the gender equality frame, the current Swedish prostitution law criminalises only sex-buying, not sex-selling as prostitutes need protection and their penalisation would only increase their vulnerabilities. Yet, it is increasingly argued that the criminalisation of sex-buying has, in fact, increased the risk of violence against prostitutes.<sup>660</sup> It follows that the framing of prostitution as gender-based violence by female parliamentarians and women's movements has been detrimental to any consideration of prostitutes' rights as sex workers as they are now forced to provide sexual services further underground where the risks of sexual exploitation are, in fact, higher based on the demand of sex clients to escape prosecution.

Swedish right-wing parties had unsuccessfully proposed the criminalisation of sex-buying and sex-selling based on the principles of the judicial system, liberalism, individualism, and personal autonomy to make free choices and bear responsibility for them.<sup>661</sup> Right-wing

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<sup>657</sup> Jana von Stein, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 488.

<sup>658</sup> See Askola (n 119) 133.

<sup>659</sup> Katalin Kelemen and Märta C Johansson, 'Still Neglecting the Demand that Fuels Human Trafficking: A Study Comparing the Criminal Laws and Practice of Five European States on Human Trafficking, Purchasing Sex from Trafficked Adults and from Minors' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 247, 248.

<sup>660</sup> Roth (n 94) 235.

<sup>661</sup> Government Bill 1997/98:114 *Protokoll* 24.

parties believed prostitutes could be adequately protected and provided with necessary health and social protections only by criminalising prostitution. However, the gender equality frame was ultimately more frequent and influential as it sought to demonstrate to the international world that Swedish national identity was ‘most gender equal’ and criminalising sex-buying was ‘a first and necessary step towards creating a fundamentally gender equal society’, or ‘a silent revolution for gender equality and against violence’.<sup>662</sup>

It is also important to note the absence of pro-sex worker movements to represent the interests of Swedish prostitutes.<sup>663</sup> This can perhaps also explain why the Finnish prostitution law criminalises only sex-buying from procured prostitutes and trafficking victims as the first union of sex workers was established in the years leading up to the Finnish sex-buying ban.<sup>664</sup> Yet, there was no framing of prostitution around the disadvantaged positions of prostitutes akin to the gender-based frame in Sweden. Instead, prostitution was addressed as a public nuisance, in particular, as the increase in street prostitution in certain cities, such as Helsinki, had threatened the free movement of women in public places.<sup>665</sup> As the parliamentary debates hardly mentioned prostitutes, the focus was on the problems prostitution brought upon ‘women’ within the larger societal context.<sup>666</sup> Despite the presence of a sex workers’ union and efforts of individual autonomous women’s wings to make the voices of prostitutes heard, they had to deal with women’s human rights externally and, therefore, could not form party support. This also marked a continuous need for renegotiations of interests and priorities.

While there was a positive responsiveness to the Swedish model as part of the Finnish identity around Nordic views,<sup>667</sup> the criminalisation of sex-buying from procured prostitutes and trafficking victims is ultimately rooted in compliance with international anti-trafficking norms. As Jyrkinen observes, international anti-trafficking instruments ‘functioned as a push factor for improvements in position of women – otherwise the changes would have taken much longer time’.<sup>668</sup> This can relate back to the 22-year gap in prostitution reforms between Sweden and Finland. However, it also relates in an important way to the fact that in Finland trafficking in persons was criminalised before the banning of sex-buying, while in Sweden the ban precedes criminalisation of trafficking in persons. Thus, Finnish prostitution policies were

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<sup>662</sup> *ibid* 42.

<sup>663</sup> Skilbrei and Holmström (n 655) 138.

<sup>664</sup> See Gall (n 656) 140.

<sup>665</sup> See Government Proposal *LA 31/1996 vp*.

<sup>666</sup> Government Proposal *HE 6/1997 PTK 77/1998* 2888.

<sup>667</sup> *ibid*.

<sup>668</sup> Jyrkinen (n 633) 191.



necessarily influenced by international developments and the ban was intentionally introduced only after the negotiations of the COE Trafficking Convention were completed.<sup>669</sup>

Thus, the Finnish prostitution policy based on moral and public order concerns and the Swedish prostitution policy based on moral and gender-based violence concerns are embedded into the national identities of these states as part of the Nordic view of prostitution. Moreover, that these values echo international prohibitions on, for example, gender discrimination under the CEDAW and the COE Trafficking Convention, makes it easier for them to comply overall with international anti-trafficking norms and standards.

### **3.4.3. The Netherlands and Belgium: Assessing the Costs and Benefits of Compliance with Measures to Discourage Demand**

The Netherlands and Belgium also have a strong compliance culture like Sweden and Finland. Both states were actively involved in the elaboration of early anti-sex trafficking instruments at the international level and the resonance of European ideologies around the cross-border movement of women for prostitution have arguably made compliance with contemporary anti-trafficking instruments sharing similar sentiments around restricting migration easier. This is particularly the case with Belgian anti-trafficking responses that echo the crime-fighting frame around contemporary responses rooted in the UN Trafficking Protocol as the Belgian fight against trafficking is part of the National Security Plan.<sup>670</sup> It is argued that states whose practices are already in conformity with treaty expectations are more likely to comply because the eventual ‘costs’ of compliance are less.<sup>671</sup> For these former imperialists, sex trafficking was of particular interest in affirming their territorial boundaries as its regulation was an important tool for controlling migration, population, and sexual relations.<sup>672</sup> Even though regulation lost its appeal once prostitution was nationalised around the world following the Second World War. Moreover, the spread of human rights had shifted attention to domestic prostitution in women and the ostensible desire to protect prostitutes from sexual exploitation through regulatory regimes.<sup>673</sup>

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<sup>669</sup> *ibid* 121.

<sup>670</sup> Circular 23 December 2016 *Omzendbrief inzake de invoering van een multidisciplinaire samenwerking met betrekking tot de slachtoffers van mensenhandel en/of van bepaalde zwaardere vormen van mensensmokkel* art 1.1.

<sup>671</sup> Camp-Keith (n 518) 359.

<sup>672</sup> Stephanie A Limoncelli, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women* (Stanford University Press 2010) 11.

<sup>673</sup> *ibid* 72.

The decriminalisation of pimping and brothel keeping in the Netherlands were discussed at length over three parliamentary debates.<sup>674</sup> On the one hand, prostitution served as a legal channel of gratification of male lust. On the other hand, violence against prostituted women demanded safeguards in the form of labour rights and guarantees. There was an influx of migrant sex workers in the 1980s with reports alleging signs of sexual exploitation in the legalised sex market.<sup>675</sup> However, such concerns were silenced by diverting public debate and media attention away from the possible decriminalisation of pimping and brothel keeping. This has been identified as one of two ways in which the Dutch government orchestrated ‘state feminism’ in favour of decriminalisation. Additionally, the government maintained control over women’s movements and ensured their cooperation during parliamentary debates through state-funding of women’s NGOs.<sup>676</sup> In a similar way that the voices of pro-sex work movements were silenced in the Swedish and Finnish debates around the banning of sex-buying, Raymond argues that governmental control over women’s NGOs during debates had made it impossible for international feminist abolitionist organisations to establish a strong foothold in the Netherlands and in partnership with local NGOs to challenge decriminalisation.<sup>677</sup> It follows that the financial benefits of decriminalisation, in particular, ‘the potential windfall of a 19 percent value-added tax’ as argued by Raymond had quickly silenced any opposition based on violence against women campaigns.<sup>678</sup> Even though tax revenues were never formally recorded during the parliamentary debates. While it may be argued that Raymond’s opposition to decriminalisation is rooted in her abolitionist views on prostitution,<sup>679</sup> more recently the Czech government considered a proposal based on the Dutch prostitution model precisely to accumulate taxes of which the state was ‘deprived’.<sup>680</sup> Thus, Raymond’s argument perhaps holds some truth. In fact, in the initial years following decriminalisation there was a violation by 43 of the 348 municipalities to grant ‘the basic federal right to work’ in brothels, which marked a mixed toleration for re-establishing brothels

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<sup>674</sup> Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths about Prostitution and the Global Sex Trade* (Potomac Books 2013) 80.

<sup>675</sup> *ibid* 81.

<sup>676</sup> *ibid* 82.

<sup>677</sup> *ibid* 82.

<sup>678</sup> *ibid* 84.

<sup>679</sup> See Weitzer (2010) (n 648) 16.

<sup>680</sup> Simona Fojtová, ‘Legalising Sex Work in the Czech Republic: Agency and Migration in a Transnational Feminist Context’ in M-S D Alexandru, M Nicolaescu and H Smith (eds), *Between History and Personal Narrative: East European Women’s Stories of Migration in the New Millennium* (LIT Verlag 2014) 86.

at the administrative level.<sup>681</sup> Even though there appeared to be immense public support for prostitution as legitimate work.<sup>682</sup>

Since 2000, prostitution is subject to a licensing system that is administered by the municipal and is believed to lead to better control and regulation through regular inspections by the labour inspectorate and local health authorities.<sup>683</sup> However, evaluations of the effects of decriminalisation reveal that the sex sector is increasingly susceptible to sexual exploitation by organised criminals as a result of municipal and regional differences in licensing and a lack of visibility in the sex industry.<sup>684</sup> The subsequent withdrawal of brothel licenses have led to the closing down of whole sex work areas.<sup>685</sup> Some policymakers even question whether the Netherlands is on the ‘right track’ with the regulation of prostitution.<sup>686</sup> This has spurred a bill to regulate prostitution and combat abuses in the sex industry that aims to tackle sexual exploitation through mandatory and uniform licensing for prostitution, a registration requirement for all sex workers, better tools for monitoring and enforcement, and criminalisation of the use of illegal sexual services.<sup>687</sup> Under the new regime, the operation of ‘sex companies’, whether brothels, escort agencies, or adult movie theatres, without a license and exploitation of prostitution will become illegal. The mandatory registration of all sex workers will require them to come into contact, at least once, with national authorities so that these have an opportunity to identify and remove detected trafficking victims. However, it assumes that victims will always show signs of trafficking or that authorities will be able to easily deduce such signs. In particular, as victims under coercion are less likely to respond truthfully.<sup>688</sup> Moreover, only persons above 21 years of age who are registered in the national register of prostitutes may work in the sex industry. The high age restriction will certainly push younger, more vulnerable victims further underground where they have no labour and health rights. Moreover, the criminalisation of the use of illegal sexual services places an onus on sex

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<sup>681</sup> *ibid* 82.

<sup>682</sup> Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York University Press 2012) 148.

<sup>683</sup> Law 1999/464 *Wet van 28 oktober 1999 tot wijziging van het Wetboek van Strafrecht, enige andere wetboeken en enige wetten (opheffing algemeen bordeelverbod)*.

<sup>684</sup> Law 32211-I *Regels betreffende de regulering van prostitutie en betreffende het bestrijden van misstanden in de seksbranche (Wet regulering prostitutie en bestrijding misstanden seksbranche)*; *Brief inzake herbezinning wetsvoorstel Regulering prostitutie en bestrijding misstanden seksbranche*.

<sup>685</sup> Verhoeven (n 646) 2.

<sup>686</sup> Corinne E Dettmeijer-Vermeulen, *Trafficking in Human Beings: Fifth Report of the Dutch National Rapporteur* (BNRM 2007) 107.

<sup>687</sup> Law 0910tkkst32211-2 *Regels betreffende de regulering van prostitutie en betreffende het bestrijden van misstanden in de seksbranche (Wet regulering prostitutie en bestrijding misstanden seksbranche)*.

<sup>688</sup> Verhoeven (n 646) 8.

clients to enquire whether the sex worker is registered but the sex worker could simply lie.<sup>689</sup> Thus, supervision and enforcement will be extremely important to reduce risks of sexual exploitation.

In Belgium, over the past decade, several legislative bills closely modelled after the Dutch and German prostitution laws, as well as, the Swedish prostitution law were submitted to Parliament, however, none passed.<sup>690</sup> Even though public debate on measures to discourage demand for sexual exploitation reveals a Belgian tendency of policy learning and policy-copying based on foreign models. The lack of public support for the legalisation of prostitution partly explains why prostitution is de facto legal in a few Belgian cities, including Antwerp, but not de jure legal at the national level.<sup>691</sup> In fact, Belgian federal law prohibits brothels and pimping, although in some cities it is tolerated and regulated. Like the de facto legalisation, regulation is permitted on pragmatic grounds, although technically such regulation itself violates federal law. Inadequate protection of domestic prostitutes has had a spill-over effect on the protection of sex trafficking victims under a legal framework that describes trafficking as a security concern most appropriately dealt with as an immigration and to a lesser extent labour issue.<sup>692</sup> According to Dormaels, Moens and Praet, it is this security dimension to the trafficking problem that afforded a certain urgency to the anti-trafficking response and led to the immediate implementation of anti-trafficking policies.<sup>693</sup> This was notable because quick implementations were contrary to Belgian legislative tradition.

The Dutch and Belgian examples demonstrate how assessments of the costs and benefits of compliance can lead to different approaches to sexual exploitation, which need not draw an intrinsic link between forced and consensual prostitution. Thus, the Netherlands distinguishes clearly between sex trafficking and prostitution and seeks to protect sex workers from exploitative situations through increased regulation of the legalised sex industry. While Belgium criminalises prostitution at the national level yet tolerates the same at the sub-national level so that victims remain without adequate protection in between the de facto and de jure of a prostitution law. Yet, it continues to delink forced and consensual prostitution.

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<sup>689</sup> Kelemen and Johansson (n 659) 248.

<sup>690</sup> *ibid* 108-109.

<sup>691</sup> *ibid* 108.

<sup>692</sup> Circular 23 December 2016 (n 670) art 1.1.

<sup>693</sup> A Dormaels, B Moens and N Praet, 'The Belgium Counter-Trafficking Policy' in Christien van den Anker (ed), *The Political Economy of New Slavery* (Palgrave Macmillan Ltd 2004) 76-77.

### 3.4.4. The Czech Republic and Romania: When Law on the Books Does Not Translate into Law in Action Due to Stigma, Discrimination, and Technical Incapacity

The Czech Republic and Romania are major origin countries for sex trafficking into Western Europe. In particular, the geographical location of the Czech Republic facilitates trafficking at its border shared with Germany.<sup>694</sup> Similarly, there is an influx of Romanian victims trafficked into Belgium as a result of regularisation efforts during the early 2000s of Romanians already living in the Belgian territory.<sup>695</sup> Further facilitated by the removal of Belgian visa requirements for Romanians in the wake of the latter's EU accession.

While both the Czech Republic and Romania demonstrate a significant divergence in formal and practical compliance, this does not preclude the former's high level of formal compliance that is arguably on a par with highly compliant Western European states, such as Finland and the Netherlands, according to a recent transposition study of the EU Trafficking Directive.<sup>696</sup> The Czech Republic is also one of the few Eastern European states to be ranked in the highest tier of compliance by the TIP Report, with a few annual exceptions due to resource constraints and inadequate penalties for labour trafficking.<sup>697</sup> While Romania consistently receives a lower ranking for the persistence of trafficking in its territory.<sup>698</sup>

Thus, the over compliance records of the Czech Republic and Romania with anti-trafficking efforts offer an interesting comparison to the four preceding case studies with a strong compliance culture that is either ingrained or based on a cost-benefit analysis. According to Keith, newer democracies, such as the Czech Republic and Romania, readily demonstrate strong formal compliance because they tend to ratify more treaties 'to constrain or "lock in" future generations of political actors and limit their ability to undermine or overthrow democratic institutions'.<sup>699</sup> At the same time, managerial models of compliance explain that noncompliance is rarely intentional but the result of inter alia capacity limitations.<sup>700</sup> There are evidently economic and socio-political disparities between the four Western European states and these two Eastern European states, which add to the latter's capacity limitations. After all,

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<sup>694</sup> Marttila (n 92) 33.

<sup>695</sup> Alice Poncelet and Marco Martiniello, 'Migration of Romanian Women to Belgium: Strategies and Dynamics of the Migration Process' in Christiane Timmerman and others (eds), *New Dynamics in Female Migration and Integration* (Routledge 2015) 162.

<sup>696</sup> Bressan (n 88) 159.

<sup>697</sup> See generally global reports on trafficking in persons <<http://www.unodc.org/unodc/en/human-trafficking/publications.html#Reports>> accessed 14 November 2014.

<sup>698</sup> *ibid.*

<sup>699</sup> Camp-Keith (n 518) 361.

<sup>700</sup> Von Stein (n 657) 486.

the wealth disparities between them are an important reason behind the higher risks of trafficking in Eastern European states. In particular, there are problems with effective prosecution and protection in origin countries given the difficulty of proving the trafficking offence or identifying victims before the exploitation occurs typically in the destination country. Additionally, the stigmatisation and discrimination of victims of prostitution-related trafficking precludes their effective protection under domestic anti-trafficking laws and they are subsequently less likely to receive assistance and support from state-run services.<sup>701</sup>

In the Czech Republic, prostitutes were perceived by the Communist Party as ‘social parasites’ unwilling to work, ‘cunning entrepreneurs’ abusing the welfare system, as well as, ethnically and nationally different from the Czech people because often they were migrants and/or persons belonging to the Roma minority.<sup>702</sup> Prostitution was, therefore, a problem external to the Czech society and Czech citizens, and prostitutes were the sources rather than the victims of prostitution as a problem. It was after the Communist rule that feminist groups, still few in numbers, began to lobby for the decriminalisation of prostitution as sex work.<sup>703</sup> In public debates on prostitution during the 2000s, two feminist groups involved in the prostitution and trafficking fields lobbied against the abolitionist positions of, first, members of parliament and ministers and, second, local governments’ representatives who promoted the regulation of prostitution and the compulsory registration of prostitutes. These feminist groups offered a third option, namely to distinguish clearly between consensual and forced prostitution, replace the notion of prostitution with ‘sex work’, and afford sex workers protection and equal treatment as ‘rational and fully fledged actors’.<sup>704</sup> It was a discursive framing used by some feminist groups and the majority of EU institutions that shifted the distinction in the 1990s between street prostitution and indoor prostitution to the one in the 2000s between consensual and forced prostitution, or between prostitution and sex trafficking.<sup>705</sup> However, attempts at regulation failed because the Czech Republic was a

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<sup>701</sup> Toman O Mahmoud and Christoph Trebesch, ‘The Economics of Human Trafficking and Labour Migration: Micro-Evidence from Eastern Europe’ (2010) 38(2) *Journal of Comparative Economics* 173, 175.

<sup>702</sup> Joyce Outshoorn and others, ‘Women’s Movements and Bodily Autonomy: Making the Case for Bodily Citizenship’ in Joyce Outshoorn (ed), *European Women’s Movements and Body Politics: The Struggle for Autonomy* (Palgrave Macmillan 2015) 158.

<sup>703</sup> *ibid* 159.

<sup>704</sup> Joyce Outshoorn and others, ‘Remaking Bodily Citizenship in Multicultural Europe: The Struggle for Autonomy and Self-Determination’ in B Halsaa, S Roseneil and S Sümer (eds), *Remaking Citizenship in Multicultural Europe: Women’s Movements, Gender and Diversity* (Palgrave Macmillan 2012) 132.

<sup>705</sup> *ibid* 133.

signatory to the 1950 Trafficking Convention that criminalised prostitution and brothel licensing.

Since 2000, there have been four more unsuccessful attempts, namely in 2004, 2008, 2010, and 2012, to regulate prostitution as sex work, with the underlying aim of collecting tax revenue.<sup>706</sup> There is good reason for the tax-focus because the almost non-existent sex trade has flourished into a USD 100 million moneymaking industry, with more than 860 brothels. Feminist lobbyists outside the Czech Republic, however, criticised the Czech government for proposing a prostitution policy modelled after the Dutch prostitution model. They also observed the lack of protest against the proposed bills to legalise prostitution, especially by Czech women's NGOs. As the best-known anti-trafficking organisation in the Czech Republic, namely La Strada, is a member of the Dutch-founded network of anti-trafficking NGOs that subsequently 'speaks in a Dutch voice'.<sup>707</sup> Yet, as Fojtová demonstrates, Czech women's organisations and researchers have been vocal about sex work issues and have worked to increase sex workers' rights. The main challenge to establishing women's representation has been apparent resistance to feminism in the post-socialist Czech society. A further challenge lies in securing independent funding and projects, which for organisations providing women support does not leave much capacity for influencing policy-making and shaping public discourse.<sup>708</sup>

Romanian prostitution laws also emerge from Communist ideologies on prostitution. However, Romania is one of the few states worldwide to criminalise all forms of prostitution. This criminalisation follows a model of intervention that views problems of prostitution as similar to those caused by other criminal behaviours, rather than as a moral, health, or human rights issue. Typically, prostitution-related activities, such as sex trafficking, are defined as causing the type of harm that warrants the use of criminal justice sanction and punishment.<sup>709</sup> Prior to its criminalisation in 1957, the Romanian government was partially regulating prostitution as a health issue that mandated registration and periodic medical examinations, and prohibited habitual prostitution 'so most of the times when the prostitutes [were] caught on the

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<sup>706</sup> Fojtová (n 680) 86.

<sup>707</sup> *ibid* 87.

<sup>708</sup> *ibid* 89-90.

<sup>709</sup> Jo Phoenix, 'Frameworks of Understanding' in Jo Phoenix (ed), *Regulating Sex for Sale: Prostitution, Policy Reform and the UK* (Policy Press 2009) 15.

streets, their deeds [were] considered contraventions and [were] punished by a fine according to a special law'.<sup>710</sup>

Between 2000 and 2007, there were four separate political attempts to decriminalise prostitution and create a legalised sex market but both the public and the Church vehemently objected.<sup>711</sup> The most recent legislative proposal was fiercely debated by the media, while policymakers opposed on health grounds. Prostitution policies in Romania are rooted in cultural and religious values that are often described to be very traditionalist and ritualistic. In particular, women's rights are marginalised to the family and in matters of sex women are traditionally thought to be passive actors.<sup>712</sup> There is consequently a moral condemnation of prostitution and a stark distinction between 'decent women' who maintain the family and 'the fallen' in prostitution. Those who have fallen institutionalise prostitution and serve to gratify male lust, in particular, such sexual services which men 'cannot ask at home'.<sup>713</sup> The moral objection to prostitution further stigmatises prostituted women and this is seen as having a knock-on effect on the protection and assistance of sex trafficking victims, who are blamed for their criminal behaviour.

Thus, in the Czech Republic and Romania entrenched values of morality around prostitution influence the treatment of both prostitutes and sex trafficking victims and ensure that the latter do not receive assistance and support to which they are entitled under domestic anti-trafficking law. Thus, the divergence in formal and practical compliance is partly maintained by stigmatisation and discrimination of victims of prostitution-related trafficking.

### 3.4.5. Preliminary Conclusions

The national exploration draws three preliminary conclusions. First, Sweden and Finland have a strong compliance culture for women's human rights. Both criminalise the purchase of sexual services even though Finland restricts criminalisation to sexual services performed by procured prostitutes and trafficking victims. The Swedish prostitution model consequently blurs the distinction between sex trafficking and prostitution, which is maintained partially in Finland. Second, the Netherlands and Belgium have a strong compliance culture based on an analysis

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<sup>710</sup> DA Dragomirescu, C Necula and R Simion, 'Romania: Emerging Market for Trafficking? Clients and Trafficked Women in Romania' in Andrea Di Nicola and others (eds), *Prostitution and Human Trafficking: Focus on Clients* (Springer 2009) 124.

<sup>711</sup> *ibid* 125.

<sup>712</sup> Oana-Rica Popaac and Norica-Felicia Bucur, 'Gender Discrimination and Education Practitioners. Reality, Perception, Possible Solutions' (2014) 127 *Procedia - Social and Behavioral Sciences* 459, 461.

<sup>713</sup> Dragomirescu, Necula and Simion (n 710) 138.



of the costs and benefits of complying with each issue-specific set of norms. However, through their analyses of prostitution effects both states end up adopting different approaches to discourage the demand for prostitution. The Netherlands distinguishes clearly between sex trafficking and prostitution with a view to stringent government controls of the legalised sex industry. While Belgium criminalises prostitution at the national level but tolerates it at the sub-national level so that there is a higher risk of sexual exploitation for prostitutes working in between the de facto and de jure. Third, the Czech Republic and Romania appear to demonstrate overall compliance with the law on the books but there are significant practical compliance gaps. In particular, the stigma around prostitution in both states and the ethnic discrimination of Roma women in the Czech Republic increase the risks of sexual exploitation of prostitutes who are deemed necessary to gratify male lust or because prostitution is highly profitable, even if morally condoned.

### **3.5. Conclusions**

This chapter examined the systemic challenges to implementation of the preeminent international and European anti-trafficking instruments and argued that the narrow political interests and priorities of individual states pose serious challenges to international regulation of trafficking. The institutional settings of these very instruments were considered in turn and the national study on prostitution policies provided a useful lens for examining how different approaches to prostitution demarking different interests in the demand debate undermine harmonised responses to the trafficking problem.

Section 3.2.1 explored the elaboration of the UN Trafficking Protocol under the auspices of the UN's legal system and how wide participation and diverging state interests, particularly between developing states seeking technical assistance and developed states debating more substantive definitional issues, ultimately weakened the content of the Protocol. The need to reach consensus between all states resulted in the adoption of a weak instrument. In other words, the consent problem had weakened the content of the Protocol. Thus, the paramount objective of international cooperation facilitated by the participation of a larger number of states within a universal forum for management ultimately decreased the likelihood that the Protocol would offer a robust cooperative framework for harmonised action.

Section 3.3.1 on the elaboration of the COE Trafficking Convention also observed how power asymmetries during the negotiations had significantly weakened the content of the Convention until its human rights began to echo existing provisions in the ECHR. Even though

the Convention was originally conceived to substantially raise the human rights standard of the UN Trafficking Protocol. Within the COE context, the role of the ECtHR in bringing trafficking within the ambit of article 4 of the ECHR was particularly noted in terms of fleshing out the responsibilities of states to establish effective legal and administrative frameworks around trafficking. However, it was seen as a major shortcoming of the ECtHR's judgements that it failed to explicate what it meant with 'effectiveness' because the ambiguity meant states could not be held accountable to precise obligations. Again, this was attributed to the casuistic judging style of the ECtHR that tends to afford member states a wide margin of appreciation in implementing their international obligations. Even though the establishment of a due diligence regime around trafficking effectively pierces the veil of sovereign prerogatives and brings within the jurisdiction of the ECtHR domestic criminal law by linking its human rights and criminal law approaches.

Within the proper international human rights system, section 3.2.2 assessed the 1950 Trafficking Convention, the CEDAW, and the Trafficking Principles and Guidelines. The Trafficking Convention had failed to adequately address the trafficking problem and its updating as part of the new transnational organised crime within which the UN Trafficking Protocol is now firmly based was not feasible because of its limited scope. Yet, it was an important reason behind the limited coverage of sex trafficking in the CEDAW as an instrument that more appropriately deals with the trafficking problem by seeking to address the root causes of trafficking victim's vulnerabilities. However, that the CEDAW was heavily reserved against undermined its effectiveness. It also pointed to a major systemic limitation of international law to stop states from entering reservations that were contrary to the object and purpose of the CEDAW or otherwise would undermine its effectiveness in ensuring to women adequate human rights in all spheres of life. Similarly, the adoption of soft law instruments, such as the Trafficking Principles and Guidelines, to circumvent state intervention in the elaboration of substantial human rights standards around trafficking bolstered the argument that cooperative agreements, such as the UN Trafficking Protocol, could never achieve consensus of all involved states and any effort to this end would weaken the content of norms and standards. Thus, it demonstrated the added-value of soft law measures in identifying and confirming ambiguous obligations, and through the adoption of certain principles in subsequent legally binding instruments, such as the COE Trafficking Convention and the EU Trafficking Directive that it could effectively work as a way station to harder legalisation. Perhaps, then,

the insistence on state consent is exaggerated and more appropriate responses are to be achieved outside the formal process of law, but by whom and to what extent?

US unilateralism explored in section 3.2.3 remains a controversial example of regulation outside the consent-based system of international law, in particular, as there are no mechanisms for challenging the unilateral decisions of the US, which can have substantial impacts on domestic trafficking situations and the treatment of victims. Perhaps one question is the extent to which the US applies the Trafficking Principles and Guidelines as the highest standard espoused in the field. In particular, if the aim of US unilateralism is to get states to make significant efforts to suppress trafficking and protect victims from exploitative situations. It cannot be forgotten that 'unfriendly' unilateralism is only acceptable where it seeks to make effective against the ineffective international law. Thus, the primary objective of unilateralism must extend beyond the narrow self-interests of states. Then, one may be able to look beyond the methodological flaws of reporting under the TIP Report or normative imprecisions in the TVPA. As these can be rectified with greater ease than international instruments that are typically cast in stone upon their adoption because they already rest on a fragile international consensus.

It is also noted in relation to the final supra-territorial instrument analysed here, namely the EU Trafficking Directive, that an overly ambitious framework that seeks to encompass within a single instrument the entire complexity and multidimensionality of trafficking, will ultimately face major challenges during the implementation process. This was illustrated in section 3.3.2 by way of example of the advantages and shortcomings of choosing a directive to express the EU response. In particular, as directives leave as much discretion to states in the implementation process as transnational cooperation agreements, such as the UN Trafficking Protocol. The sheer number of national transposition measures recorded by the case studies was reason for concern as it cannot be said that an effective response to trafficking in the Czech Republic relies on 67 separate measures as this creates immense problems for victims seeking to rely on these measures for protection. If consensus was difficult to form in relation to the UN Trafficking Protocol with participation of some 120 country representatives from different regions of the world, the situation in the EU with 27 member states, excluding Denmark that does not take part in the adoption of Title V measures, is not any different. As the growing membership of the EU necessitates greater flexibility in the transposition process for which the provisions of the directive need to be sufficiently ambiguous. Thus, consensus formation in the wider context of the UN and the limited context of the EU cannot materialise to produce an

effective response to the trafficking problem because states' interests are too varied or diverse. This point was brought to the fore with the example of different approaches to prostitution among the case studies in section 3.4.

In considering measures to discourage the demand for prostitution-related exploitation, states must consider the possibility of criminalising sex-buying from trafficking victims. However, states have chosen through the six main approaches to prostitution to either draw a clear link between prostitution and sexual exploitation or to distinguish between both forms of prostitution. This, in turn, has serious implications for the treatment of victims, even though it is impossible to say which of the six approaches discourages the demand for prostitution most effectively. In the examination of the development of national prostitution policies, it has also become evident that the issue is more complex than can be adequately depicted in this space. Thus, the national exploration teases out some of the more pertinent issues around prostitution policies and relates these to the already established compliance behaviours of the case studies based on the 'worlds of compliance' theory. It follows that Sweden and Finland demonstrate an ingrained compliance culture around women's human rights, which is rooted in a moral condemnation of prostitution. Even though Sweden strengthens its general criminalisation of sex-buying around the violence against women, and Finland bases its partial criminalisation of sex-buying from procured prostitutes and trafficking victims on the need for public order. Both models place the onus directly on the sex client to discourage the demand for sexual exploitation.

The Netherlands and Belgium also have a strong compliance culture, in particular, as these states have been involved in the fight against trafficking since the very first instruments on the white slave traffic. This also makes it easier for these states to analyse the costs and benefits of compliance as their prostitution policies are not rooted in moral considerations but the Dutch within a labour paradigm and the Belgian within an immigration and border security paradigm. The Netherlands currently regulates prostitution through increased police controls of the legalised sex industry and possible mandatory registration of sex workers should the current bill to regulate prostitution and combat abuses in the sex industry pass. The Netherlands distinguishes between consensual and forced prostitution and aims to reduce sexual exploitation in the commercial sex market by guaranteeing to sex workers the safeguards of labour contracts. Belgium draws no link between prostitution and sexual exploitation, thus, maintaining its criminalisation of prostitution at the national level, even though it is tolerated at the sub-national level for typically male gratification.

The divergence in formal and practical compliance is most visible in the Czech Republic and Romania as major origin countries for trafficking that lack the structural infrastructure to reduce the vulnerabilities of trafficking victims. Even though stigmatisation and discrimination around prostitution are major reasons for the persistence of sexual exploitation in these states. Both states focus on a crime approach to prostitution with heavier punishments and better law enforcement. This could perhaps explain the high number of prosecutions recorded by Romania, while the low number of prosecutions recorded by the Czech Republic reinforces that overall compliance on the law on the books does not translate into the law in action.

Thus, it remains to be seen how compliance in the case studies can be improved with the assistance of international and regional enforcement mechanisms that attach directly or indirectly to the preeminent anti-trafficking instruments under exploration, as well as, through the national rapporteurs or equivalent mechanisms that operate within the domestic context to increase knowledge production and improve the compliance behaviours of their respective governments.

## **The Legal Mechanisms of Enforcement of the Legal Framework of Sex Trafficking: A Critical Appraisal of their Functions and Powers**

### **4.1. Introduction**

States have legal obligations to implement into their domestic legal systems the provisions of the international and European anti-trafficking instruments to which they are party, in order to realise the minimum standards around prevention, prosecution, and protection that will facilitate cooperation. However, states are not best placed to monitor national implementation because of their narrow self-interests in complying with their international and European obligations as evidenced in chapter 2, by way of example of the case studies. Moreover, it is at the stage of implementation that the systemic challenges identified in the previous chapter in relation to ambiguous definitions and concepts around the trafficking problem can be remedied. It follows that mechanisms of enforcement with the authority to maintain states in the implementation process towards compliance can most appropriately assist states in attaining those minimum standards. For this, enforcement mechanisms must have a legal mandate to monitor and report on national implementation, with clearly defined tools of enforcement to allow those mechanisms to collect and analyse the necessary information directly from states and other stakeholders. In particular, NGOs that typically come into contact with trafficking victims and subsequently have an increased understanding about the practical effects of national anti-trafficking policies. Moreover, those mechanisms should be sufficiently independent to determine their own working methods. Since increased independence raises the credibility of their work and, in turn, the authority and respect that national implementation of their recommendations demands.

However, as this chapter illustrates states intentionally design enforcement mechanisms with noncoercive enforcement tools so that they remain in control of what information is transmitted to those mechanisms and, in turn, which policy matters around the trafficking problem become the subject of international scrutiny. There is an instinctive benefit to generating compliance using a high level of intrusiveness on state sovereignty as the most

revered principle of the consent-based system of international and European law, since mechanisms that are more intrusive are better at generating sovereignty costs for noncompliance.<sup>714</sup> However, scholars have different understandings about the sovereignty costs that effectuate compliance, including where appropriate the obligation of states to report on national implementation measures and respond to information requests by enforcement mechanisms. Hathaway argues that good international citizenship generates compliance but that there are no effective sovereignty costs for noncompliant states that ‘are likely to receive an expressive benefit regardless of their actual practices’.<sup>715</sup> US unilateralism in the field is an instructive example as the US continues to promote double standards, one for itself and another for other states, by largely ignoring its international anti-trafficking obligations but expecting other state parties to help it solve the global trafficking problem. To this end, a reputation for good policy, according to Koh, can provide democratic states with greater soft power to influence and persuade other governments.<sup>716</sup> While Hafner-Burton bolsters Hathaway’s reputation model by arguing that a good reputation for cooperation creates a perception of trustworthiness and opens avenues for cooperation in other foreign policy areas, such as trade and foreign investment.<sup>717</sup> Then, democratic states concerned about their reputation are more likely to accept the authority of enforcement mechanisms with intrusive enforcement tools as a credible signal of their intent to prevent and combat trafficking.

It follows that the enforcement mechanisms attaching directly or indirectly to the preeminent anti-trafficking instruments identified in chapter 2 can carry out monitoring and reporting of national anti-trafficking efforts using enforcement tools of varying intrusiveness. Intrusiveness is best understood using Abbott and Snidal’s definition of ‘legalisation’ based on the three dimensions of obligation, rule precision, and delegation.<sup>718</sup> In the context of enforcement mechanisms, this means that legally binding obligations that are precise or can be made precise and that delegate authority for interpreting and implementing the law are more likely to attract intrusive enforcement. While delegation is seen to monotonically increase from state reporting to individual complaints procedures to inquiry procedures to country visits. Thus, more extensive state obligations require more expansive enforcement mandates, and

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<sup>714</sup> EM Hafner-Burton, ED Mansfield and JCW Pevehouse, ‘Human Rights Institutions, Sovereignty Costs and Democratization’ (2015) 45(1) *British Journal of Political Science* 1, 1.

<sup>715</sup> Hathaway (n 569) 2011.

<sup>716</sup> Harold H Koh, ‘On American Exceptionalism’ (2003) 55(5) *Stanford Law Review* 1479, 1500-1501.

<sup>717</sup> Emilie M Hafner-Burton, ‘International Regimes for Human Rights’ (2012) 15 *Annual Review of Political Science* 265, 278.

<sup>718</sup> Abbott and Snidal (n 537) 421-422.

noncompliance of more precise rules are more easily detectable. This means that the UN Trafficking Protocol with its lower minimum standards for prevention, prosecution, and protection will provide its Conference of the Parties (COP) with a narrower mandate than the Special Rapporteur on Trafficking in Persons, especially Women and Children (SRTIP), whose mandate covers more expansively the human rights protection of trafficking victims under international human rights law. The greater delegation of authority to the SRTIP also attracts a greater set of enforcement tools that will be more intrusive to more easily detect noncompliance, in particular, because rule specificity remains a challenge with the preeminent anti-trafficking instruments.

The level of intrusiveness of the enforcement mechanisms developed by states to monitor and report on national implementation of anti-trafficking norms and standards forms the basis of this chapter. Section 4.2 examines four international enforcement mechanisms, namely the COP that directly attaches to the UN Trafficking Protocol, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) that directly attaches to the CEDAW and its Optional Protocol, the SRTIP that indirectly attaches to both the Protocol and the CEDAW, as well as, the Trafficking Principles and Guidelines, and the Office to Monitor and Combat Trafficking in Persons (TIP Office) that directly attaches to the TVPA. The TIP Office is placed within the international examination despite being a purely domestic enforcement mechanism because it is often perceived as the *de facto* treaty-monitoring body of the UN Trafficking Protocol. Section 4.3 analyses two European enforcement mechanisms, namely the bipartite mechanism composed of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, which directly attach to the COE Trafficking Convention, and the European Commission that directly attaches to the EU Trafficking Directive. Even though the Commission is responsible for overall enforcement of EU law. Section 4.4 evaluates six national enforcement mechanisms, namely the national rapporteur or equivalent mechanism (NREM) in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden. The comparability of those enforcement mechanisms is facilitated by four key features, namely the scope of mandate, the degree of independence and accountability of office, the availability of adequate resources, and the extent of cooperation with NGOs. The scope of mandate reveals the level of intrusiveness. While the degree of independence and accountability, the adequacy of resources, and the extent of NGO cooperation indicate whether that level of intrusiveness is appropriate for effective enforcement. Finally, the core conclusions of this chapter are laid out in section 3.5.



## 4.2. International Responses

The section begins by comparing the scope of the mandates of the COP, the CEDAW Committee, the SRTIP, and the TIP Office, followed in sections 4.2.2 to 4.2.4 by a closer examination of the degree of independence and accountability of their offices, the adequacy of their resources, and the extent of NGO cooperation respectively. The four preliminary conclusions to this core section are laid out in section 4.2.5.

### 4.2.1. Mandates of the COP, the CEDAW Committee, the SRTIP, and the TIP Office

In the international examination, only the mandate of the CEDAW Committee deals more broadly with women's human rights issues, including trafficking in women as a form of gender-based discrimination.<sup>719</sup> This means that trafficking can be considered by the Committee in relation to other relevant provisions, such as article 5(a) of the CEDAW on the elimination of prejudices, customs, and practices that discriminate against women. As the disadvantaged position of women in society makes women more susceptible to trafficking. While the mandates of the COP,<sup>720</sup> the SRTIP,<sup>721</sup> and the TIP Office<sup>722</sup> focus explicitly on trafficking in persons as defined in the UN Trafficking Protocol, or in the specific case of the TIP Office as laid down by the TVPA.

As mentioned already, there are substantial differences in the definitions found in both instruments, not least because the TVPA defines as 'severe forms of trafficking' only forced prostitution, involuntary servitude, peonage, debt bondage, and slavery.<sup>723</sup> There is, for example, no mention of the removal of organs that is included in the Protocol's definition as a minimum, or the possibility of expanding the TVPA's definition to include additional forms of exploitation. While the TVPA perhaps adequately addresses the domestic trafficking situation in the US, its trafficking definition is too narrow for a mechanism that purports to be the de facto treaty-monitoring body of the Protocol.<sup>724</sup> As the Protocol remains without an effective review mechanism and the COP and its supplementary working groups, including the working group on the Trafficking Protocol, are not considered adequate for the review purpose.<sup>725</sup> In

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<sup>719</sup> CEDAW (n 45) art 17.

<sup>720</sup> UNCTOC (n 14) art 32. See also COP (2004) (n 556) decision 1/5(a).

<sup>721</sup> UNGA Res 35/5 (10 July 2017) UN Doc A/HRC/RES/35/5.

<sup>722</sup> TVPA (n 47) s 105(e).

<sup>723</sup> *ibid* s 103(8).

<sup>724</sup> Allain (2013) (n 5) 360.

<sup>725</sup> See UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime (2014) (n 48) para 3.

particular, the TVPA's narrow definition limits the scope of the TIP Office's mandate. Even though more recent TIP Reports mention the criminalisation of forms other than sexual and labour exploitation by reviewed states, including organ removal.<sup>726</sup> But it remains that their compliance assessment by the TIP Office is not affected by the criminalisation of additional forms. As assessment revolves around a predefined set of four minimum standards on the prohibition of trafficking and the punishment of trafficking offences that are commensurate to the gravity of the trafficking act and sufficiently stringent to deter traffickers and reflect the heinous nature of trafficking offences.<sup>727</sup> Whether governments make 'serious and sustained efforts' to eliminate severe forms of trafficking is determined against 12 criteria, asking whether the government vigorously investigates and prosecutes trafficking, with the cooperation of other states and convicts and sentences traffickers, including public officials, or extradites traffickers upon request, protects victims and encourages their assistance in investigations and prosecutions, prevents trafficking by raising awareness and educating the public, and systematically monitors domestic situations, including migration patterns, and makes publically available periodic assessments that demonstrate appreciable progress in eliminating trafficking.<sup>728</sup>

As part of their serious and sustained efforts, the TIP Office assesses whether governments have reduced the demand for 'commercial sex acts' defined as any sex act for which 'anything of value is given to or received by any person'.<sup>729</sup> Thus, drawing an intrinsic link between the demand for prostitution and increases in sexual exploitation. This is problematic because states determine for themselves the most appropriate measures to discourage the demand for sexual services provided by trafficking victims,<sup>730</sup> and as seen in relation to, for example, the Dutch response demand can be discouraged while maintaining a distinction between forced and consensual prostitution based on stringent state regulation of the legalised sex industry.

It is also observed that certain TVPA criteria, such as whether the percentage of foreign victims within the territory of the reviewed state is 'insignificant' or the state achieves 'appreciable progress' compared to the previous assessment year, are largely subjective and do not yield accurate assessments of states' anti-trafficking efforts.<sup>731</sup> Moreover, there is no legal

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<sup>726</sup> See TIP Office (2017) (n 28).

<sup>727</sup> TVPA (n 47) s 108(a).

<sup>728</sup> *ibid* s 108(b)

<sup>729</sup> *ibid* s 103(3).

<sup>730</sup> See UN Trafficking Protocol (n 1) art 9(5).

<sup>731</sup> TVPRA 2003 (n 47) s 6(d)(3).

obligation for states to provide the necessary information for accurate assessments and in its absence the TVPA dictates that the TIP Office shall presume that those efforts do not meet the minimum standards.<sup>732</sup> This is also problematic because a negative assessment influences the ranking of the uncooperative state as all reviewed states are ranked into one of four ‘tiers’ of compliance with the TVPA’s minimum standards.

By contrast, the formal mechanisms of international enforcement, whether the COP, the SRTIP, and the CEDAW Committee, abstain from ranking state compliance with international anti-trafficking norms and standards. Instead, these mechanisms rely on constructive dialoguing with state parties, since the primary objective of review of national implementation is not to condone noncompliance but to assist the state in improving its compliance behaviour, such as through the provision of technical assistance.<sup>733</sup> It is debatable whether state compliance is more effectively ensured through rankings that threaten to name and shame noncompliant states and tarnish their international reputations for cooperation, or through constructive dialoguing with state parties once the enforcement mechanism has reviewed the state report outlining the implementation measures, such as the programmes, plans, and practices, as well as, the legislative and administrative measures.<sup>734</sup> In the former case, the decision power rests with one single state, namely the US, and states have no means of challenging their rankings. In the latter case, the decision power remains in the hands of state parties that decide how much information to provide to the enforcement mechanism and whether to implement the mechanism’s recommendations, with a view to improving compliance. In particular, as the latter mechanisms have no coercive enforcement powers. This is an important reason behind the use of naming and shaming tools without any form of ranking by, for example, the SRTIP.

As part of the special procedures of the Human Rights Council (HRC), the SRTIP is mandated to examine the impact of national, regional, and international anti-trafficking measures on the human rights of victims, and in this connection to make recommendations on practical solutions.<sup>735</sup> The mandate focuses on the human rights dimension of the trafficking problem and as the mandate is not directly attached to a specific anti-trafficking instrument, the SRTIP can draw on an array of human rights norms, most importantly, those found in the Trafficking Principles and Guidelines, the UN Trafficking Protocol, the CEDAW, and the

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<sup>732</sup> *ibid* ss 6(d)(1)(B), 6(d)(2)(B).

<sup>733</sup> See UNCTOC (n 14) art 32(3)(a).

<sup>734</sup> See *ibid* art 32(5). See also CEDAW (n 45) art 18(1).

<sup>735</sup> UNGA Res 26/8 (17 July 2014) UN Doc A/HRC/RES/26/8 paras 2(e)-(f)

conventions of the International Labour Organization.<sup>736</sup> The specific mention of the CEDAW in the SRTIP's mandate links its work to that of the CEDAW Committee where the mandate applies specifically to the state parties to the CEDAW.

While the mandates of the COP and the CEDAW Committee apply only to state parties to the UNCTOC and by extension to the UN Trafficking Protocol, as well as, the CEDAW respectively, the mandates of the SRTIP apply to all UN member states because it is a UN Charter-based mechanism and of the TIP Office to currently 188 states around the globe. This means that the SRTIP and the TIP Office can at least examine the impact of anti-trafficking efforts of the 20 non-signatories to the UN Trafficking Protocol.<sup>737</sup> Five of those states, namely Comoros, the Republic of Congo, Iran, Korea (DPRK), and South Sudan, according to the TIP Office, are not making serious and sustained efforts to eliminate trafficking and protect victims.<sup>738</sup> Another four states, including Bangladesh and Pakistan, are currently on the TIP Office's watch list for making significant efforts but failing to provide evidence of increasing efforts compared to the previous annual assessment.<sup>739</sup>

In 2010, the SRTIP had sent two separate letters of allegation of human rights violations to Bangladesh and Pakistan. The letter to Bangladesh concerned the alleged trafficking of children for bonded labour in the Indian mining industry,<sup>740</sup> while the letter to Pakistan sought clarification on the status of compensation claims of former child camel jockeys trafficked to the United Arab Emirates.<sup>741</sup> However, in both cases the respective governments did not respond to the allegations, even though the Bangladeshi government at least acknowledged that the communication was forwarded to the concerned authority for inquiry and action.<sup>742</sup> In some cases, the very fact that the matter is brought to international attention can deter governments from taking questionable action.<sup>743</sup> It follows that the SRTIP's mandate in addition to the review of national anti-trafficking efforts provides for the request, receipt, and exchange of information from inter alia governments, treaty bodies, special procedures, NGOs, and trafficking victims or their representatives.<sup>744</sup>

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<sup>736</sup> See *ibid* preamble.

<sup>737</sup> TIP Office (2017) (n 28) 13.

<sup>738</sup> *ibid* 46.

<sup>739</sup> *ibid* 80, 311.

<sup>740</sup> UNHRC 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (17 May 2011) UN Doc A/HRC/17/35/Add.1 para 8.

<sup>741</sup> UNHRC 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (31 May 2010) UN Doc A/HRC/14/32/Add.1 para 60.

<sup>742</sup> UNHRC (2011) (n 740) para 13.

<sup>743</sup> See Surya P Subedi, 'Life as a UN Special Rapporteur' (Public Lecture, Leeds, May 2015) 9.

<sup>744</sup> UNGA (2014) (n 735) para 2(g).

Under the CEDAW's Optional Protocol, the CEDAW Committee also has capacity to receive and consider individual communications of CEDAW violations, as well as, to inquire about grave or systematic violations of CEDAW's provisions by state parties to the Optional Protocol.<sup>745</sup> However, not every state party to the CEDAW is a party to the Protocol, and several major states, such as the US because its ratification of the CEDAW is pending, do not grant women the benefits of the individual communications and inquiry procedures. Even though the procedures are underutilised. In particular, the individual communications procedure is subject to burdensome admissibility requirements, not least the exhaustion of domestic remedies, concerning a matter not already examined by the CEDAW Committee or another international body, sufficiently substantiated, and, most importantly, refers to facts occurring after the entry into force of the Optional Protocol for the state party concerned.<sup>746</sup>

So far, the CEDAW Committee has considered two communications on trafficking, both for the sexual exploitation of a Chinese and a Mongolian national, and both against the Netherlands for denying their asylum claims. In the first communication, in 2007, the majority of the Committee members found that the Chinese applicant had failed to exhaust domestic remedies by not applying for residency as a trafficking victim, or raising a violation of article 6 of the CEDAW before domestic authorities.<sup>747</sup> Additionally, the application for judicial review of her asylum claim based on special circumstances was pending. However, the dissenting opinion of three members observed that asylum and residency proceedings were irrelevant to the present communication on trafficking, and that the Netherlands had an obligation to exercise due diligence to protect victims with early identification.<sup>748</sup> In particular, as there were numerous signs of trafficking in the applicant's interviews and reports. The members underlined the particular vulnerability of trafficking victims, and in the specific case the applicant's illiteracy that impeded her ability to precisely report on her situation.<sup>749</sup>

In the second communication, in 2012, the CEDAW Committee concluded that the Mongolian applicant had failed to sufficiently substantiate the trafficking claims.<sup>750</sup> However, on the issue of extraterritoriality and the alleged risks to the applicant upon return to Mongolia, the Committee clarified that a state party taking a decision relating to a person within its

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<sup>745</sup> Optional Protocol (n 199) arts 2, 8.

<sup>746</sup> *ibid* art 4.

<sup>747</sup> UN Committee for the Elimination of All Forms of Discrimination against Women 'Communication No 15/2007, *Zhen Zhen Zheng v The Netherlands*' (26 October 2009) UN Doc CEDAW/C/42/D/15/2007 para 7.3.

<sup>748</sup> *ibid* para 8.1.

<sup>749</sup> *ibid* paras 8.6-8.7.

<sup>750</sup> UN Committee for the Elimination of All Forms of Discrimination against Women 'Communication No 39/2012, *N v The Netherlands*' (12 March 2014) UN Doc CEDAW/C/57/D/39/2012 para 6.7.

jurisdiction could itself violate the CEDAW if the necessary and foreseeable consequence is that that person's CEDAW rights will be violated in another jurisdiction, although the consequence would not occur until later.<sup>751</sup> This means that the CEDAW applies to both citizens and non-citizens, even if not situated within the territory.

Finally, the SRTIP's mandate additionally allows country visits to explore trafficking situations in situ, with the consent of the concerned state.<sup>752</sup> Country visits form an important part of the SRTIP's fact-finding mission and the HRC attaches great importance to recommendations based on country visits due to their potential to improve governments' policy-making.<sup>753</sup> Yet, they are infrequent due to financial restrictions and, thus, tend to focus on states with severe trafficking situations based on information in the individual communications. For this reason, no country visits have been undertaken in the case studies. During her visit to the US, in 2016, the SRTIP observed inter alia how US migration policies and the criminalisation of prostitution contributed to the vulnerabilities of trafficking victims as the non-prosecution principle for criminal activities committed as part of their trafficking was not being implemented systemically.<sup>754</sup> According to the SRTIP, a human rights-based approach 'necessarily includes the decriminalization' of prostitution so that trafficking victims can report their situation without fear of arrest, prosecution, or deportation as often happens.<sup>755</sup> The SRTIP, thus, draws an intrinsic link between the identification of sex trafficking victims and the decriminalisation of prostitution.

#### **4.2.2. Independence and Accountability of the COP, the CEDAW Committee, the SRTIP, and the TIP Office**

Most UN treaties are self-enforcing and rely on state parties themselves or the international community to uphold international cooperation. The process promotes self-reporting and ensures that implementation and its review remain in the hands of state parties. The review of implementation of the UNCTOC regime, including the UN Trafficking Protocol was a time-consuming and delicate matter during negotiations, in particular, as the UNCTOC was regarded

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<sup>751</sup> *ibid* para 8.10.

<sup>752</sup> UNGA (2014) (n 735) para 3.

<sup>753</sup> See UNCHR 'Report on the twenty-first annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council, including updated information on the special procedures' (2015) UN Doc A/HRC/28/41 para 84.

<sup>754</sup> UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children on her mission to the United States of America' (7 June 2017) UN Doc A/HRC/35/37/Add.2 para 85.

<sup>755</sup> *ibid* para 42.

as the centrepiece of a new global strategy against organised crime in a globalised economy.<sup>756</sup> Several states were wary of international monitoring, in particular, monitoring through intrusive practices that could threaten the principles of sovereign equality, territorial integrity, and non-interference in domestic affairs.<sup>757</sup> Another concern was the possibility of making state reports widely available to the public as this would subject states to greater scrutiny and there was a legitimate concern over the sensitivity of certain information in relation to ongoing investigations.<sup>758</sup> Thus, the COP aims to improve state compliance through political dialogues that clarify definitions and obligations, rather than scrutinise noncompliance or incorrect compliance with international anti-trafficking norms.

Even though the CEDAW Committee and the SRTIP are independent by nature their review functions entail an element of political dialoguing with states because they depend upon state cooperation to improve human rights practices domestically.<sup>759</sup> In fact, constructive dialogues have become necessary because of the wide margin of discretion granted to states in implementing their international obligations, which can lead to different understandings about state obligations, in particular, where those are qualified. The constructive dialoguing between the concerned state and the enforcement mechanism also provides states with an opportunity to clarify gaps in the knowledge base of the mechanism and challenge any of its conclusions and recommendations. For example, the CEDAW Committee argues that ‘positive appraisal by the Committee gives impetus to further progress, and an adverse assessment provides incentive to future action’.<sup>760</sup> Since noncompliance typically relates to technical incapacities, rather than a sheer unwillingness to adhere to commitments. As Simmons argues, ‘[n]o rational government would pay a high “down payment” on a cooperative enterprise if it did not intend to abide by the agreement.’<sup>761</sup>

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<sup>756</sup> UNGA ‘Report of the Informal Preparatory Meeting of the Open-Ended Intergovernmental Ad Hoc Committee on the Elaboration of a Comprehensive International Convention against Organised Transnational Crime, Held at Buenos Aires from 31 August to 4 September 1998’ (14 December 1998) 1<sup>st</sup> Session (1999) UN Doc A/AC.254/3 para 14.

<sup>757</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Relaunching the Conference of the Parties’ (4 October 2006) UN Doc CTOC/COP/2006/10 para 1.

<sup>758</sup> UNODC (2006) (n 100) 270.

<sup>759</sup> For a discussion on the tension between the independence of mandate-holders of the special procedures to determine their programme of work and their obligation to treat reviewed states as partners and adversaries, see Joanna Naples-Mitchell, ‘Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights’ (2011) 15(2) *International Journal of Human Rights* 232.

<sup>760</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘Report on Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women’ (21 June 1995) UN Doc A/CONF.177/7 para 56.

<sup>761</sup> Simmons (n 38) 119.

A perceived benefit of the composition of the CEDAW Committee is that the vast majority of members are women and only five men have served so far.<sup>762</sup> As Hodson rightly argues, a Committee headed by women decision-makers certainly adds to a perception that women are in control of upholding their human rights.<sup>763</sup> This is important because it tips the typical gender ‘balance’ of international institutions in favour of female members and addresses the typical silencing of women’s voices in international law. Moreover, the appointment of independent experts with ‘high moral standing and competence in the field’ allows the Committee to engage favourably in all spheres of a woman’s life.<sup>764</sup> Since Committee members have different professions, including lawyers, doctors, politicians, psychologists, economists, sociologists, educationalists, and diplomats, while the vast majority of members of other human rights enforcement mechanisms are typically lawyers so that reporting does not often transcend the limits of formal legalism.<sup>765</sup>

States are especially wary of review by human rights enforcement mechanisms with independent experts, in particular, by the special procedures where state consent is irrelevant for monitoring domestic realities. Since respect for human rights positively affects a state’s international reputation, which infers respect for treaty commitments. Thus, any criticism of the state’s ability to respect human rights can tarnish its international reputation for cooperation. Based on the high expectation on the special procedures to shine the spotlight on domestic human rights situations, they have had a formidable task of acting as ‘a human rights activist, a rallying point for human rights, an international diplomat, an academic, and a government adviser’.<sup>766</sup> However, this also makes them the target of stronger concerted criticism, compared to treaty-based enforcement mechanisms that monitor fewer states and have flexible decision-making.<sup>767</sup> It follows that the HRC has adopted a manual of operations<sup>768</sup> and states have developed a code of conduct<sup>769</sup> to guarantee independence, impartiality,

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<sup>762</sup> See generally list of membership of the CEDAW Committee since 1982 <[http://www.ohchr.org/Documents/HRBodies/CEDAW/Membership\\_1982\\_Present.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Membership_1982_Present.pdf)> accessed 27 January 2017.

<sup>763</sup> Hodson (n 522) 561.

<sup>764</sup> CEDAW (n 45) art 17(1).

<sup>765</sup> See generally (n 762).

<sup>766</sup> Surya P Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33(1) *Human Rights Quarterly* 201, 212.

<sup>767</sup> Michael Kirby, ‘UN Special Procedures: Reflections on the Office of UN Special Representative for Human Rights in Cambodia’ (2010) 11(2) *Melbourne Journal of International Law* 491, 492.

<sup>768</sup> ‘Manual of Operations of the Special Procedures of the Human Rights Council’ (*OHCHR*, August 2008) <[http://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf)> accessed 29 January 2017 (Manual of Operations).

<sup>769</sup> UNGA ‘Report to the General Assembly on the fifth session of the Council’ (7 August 2007) UN Doc A/HRC/5/21 (Code of Conduct) para 39.



objectivity, and personal integrity of the special procedures, which, in turn, affords the findings of the special procedures greater credibility. Moreover, since 2008, the practices and working methods of the special procedures are reviewed through a self-regulatory Internal Advisory Procedure that allows different stakeholders, including states, to raise issues around operation and conduct before the Coordination Committee.<sup>770</sup> Yet, even with these tools in place to ensure that the special procedures are acting in good faith and on the basis of information received, their work is criticised as selective or political motivated.<sup>771</sup> At the same time, the special procedures criticise the state-imposed code of conduct as a means of stifling monitoring and opposing the creation of any compliance mechanism.<sup>772</sup> One can see the possibility of partiality when the decision-making power rests solely with one mandate-holder. This is partly offset in committees composed of independent experts where their rules of procedure prefer that decisions are reached by consensus.<sup>773</sup> In this case, the experts can exercise what Alston refers to as peer accountability.<sup>774</sup> While the second component of peer accountability, namely the public, is already engaged through the public accessibility of reports.

The independence and accountability concerns of the TIP Office are distinct as it is adopted outside the formal process of international law, which already calls into question the possibility of unilaterally developed and applied anti-trafficking standards to hold foreign states accountable. Scholars and the media have already exposed the political nature of reporting by the TIP Office and as regularly happens the possibility of the Interagency Task Force to change the rankings determined by the TIP Office for political motivations.<sup>775</sup> Thus, there is an increased pressure on the Office, at least, to improve the methodology of data collection and analysis used for review purposes. In particular, as no sources are cited to support the credibility of collected information.<sup>776</sup> That states view reporting under the TIP Report and the associated

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<sup>770</sup> UNCHR 'Report on the fifteenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Council, held in Geneva from 23 to 27 June 2008' (2008) UN Doc A/HRC/10/24 annex III.

<sup>771</sup> Subedi (n 766) 220.

<sup>772</sup> Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?' (2011) 52(2) *Harvard International Law Journal* 561, 563-564.

<sup>773</sup> UN Committee on the Elimination of Discrimination against Women 'Rules of Procedure of the Committee on the Elimination of Discrimination against Women' in 'Note by the Secretariat, Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies' (28 May 2008) UN Doc HRI/GEN/3/Rev.3 (CEDAW Committee Rules of Procedure) rule 31(1).

<sup>774</sup> Alston (n 772) 579.

<sup>775</sup> Jason Szep and Matt Spetalnick, 'Special Report: State Department Watered down Human Trafficking Report' (*Reuters*, 3 August 2015) <<http://www.reuters.com/article/us-usa-humantrafficking-disputes-special-idUSKCN0Q821Y20150803>> accessed 11 November 2016.

<sup>776</sup> Ashley Feasley, 'Time for a Tune-up: Retooling the 2012 TIP Report in Order to Better Meet International Legal Research Standards' (2013) 25 *Florida Journal of International Law* 5, 8.

ranking system of the TIP Office as a threat to the principle of non-interference in domestic affairs is deduced from the specific mention of non-ranking and non-punitiveness in the principles and characteristics that the future enforcement mechanism under the UNCTOC should possess.<sup>777</sup> A similar sentiment encouraged NGOs to submit a joint statement to the COP that any future enforcement mechanism ‘must be non-punitive, non-adversarial, non-conditional and non-ranking’.<sup>778</sup> As Gallagher observes, the NGOs in this statement would have been more receptive to the idea of rigorous monitoring had it not been for the negative experiences of the US mechanism.<sup>779</sup>

#### **4.2.3. Adequate Resources for the COP, the CEDAW Committee, the SRTIP, and the TIP Office**

The inadequacy of resources, whether financial or administrative, is a serious impediment to the proper functioning of the international enforcement mechanisms. The necessary information for review purposes is collected through the secretariats of the COP<sup>780</sup> and the CEDAW,<sup>781</sup> namely the UNODC and the OHCHR respectively. The OHCHR also supports the work of the SRTIP, and the Special Procedures Division manages operational and administrative tasks, including research and analytical work, as well as, the transmission of information requests based on the SRTIP’s questionnaires to key actors in the field.<sup>782</sup> Moreover, the communications and urgent appeals sent by the SRTIP are managed through a central database for the special procedures.<sup>783</sup> As the SRTIP frequently sends joint communications with the Special Rapporteurs on violence against women, its causes and consequences,<sup>784</sup> on the sale and sexual exploitation of children, including child prostitution,

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<sup>777</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its eighth session, held in Vienna from 17 to 21 October 2016’ (7 November 2016) UN Doc CTOC/COP/2016/15 resolution 8/2 paras 3(b), (f).

<sup>778</sup> GAATW and others, ‘Statement on a monitoring mechanism for the United Nations Convention against Transnational Organized Crime and each of the protocols thereto with specific attention to the Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Human Trafficking Protocol)’ (GAATW, 13 October 2008) <[http://www.gaatw.org/statements/Statement\\_on\\_a\\_Monitoring\\_Mechanism-COPS08.pdf](http://www.gaatw.org/statements/Statement_on_a_Monitoring_Mechanism-COPS08.pdf)> accessed 24 February 2017.

<sup>779</sup> Gallagher (2011) (n 93) 391-392.

<sup>780</sup> UNCTOC (n 14) art 33.

<sup>781</sup> CEDAW Committee (2008) (n 773) rule 21.

<sup>782</sup> Manual of Operations (n 768) para 21.

<sup>783</sup> *ibid* para 31.

<sup>784</sup> UNGA Res 32/19 (19 July 2016) UN Doc A/HRC/RES/32/19 para 18.

child pornography and other child sexual abuse material,<sup>785</sup> and on the human rights of migrants.<sup>786</sup>

States have a reporting obligation only in relation to the UNCTOC and by extension to the UN Trafficking Protocol, as well as, the CEDAW. Under article 32(5) of the UNCTOC, state parties report to the COP on ‘programmes, plans and practices, as well as legislative and administrative measures’ taken to implement the UNCTOC provisions. Similarly, under article 18(1) of the CEDAW, state parties report on ‘legislative, judicial, administrative or other measures’ adopted to implement the CEDAW. The CEDAW additionally requires information on ‘progress made’ and the ‘factors and difficulties’ encountered.<sup>787</sup> However, both the reporting periodicity and methodology for collecting information by the COP and the CEDAW Committee are different. State reports under the CEDAW are submitted once every four years,<sup>788</sup> and under the UNCTOC as required by the COP.<sup>789</sup> In addition to state reports, the COP gathers information through tools and resources developed by the UNODC that acts as its secretariat. Initially, information was acquired through lengthy questionnaires and states that were parties to more than one additional protocol would complain of a reporting fatigue because there was a questionnaire for each instrument and the questions were complicated so that they could not be completed without the coordinated efforts of national authorities.<sup>790</sup> Thus, in 2008, the questionnaires were upgraded to a user-friendly online platform with shorter questions and the possibility for multiple authorities to work simultaneously on different parts of the questionnaire, with a view to enhancing coordination.<sup>791</sup> Additionally, in 2008, the COP established as supplementary review mechanisms six working groups dealing with specific areas of the COP’s work, including a working group on the UN Trafficking Protocol,<sup>792</sup> which forms a permanent component of the COP since 2014.<sup>793</sup> As a result of the growing ratification

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<sup>785</sup> UNGA Res 34/16 (6 April 2017) UN Doc A/HRC/RES/34/16 para 32.

<sup>786</sup> UNGA Res 34/21 (7 April 2017) UN Doc A/HRC/RES/34/21 para 3.

<sup>787</sup> CEDAW (n 45) art 18.

<sup>788</sup> *ibid* art 18(1)(b).

<sup>789</sup> UNCTOC (n 14) art 32(5).

<sup>790</sup> COP (2006) (n 757) para 13.

<sup>791</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report of the Secretariat on Development of tools to gather information from States on the implementation of the United Nations Convention against Transnational Organized Crime and each of the Protocols thereto’ (25 July 2008) UN Doc CTOC/COP/2008/2 para 12.

<sup>792</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008’ (1 December 2008) UN Doc CTOC/COP/2008/19 decision 4/4 para n.

<sup>793</sup> COP (2014) (n 48) resolution 7/1 para 6.

of the Protocol and the increased need for assistance in reviewing implementation, which will progress from a less complicated ‘horizontal’ review to a more demanding ‘vertical’ review.

Review of implementation of the CEDAW is more elaborate than that of the UNCTOC framework, with five reporting stages from the preparation of state reports at the national level to their consideration at the international level in a public meeting through constructive dialogue with the concerned state party.<sup>794</sup> States have at least four years to submit to the CEDAW Committee a report on the implementation measures. In relation to the case studies, only the Czech Republic submits reports on average every four years, while Belgium, Finland, the Netherlands, Romania, and Sweden submit their reports on average every five years.<sup>795</sup> With the exception of the Netherlands, these states have submitted on at least one occasion a combined report comprising two overdue reports.<sup>796</sup> This provision helps to clear the backlog of overdue state party reports, while at the same time maintaining consistency of the periodic reporting procedure.<sup>797</sup> Yet, in cases of chronic under-reporting and late reporting the CEDAW Committee can but include a reference to this effect in its annual report to the General Assembly.<sup>798</sup>

In fact, late and underreporting are perennial problems to international enforcement mechanisms because every UN member state is party to more than one international legal instrument. Even states that have technical capacity and political will to enforce their international obligations may find the reporting obligations to be burdensome, in particular, if a number of reports are due around the same time. Thus, the reasons for late and underreporting are manifold, including human, administrative, and technical incapacities, as well as, different reporting obligations for each instrument. The revision of the human rights reporting system is instructive of the difficulties of state reporting, and the revised system eases reporting to multiple human rights instruments through a common core document and a treaty-specific document.<sup>799</sup> The former provides to enforcement mechanisms a comprehensive account of

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<sup>794</sup> CEDAW Committee Rules of Procedure (n 773) rules 48-55.

<sup>795</sup> See generally state party reports submitted to the CEDAW Committee <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=29)> accessed 27 January 2017.

<sup>796</sup> CEDAW Committee Rules of Procedure (n 773) rule 49(3).

<sup>797</sup> See also the CEDAW Committee’s simplified reporting procedure for the submission of overdue state party reports as from 2015. UNGA ‘Report of the Committee on the Elimination of Discrimination against Women’ (2014) GAOR 58<sup>th</sup> Session Supp 38 decision 58/II.

<sup>798</sup> CEDAW Committee Rules of Procedure (n 773) rule 49(2).

<sup>799</sup> UN Inter-Committee Technical Working Group ‘Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents’ (10 May 2006) UN Doc HRI/MC/2006/3.

general and factual information on implementation of international human rights instruments.<sup>800</sup> The latter reflects the need for specific treatment of the human rights issues contained in the relevant instrument, including the domestic situation *de jure* and *de facto*, as well as, statistical and comparable data, in a concise and structured manner.<sup>801</sup>

Another factor contributing to the backlog of state reports under the CEDAW Committee was the initially disadvantaged position of the Committee in terms of the length of annual sessions during which to consider state reports.<sup>802</sup> The length of sessions was only increased in 2010 so that the Committee can now hold three annual sessions of three weeks each, with a one-week pre-session working group for each session, as well as, three annual sessions of the Working Group on Communications under the Optional Protocol to the CEDAW.<sup>803</sup> Yet, the extension of meeting times has not mitigated the backlog of reports.<sup>804</sup>

The inadequacy of resources available to the SRTIP and the special procedures, in general, seriously impedes on its ability to examine national anti-trafficking efforts. In fact, the special procedures receive less than half a percent of the regular UN budget,<sup>805</sup> with the possibility of additionally receiving external funds.<sup>806</sup> The logistics behind the preparation of individual communications, particularly when these are jointly sent with other special rapporteurs, and the undertaking of country visits cannot be adequately addressed within the limited resources allocated to the SRTIP. As a special procedures mechanism, the SRTIP is not mandated to review state reports. Therefore, it relies almost exclusively on individual communications and country visits to collect information that is necessary for the preparation of thematic and country-specific reports. Thematic reports develop international anti-trafficking standards and promote awareness of poorly understood or new areas of concern, such as regional and sub-regional cooperation in promoting a human rights-based approach to trafficking.<sup>807</sup> Since the establishment of the mandate, the SRTIP has published nine thematic reports based on at least 227 government responses, 35 IGO responses, and 59 NGO

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<sup>800</sup> *ibid* para 27.

<sup>801</sup> *ibid* paras 25-26.

<sup>802</sup> CEDAW (n 45) art 20(1).

<sup>803</sup> UNGA 'Convention on the Elimination of All Forms of Discrimination against Women' (27 November 2007) UN Doc A/C.3/62/L.20/Rev.1 para 14.

<sup>804</sup> Hodson (n 522) 563.

<sup>805</sup> Ted Piccone, 'Human Rights Special Procedures: Determinants of Influence' (2014) 108 *Proceedings of the Annual Meeting (American Society of International Law)* 288, 289.

<sup>806</sup> UNHCR 'Report of the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council (Geneva, 8 to 12 June 2015), including updated information on the special procedures' (2016) UN Doc A/HRC/31/39 para 44.

<sup>807</sup> See UNHRC 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (4 May 2010) UN Doc A/HRC/14/32.

responses.<sup>808</sup> Country-specific reports provide an opportunity to gather information, expertise, and insight about the realities of domestic situations, whereupon the SRTIP can propose specific recommendations that have led to changes in migration policies, amendments to national laws, and improved cooperation with NGOs.<sup>809</sup> Since the establishment of the mandate, the SRTIP has undertaken 21 country visits, predominantly to the Western Asian region based on the highest number of communications sent regionally.<sup>810</sup> The SRTIP has also sent in total 99 communications that have garnered 54 full or partial responses from states, including communications to the Netherlands and Romania in 2006<sup>811</sup> and the Czech Republic in 2010.<sup>812</sup>

The TIP Office is currently staffed with 74 members who assist in the preparation of the TIP Report, in addition to political service officers within local embassies using an extensive questionnaire with a typical response deadline of three weeks.<sup>813</sup> In the initial years following its establishment, the TIP Office had no allocated resources and relied on assistance from staff of agencies represented on the Interagency Task Force to Monitor and Combat Trafficking on a non-reimbursable basis.<sup>814</sup> Since the TIP Report was seen as ‘wasteful, mismanaged, and duplicative’ of reporting in the Country Reports on Human Rights Practices that already monitored implementation of internationally recognised human rights.<sup>815</sup> Thus, it was thought more favourable to include within the Country Report a description of domestic and foreign trafficking situations, and to develop the capacities of existing offices, rather than set up the TIP Office.<sup>816</sup>

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<sup>808</sup> *ibid* para 28.

<sup>809</sup> UNHRC ‘Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo’ (1 April 2014) UN Doc A/HRC/26/37 para 29.

<sup>810</sup> *ibid* paras 30, 32.

<sup>811</sup> UNHRC ‘Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda’ (30 May 2007) UN Doc A/HRC/4/23/Add.1.

<sup>812</sup> UNHRC (2011) (n 740).

<sup>813</sup> David E Guinn, ‘Defining the Problem of Trafficking: The Interplay of US Law, Donor, and NGO Engagement and the Local Context in Latin America’ in Leonard Territo and George Kirkham (eds), *International Sex Trafficking of Women & Children: Understanding the Global Epidemic* (Looseleaf Law Publications Inc 2010) 77.

<sup>814</sup> TVPA (n 47) s 105(e).

<sup>815</sup> *ibid* s 104.

<sup>816</sup> Asif Efrat, *Governing Guns, Preventing Plunder: International Cooperation against Illicit Trade* (OUP 2012) 187.

#### 4.2.4. Cooperation between NGOs and the COP, the CEDAW Committee, the SRTIP, and the TIP Office

Given the inadequacy of financial and administrative resources to effectively carry out review of national anti-trafficking efforts, there is an increased presence of NGOs in the consultation processes of the enforcement mechanisms. The CEDAW Committee, for example, has a procedure for receiving shadow reports from NGOs,<sup>817</sup> and the SRTIP's mandate explicitly mentions cooperation with NGOs as part of gathering information.<sup>818</sup> NGOs are also critical to the SRTIP's understanding of the practical implementation of national anti-trafficking policies and to this end meets with NGOs during country visits. NGOs can also act as follow-up tools on the SRTIP's concrete recommendations in the country visit report. In particular, as the SRTIP's recommendations are not legally binding on visited states. A similar point can be made in relation to the recommendations of the CEDAW Committee in specific individual communications. For example, in the 2007 communication concerning the denial of an asylum claim by an alleged sex trafficking victim, the Committee members in their dissenting opinion recommended that the Netherlands determine whether the applicant was a trafficking victim and, therefore, entitled to protection benefits under article 6 of the UN Trafficking Protocol, to which it was a party.<sup>819</sup> NGOs can have an added-value in ensuring that this recommendation is followed-up by the Netherlands to protect the applicant from the risks of re-trafficking.

In relation to the review of state reports by the CEDAW Committee it is also important to note the added-value of shadow reports, particularly when the information provided by the state party is of inadequate quality for review purposes or the necessary information is unavailable. That the Committee includes in its general recommendations programme suggestions addressed to NGOs bolsters the added-value of NGOs in the implementation process of the CEDAW provisions. In turn, NGOs benefit through regular cooperation with the SRTIP and the CEDAW Committee from the use of appropriate human rights material prepared with their input and having international legal weight as part of its arsenal of advocacy tools.

The role of NGOs in developing anti-trafficking policies and assessing their practical effects is also recognised by states with the COP.<sup>820</sup> Through their regular participation in the

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<sup>817</sup> See UN Committee for the Elimination of All Forms of Discrimination against Women 'Results of the forty-fourth and forty-fifth sessions of the Committee on the Elimination of Discrimination against Women' (12 February 2010) UN Doc E/CN.6/2010/CRP.2 annex VII paras 5-7.

<sup>818</sup> UNGA (2014) (n 735) paras 2(g)-(h).

<sup>819</sup> CEDAW Committee (2009) (n 747) para 9.1(I).

<sup>820</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime

plenary meetings of the COP, NGOs can influence policy direction and bring to the attention of the COP any severe implementation challenges. Even though as observers in the plenary meetings, they can only make oral statements on questions relating to their activities.<sup>821</sup> Moreover, there was no initial consensus on the participation of NGOs in the meetings of the WGTIP, despite their recognised partner role in preventing and combating trafficking and protecting and assisting victims.<sup>822</sup> Such restriction reflects, in part, the longstanding battle of NGOs for access rights at UN-sponsored forums.<sup>823</sup> In fact, the extent of NGO involvement in the plenary meetings of the COP was a serious concern for states during the negotiations of the COP mechanism as NGO statements are recorded and publically available.<sup>824</sup> Thus, negative comments could undermine the political process of review under the COP.

There is a serious impediment to NGO cooperation in the context of the TIP Office as the Office's Director, who is responsible for all policy, funding and programming decisions over victim support funds, including coordination of anti-trafficking programmes of the Department of State,<sup>825</sup> restricts funding to NGOs that do not 'promote, support, or advocate the legalization or practice of prostitution', and requires that those make similar statements in their grant applications and/or agreements, also known as 'the anti-prostitution loyalty oath'.<sup>826</sup> As funded NGOs are restricted in the services they may provide to sex trafficking victims, this means that they are also less likely to come into contact with those victims for fear of repercussions. It is, in fact, observed by NGO workers in the field that the US government scrutinises and publicly accuses pro-sex work NGOs of trafficking women and girls, who, in turn, become the common target of 'a locally operated and internationally funded raid and rescue industry'.<sup>827</sup> Taking into account the SRTIP's argument in relation to the country visit to the US, the decriminalisation of prostitution is important for identifying sex trafficking victims so that they can receive protection and assistance, which alleviates the risks of further exploitation and/or re-trafficking.<sup>828</sup> Moreover, NGOs can be valuable sources of empirical research on service needs and the beneficial impact of health programmes offered to sex

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on its second session, held in Vienna from 10 to 21 October 2005' (1 December 2005) UN Doc CTOC/COP/2005/8 para 110.

<sup>821</sup> UNGA Draft rules of procedure for the Conference of the Parties to the United Nations Convention against Transnational Organized Crime UN Doc CTOC/COP/2004/3-A/AC.254/43 rule 17(3)(b).

<sup>822</sup> COP (2014) (n 48) para 42.

<sup>823</sup> José E Alvarez, *International Organizations as Law-makers* (OUP 2006) 340. See Oberleitner (n 498) 185.

<sup>824</sup> UNODC (2006) (n 100) 269.

<sup>825</sup> TVPRA 2008 (n 47) s 102(3).

<sup>826</sup> Ahmed and Seshu (n 218) 153.

<sup>827</sup> *ibid* 157.

<sup>828</sup> UNHRC (2017) (n 754) para 42.



trafficking victims. After all, that NGOs provide information on the practical effects of national anti-trafficking policies in relation to the international anti-trafficking instruments is a primary reason behind encouraging their involvement in the review processes of international enforcement mechanisms.

#### **4.2.5. Preliminary Conclusions**

The international study draws four preliminary conclusions. First, the mechanisms established within the UN's human rights system, namely the CEDAW Committee and the SRTIP, have broader mandates compared to the COP and the TIP Office, which primarily focus on monitoring and reporting on national anti-trafficking efforts. This means the four enforcement mechanisms are mandated at a minimum to monitor and report on the national implementation of international anti-trafficking norms and standards. While the CEDAW Committee and the SRTIP also consider individual complaints and inquiries about human rights violations, and the SRTIP additionally undertakes country visits. Second, then, an enforcement mechanism with a broad mandate is perceived as more independent because it has more enforcement tools, such as the individual complaints and inquiry procedures, and country visits, to make informed conclusions on national implementation. This also means an independent mechanism should be more accountable to provide objective assessments and to promote consistency with other independent enforcement mechanisms. Even though accountability measures, such as the state-imposed code of conduct that applies to the SRTIP, remind that state sovereignty remains the cornerstone of international regulation. Third, the inadequacy of financial and human resources is a common challenge for the four mechanisms and a determining factor of their effectiveness. While the four mechanisms appear to work around the resource challenge by establishing supplementary mechanisms, such as the COP's WGTIP, increasing the length of annual sessions, such as in relation to the CEDAW Committee, or cooperating with other mechanisms, such as the joint communications sent by the SRTIP and other special rapporteurs. The cooperation with NGOs can also mitigate the resource challenge as information shared by NGOs contributes to the knowledge base of the enforcement mechanisms and their ability to better monitor and report on national implementation. Thus, fourth, the four mechanisms cooperate with NGOs to request, receive, or exchange information. Even though NGOs providing services to sex workers are less likely to share information on sexual exploitation with the TIP Office because of the anti-prostitution loyalty oath.

### 4.3. European Responses

In light of the four features around mandate, independence and accountability, resources, and NGO cooperation, sections 4.3.1 to 4.3.4 respectively compare the bipartite mechanism composed of GRETA and the Committee of the Parties, as well as, the European Commission. The four preliminary conclusions to this core section are laid out in section 4.3.5.

#### 4.3.1. Mandates of GRETA and the Committee of the Parties, as well as, the European Commission

The enforcement mechanisms under the COE Trafficking Convention and the EU Trafficking Directive are distinct. Above all, enforcement of the Directive is the responsibility of the European Commission that oversees overall enforcement of EU law.<sup>829</sup> Even though as part of the priority-matters of its work, the Commission focuses on timely transposition of EU directives, which could otherwise undermine the effectiveness of EU law and allow discriminatory practices to exist.<sup>830</sup> In connection with timely transposition, the Commission is mandated under the Directive to submit two reports by 6 April 2015, namely on the extent of state compliance with the Directive's provisions, and the impact of existing national laws that criminalise the intentional buying of services provided by trafficking victims to discourage the demand for trafficking-related exploitation.<sup>831</sup> Thereafter, the Commission is to report biennially on the progress in fighting trafficking.<sup>832</sup> Moreover, the Commission is the only mechanism considered here with the power to initiate infringement proceedings against member states for late transposition or non-communication of transposition measures, which triggers the threat of judicially binding sanctions by the CJEU.<sup>833</sup> Even though the CJEU has not yet been called upon to consider infringements under the Trafficking Directive, since all 13 proceedings in relation to the Directive were closed by the Commission at an early stage.<sup>834</sup> Like the COP and the CEDAW Committee, the European Commission prefers constructive dialoguing with the concerned state as the primary objective is to maintain noncompliant states in the transposition process towards compliance.<sup>835</sup>

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<sup>829</sup> TEU (n 281) art 17(1).

<sup>830</sup> Commission Communication Better Monitoring of the Application of Community Law COM(2002)725 final 11-12.

<sup>831</sup> EU Trafficking Directive (n 24) art 23.

<sup>832</sup> *ibid* art 20.

<sup>833</sup> See TFEU (n 72) arts 258, 260.

<sup>834</sup> See (n 57).

<sup>835</sup> Andersen (n 294) 3.

While enforcement of the Convention is secured through a bipartite mechanism composed of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties. The specific structure of this bipartite mechanism was noted by the COP as part of establishing a more effective review mechanism to assist the COP in assessing national implementation of the UNCTOC framework, including the UN Trafficking Protocol. However, a proper evaluation of the appropriateness of a structure such as the bipartite mechanism could not take place as the mechanism had not fully developed to its full potential. In fact, there was a high level of overlap between reports generated by GRETA and the Committee of the Parties during their first year of operation, in particular, as the task of formally evaluating implementation was yet to begin.<sup>836</sup> GRETA is primarily responsible for review of national implementation of the Convention,<sup>837</sup> while the Committee introduces a political dimension into GRETA's dialogue with state parties towards the later stages of reporting.<sup>838</sup> Additionally, the Committee makes recommendations based on GRETA's country reports on how to improve implementation by the reviewed state.<sup>839</sup> Two distinct features of monitoring by GRETA are that GRETA sends its draft report containing suggestions and proposals for improving implementation to the concerned state for comments that are taken into account by GRETA when finalising its report.<sup>840</sup> Thus, in this specific case the constructive dialogue between the enforcement mechanism and the concerned state takes place as part of GRETA's reporting process, while constructive dialoguing at the international level takes place once the enforcement mechanism has considered the report submitted by the concerned state as part of the latter's reporting obligation. The second distinct feature is that, in addition to acquiring the necessary information for review purposes through necessary means, such as questionnaires, GRETA is mandated to undertake country visits to each state party on the basis of which only GRETA prepares its draft report for additional comments from the concerned state.<sup>841</sup> It is important that GRETA does not need an invitation from the concerned state to undertake a visit, by contrast to country visits undertaken by the SRTIP only upon the extension of an invitation or standing invitation to the special procedures. This also puts less pressure on

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<sup>836</sup> Gallagher (2010) (n 40) 476.

<sup>837</sup> COE Trafficking Convention (n 23) art 36(1).

<sup>838</sup> Explanatory Report (n 185) para 369.

<sup>839</sup> COE Trafficking Convention (n 23) art 38(7).

<sup>840</sup> *ibid* art 38(5).

<sup>841</sup> *ibid* art 38(4).

GRETA to cooperate with NGOs for information-gathering purposes, even though as part of its country visits GRETA regularly engages with local NGOs.<sup>842</sup>

#### **4.3.2. Independence and Accountability of GRETA and the Committee of the Parties, as well as, the European Commission**

The bipartite structure of GRETA and the Committee of the Parties offers a good balance between the independence that is necessary to carry out reporting in an objective and transparent way and the political sensitivity that is necessary to accommodate within the reporting process the differences among the legal systems of states and their capacities to fully implement the provisions of the COE Trafficking Convention. In particular, the qualified human rights provisions that contain important measures for ensuring victims' protection and assistance, with a view to preventing their continued exploitation or the risks of re-trafficking. As a human rights mechanism developed within the international human rights framework of the COE system, GRETA's independence is akin to that of the CEDAW Committee members as GRETA members are independent experts in the field acting in their personal capacity.<sup>843</sup> Moreover, GRETA members can serve for a maximum term of 8 years, and two members cannot hold the same nationality to guarantee their impartiality during the reporting process as members are selected from amongst nationals of state parties to the Convention.<sup>844</sup> There is also a proportionate gender-balance among members, which has an added-value when considering the particular vulnerabilities of men and women to different forms of exploitation. Moreover, members belong to both origin and destination countries, which is important for grasping the different approaches of states to the trafficking problem that necessarily depends upon context. The vast majority of members have a legal professional background, which is largely suggestive of the fact that reporting does not transcend the limits of formal legalism, compared to the CEDAW Committee members, whose diverse professions allow them to more favourably consider discrimination against women in all spheres of life, taking into account the object and spirit of the CEDAW.<sup>845</sup>

There are also certain checks in place to further guarantee the independence of Committee members during the reporting process, such as the public accessibility of GRETA's

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<sup>842</sup> GRETA 'Internal rules of procedure of the Group of Experts on Action against Trafficking in Human Beings' THB-GRETA(2009)1 (GRETA Internal Rules of Procedure) rule 9.

<sup>843</sup> COE Trafficking Convention (n 23) art 36(2)-(3).

<sup>844</sup> *ibid* art 36(3)(c).

<sup>845</sup> See generally biographies of the current members of GRETA <<http://www.coe.int/en/web/anti-human-trafficking/composition>> accessed 3 February 2017.

final country reports, along with the comments of the concerned state. Additionally, the meetings of GRETA are held in camera to offer some visibility of decision-making, and the list of meeting decisions is also published.<sup>846</sup> Even though GRETA members must maintain the confidentiality of meeting documents and deliberations. It is important that the Committee of the Parties cannot amend GRETA's final report, which, therefore, ensures independence in the reporting process, in particular, no political interference by the Committee of the Parties.<sup>847</sup>

At the same time, there is a certain accountability of the enforcement process, since the Committee of the Parties, much like representation of the COP explored above, is composed of the representatives on the COE's Committee of Ministers of member state parties to the Convention, as well as, representatives of non-member state parties to the Convention, which currently includes only Belarus.<sup>848</sup> Given the non-binding nature of GRETA's proposals, which are attached to its final country reports, the Committee of the Parties serves an important function of both making recommendations to the concerned state and ensuring that its recommendations based on GRETA's report and proposals are fully implemented, when necessary by facilitating the concerned state with technical assistance, much like the COP.

Even the European Commission is increasingly coming under attack for acquiring a semi-political role as the general infringement procedure through which it pursues noncompliance adapts to the political conditions of managing EU law enforcement, in part, necessitated by the growing demand of member states for flexibility in the transposition process.<sup>849</sup> The early closure of infringement proceedings against 13 member states in relation to the EU Trafficking Directive is an instructive example. In this specific case, flexibility was necessary to accommodate the arguably ambitious anti-trafficking framework under the Directive, which relies on transposition of additional instruments on residence permits for non-EU citizens and sanctions for employers of illegal migrants in the EU area, as well as, an overall higher human rights standard affording greater protection to victims and requiring significant improvements to domestic criminal laws, compared to the former EU Trafficking Framework Decision.<sup>850</sup> It follows from the Commission's semi-political role that its assessment report on the extent of compliance with the EU Trafficking Directive uses a strong political language that is encouraging of member states' anti-trafficking efforts and does not assess in any

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<sup>846</sup> GRETA Internal Rules of Procedure (n 842) rules 17, 24.

<sup>847</sup> Explanatory Report (n 185) para 368.

<sup>848</sup> COE Trafficking Convention (n 23) art 37(1).

<sup>849</sup> Andersen (n 294) 24-30.

<sup>850</sup> See EU Trafficking Directive (n 24) preamble.

meaningful way the impact of the transposition measures on domestic trafficking situations.<sup>851</sup> Even though, as Toshkov generally argues, the presence of infringement data in itself indicates challenges of practical compliance, which provides at least a glimpse of domestic realities.<sup>852</sup>

#### **4.3.3. Adequate Resources for GRETA and the Committee of the Parties, as well as, the European Commission and the ATC**

The inadequacy of resources is also a problem at the European level. For example, the number of plenary sessions of GRETA had to be reduced from four to three annual meetings, and it can be argued that the bipartite mechanism's secretariat currently composed of 11 staff members under the Directorate-General for democracy remains understaffed.<sup>853</sup> In particular, as the secretariat serves both GRETA and the Committee of the Parties, which following the restructuring of the COE's Secretariat in 2011 has assumed all cooperative functions in respect of the COE's anti-trafficking efforts.<sup>854</sup> Even though provision was made in 2012 and 2013 to increase the number of staff to its current total.<sup>855</sup> At the same time, GRETA's operational budget was increased in 2012 to mark growing ratification of the Convention and the subsequent number of country visits to be undertaken in any given year, from 10 to 12 annual visits.<sup>856</sup> A budget is also allocated to the Committee of the Parties to facilitate implementation of its recommendations by states, which apparently compensates for the absence of an individual complaints procedure under GRETA akin to the procedure under the CEDAW's Optional Protocol.<sup>857</sup> However, the European Commission and its member states opposed any proposal to strengthen monitoring under GRETA, and the Parliamentary Assembly, in fact, criticised 'the open attempt' during the negotiations of the COE Trafficking Convention to escape such scrutiny.<sup>858</sup> Nonetheless, the bipartite mechanism remains one of the main strengths of the COE Trafficking Convention.<sup>859</sup>

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<sup>851</sup> See Commission Report (2016b) (n 438).

<sup>852</sup> Dimiter Toshkov, 'Taking Stock: A Review of Quantitative Studies of Transposition and Implementation of EU Law' (NIG Annual Work Conference, Maastricht, November 2010) 7-8.

<sup>853</sup> GRETA 'Third General Report on GRETA's activities covering the period from 1 August 2012 to 31 July 2013' GRETA(2013)17 paras 20-21.

<sup>854</sup> *ibid* para 20.

<sup>855</sup> *ibid* paras 20-21.

<sup>856</sup> GRETA 'Second General Report on GRETA's activities covering the period from 1 August 2011 to 31 July 2012' GRETA(2012)13 para 26.

<sup>857</sup> See PACE Opinion 253 (2005) on draft Council of Europe convention on action against trafficking in human beings para 14(xxiii). See also Opinion of 24 September 2004 of the Expert Group on Trafficking in Human Beings of the European Commission: On measures in the Council of Europe Convention on Action Against Trafficking in Human Beings to establish a Monitoring Mechanism para 4.

<sup>858</sup> PACE Recommendation 1695 (n 230) para 7.

<sup>859</sup> Explanatory Report (n 185) para 354.

Perhaps a strong indication of the inadequacy of resources for enforcing EU anti-trafficking policies is the establishment of the Anti-Trafficking Coordinator (ATC) under article 20 of the EU Trafficking Directive to coordinate Union strategies against trafficking and facilitate the biennial reporting mandate of the European Commission also established therewith. According to the Commission, there are more than 128 national authorities involved with data collection and so far 52 distinctive offence classification systems have been identified.<sup>860</sup> This makes the coordination function of the ATC a crucial one in terms of both knowledge production and EU regulation in the field. However, the office of the ATC is underfunded and under-staffed.<sup>861</sup> Perhaps for this reason, the Directive also establishes under article 19 national rapporteurs or equivalent mechanisms (NREMs) at the national level that will produce the necessary information for the Commission's reporting of state compliance with the Directive. The NREMs of the case studies are explored below. Thus, the EU system has overcome the resource problem by requiring that its member states establish NREMs and transmit the collected information to the ATC for reporting purposes. While the COE system has tasked GRETA itself with collecting the necessary information through inter alia country visits. However, there are significant advantages to having in place a permanent mechanism at the domestic level to collect information, and through their constitution in an informal EU network of NREMs to promote systematic data collection and analysis methodologies.<sup>862</sup> In particular, as the NREMs meet biannually at the EU level to exchange information and best practices, compared to GRETA's reporting of individual states once every four years, with no mechanism in place to assess progress in between reporting cycles.<sup>863</sup> The delegation of data collection to the NREMs also allows the ATC to focus on coordinating anti-trafficking efforts at the EU level among the seven EU Justice and Home Affairs agencies involved, namely the European Union Agency for Law Enforcement Training, the European Asylum Support Office, the European Institute for Gender Equality, the European Border and Coast Guard Agency, Eurojust, Eurojust, and the European Union Agency for Fundamental Rights.<sup>864</sup>

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<sup>860</sup> Commission Communication Measuring Crime in the EU: Statistics Action Plan 2011-2015 COM(2011)713 final para 2.3.

<sup>861</sup> European Parliament Debate Item 5 (Silvia Costa) (19 April 2012).

<sup>862</sup> Council Conclusions Establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings (4 June 2009) 2946<sup>th</sup> meeting of the Justice and Home Affairs Council 3.

<sup>863</sup> GRETA Internal Rules of Procedure (n 842) rule 2.

<sup>864</sup> See Commission Staff Working Document mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (COM(2014)635 final) SWD(2014)318 final annex.

#### **4.3.4. Cooperation between NGOs and GRETA and the Committee of the Parties, as well as, the European Commission and the ATC**

Whereas NGO involvement is interwoven into the reporting process of GRETA, NGO cooperation at the EU level is facilitated by the European Commission through the ATC as part of the latter's coordination mandate. The Commission and the ATC do not directly cooperate with NGOs in relation to reporting under the EU Trafficking Directive as the necessary information is directly collected from national authorities, typically their NREMs that are already required to gather statistics on the results of national anti-trafficking efforts 'in close cooperation with relevant civil society organisations active in this field'.<sup>865</sup> Currently, 103 civil society organisations active in the EU area, as well as, Albania, Morocco, Turkey, and Ukraine are constituted in the EU platform of civil society organisations and service providers that offer victim protection and assistance in member states and selected non-EU member states.<sup>866</sup> They meet biennially, like the NREMs, to exchange information and best practices, and in between biennial meetings their cooperation is further facilitated through a restricted online platform that ensures the continuity of discussions and removes the physical barriers and obstacles to attending meetings, especially for small-scale NGOs.<sup>867</sup> The platform is particularly useful for raising awareness of new forms of coercion, exploitation, or *modi operandi* of traffickers, or drawing attention to neglected areas of victim support, as well as, for building rapport among local NGOs in other states as part of catering to the special needs of victims, particularly in cases of foreign victims. That all relevant information can be found in one place, alongside the possibility for online interactions with other NGOs also ensures coherence of trafficking data and avoids the duplication of efforts. This is important because very little is actually known about domestic trafficking situations. Moreover, the restricted access to civil society organisations ensures that those can openly scrutinise national anti-trafficking efforts, which is important for addressing practical implementation challenges.

A similar confidentiality is found in the cooperation of NGOs and GRETA as all information transmitted to GRETA through questionnaires and specific information requests is treated as confidential, unless the NGO requests publication.<sup>868</sup> Consequently, there has been an increase in the number of NGO responses received by GRETA since the first evaluation

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<sup>865</sup> EU Trafficking Directive (n 24) art 19.

<sup>866</sup> Commission Staff Working Document (2014) (n 864) para 7.2.

<sup>867</sup> See generally 'EU Civil Society e-Platform' <[http://ec.europa.eu/anti-trafficking/media-outreach-els/eu-civil-society-e-platform\\_en](http://ec.europa.eu/anti-trafficking/media-outreach-els/eu-civil-society-e-platform_en)> accessed 4 February 2017.

<sup>868</sup> GRETA Internal Rules of Procedure (n 842) rule 8.



round that ended in 2013.<sup>869</sup> To better coordinate NGO responses, GRETA sends to only NGOs active in field of action, including national coalitions of organisation or national branches of international NGOs, the same questionnaire that is sent to state parties.<sup>870</sup> The information, thus, received from NGOs can corroborate information transmitted by state parties and fill in any information gaps, both enhance reporting by GRETA using information of a consequently better quality. Provision is also specifically made for transmitting to NGOs reliable sources of information for verification purposes.<sup>871</sup> GRETA also physically cooperates with NGOs through periodic hearings to promote the implementation of the COE Trafficking Convention. Five major NGO-partners, namely Amnesty International, Anti-Slavery International, La Strada International, ECPAT, and Terre des Hommes, receive special mention on GRETA's website.<sup>872</sup> Among them, Anti-Slavery International and La Strada International have been responsible for launching a victim compensation project and campaign to implement article 15 of the Convention on victims' right to compensation for harm suffered during the trafficking process.<sup>873</sup> They have also developed a reporting guide for NGOs transmitting information to GRETA, organised conferences to raise awareness of data protection and privacy for marginalised victim groups, and actively participated in GRETA's round-table meetings on the role of civil society in combating trafficking.<sup>874</sup>

#### 4.3.5. Preliminary Conclusions

The European examination draws four preliminary conclusions. First, monitoring and reporting are at the core of the mandates of both enforcement mechanisms, while GRETA as a human rights body additionally undertakes country visits to increase its knowledge base about national implementation of the COE Trafficking Convention. Second, the bipartite mechanism composed of GRETA as a technical body and the Committee of the Parties as a political body better ensures independent reporting by GRETA, which, in turn, increases the authority and respect that the Committee's recommendations based on GRETA's reports demand. By contrast, the European Commission increasingly acquires a semi-political role in enforcing EU

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<sup>869</sup> GRETA (2013) (n 853) para 55.

<sup>870</sup> GRETA Internal Rules of Procedure (n 842) rule 8.

<sup>871</sup> *ibid.*

<sup>872</sup> See generally the role of five NGOs, namely Amnesty International, Anti-Slavery International, La Strada International, ECPAT, and Terre des Hommes <<http://www.coe.int/en/web/anti-human-trafficking/role-of-ngos>> accessed 3 February 2017.

<sup>873</sup> GRETA 'First General Report on GRETA's activities covering the period from February 2009 to July 2011' GRETA(2011)11 para 63.

<sup>874</sup> GRETA 'Fourth General Report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014' GRETA(2015)1 para 7.5.

law as a result of the growing differences among the legal systems of member states and the need for flexibility in the transposition stage. This semi-political role influences the perceived independence of the Commission's report on compliance with the EU Trafficking Directive. Third, both enforcement mechanisms work under financial and human resource constraints but the Commission can delegate the task of gathering information on compliance with the Directive to the newly established ATC at the EU level, which works closely with the data collection mandate of NREMs at the national level. While GRETA relies on country visits, which appear adequately covered by its budget. Fourth, GRETA as an independent body readily cooperates with NGOs to request, receive, or exchange information, while the Commission facilitates overall NGO involvement in national anti-trafficking efforts through biennial meetings and an online platform at the EU level, rather than direct NGO cooperation.

#### **4.4. National Responses**

By way of example of the different models of the NREM in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, sections 4.4.1 to 4.4.4 respectively appraise the scope of their mandates, the degree of independence and accountability of their offices, the adequacy of resources, and the extent of cooperation with NGOs. The four preliminary conclusions to this core section are laid out in section 4.4.5.

##### **4.4.1. Mandates of the Belgian, Czech, Dutch, Finnish, Romanian, and Swedish NREMs**

Article 19 of the EU Trafficking Directive that establishes NREMs within domestic legal systems of member states identifies four primary tasks for such mechanisms, namely assessing trafficking trends, measuring the results of anti-trafficking actions, including gathering statistics in close cooperation with relevant civil society organisations active in the field, and reporting. These tasks take into account the need for a minimum structure, even though the mechanism should be established by member states 'in the way in which they consider appropriate according to their internal organisation'.<sup>875</sup> Additionally, NREMs are constituted in an informal EU network to provide the Union and member states with objective, reliable, comparable, and up-to-date strategic information and exchanges of experience and best practices in preventing and combating trafficking.<sup>876</sup> Thus, their mandates should facilitate

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<sup>875</sup> EU Trafficking Directive (n 24) preamble para 27.

<sup>876</sup> *ibid.*

knowledge production at the EU level. The setting-up of the NREM signals a positive intention of states to tackle trafficking and it is noteworthy that the case studies already had in place a NREM before such establishment became a legal obligation under the Directive. Belgium was the first country to establish the Interdepartmental Coordination Platform for the Fight against the Trafficking and Smuggling of Human Beings (the Belgian Coordination Platform), in 1995,<sup>877</sup> and the Centre for Equal Opportunities and Opposition to Racism, in 1993, to coordinate anti-trafficking policies, and monitor and report on policy implementation as from 1995.<sup>878</sup> Even though the mandate of the Belgian Rapporteur was formalised only in 2014 to encompass a coordination body, namely the Belgian Coordination Platform, and an independent and autonomous body, namely Myria.<sup>879880</sup> The first mandate of the Rapporteur was adopted by Sweden in 1998,<sup>881</sup> followed by the Netherlands in 2000.<sup>882</sup> Both mandates were adopted in response to The Hague Ministerial Declaration on European Guidelines for Effective Measure to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation, which recommended the setting-up of a national rapporteur for sex trafficking in women.<sup>883</sup> While the Swedish mandate subsequently focused on sex trafficking in women within the policy framework of violence against women, the Dutch mandate covered women, men, and children. The National Police had already achieved some success in designing programmes and policy documents on violence against women, thus, the National Criminal Investigation Department serves as the Swedish Rapporteur. The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children has an independent mandate, which is also the most notable feature, since the only other independent mandate was established by Finland in 2008, which also makes the Finnish mandate the most recent among the case studies.<sup>884</sup> In Finland, trafficking is addressed as a discriminatory practice, thus, the

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<sup>877</sup> Royal Decree 16 June 1995 *Koninklijk besluit van 16 juni 1995 tot uitvoering van artikel 11, § 5, van de wet van 13 april 1995 houdende bepalingen tot bestrijding van de mensenhandel en van de kinderpornografie*. See also Royal Decree 16 May 2004 *Koninklijk besluit betreffende de bestrijding van de mensensmokkel en mensenhandel* chpt II.

<sup>878</sup> Law 13 April 1995 *Wet van 13 april 1995 houdende bepalingen tot bestrijding van de mensenhandel en van de mensensmokkel* art 11(3).

<sup>879</sup> Royal Decree 21 July 2014 *Koninklijk besluit tot wijziging van het koninklijk besluit van 16 mei 2004 betreffende de bestrijding van de mensensmokkel en mensenhandel* art 11.

<sup>880</sup> The Federal Centre for the Analysis of Migration Flows, the Protection of the Basic Rights of Foreigners and the Fight against Trafficking was renamed 'Myria' in 2015. François De Smet, *Annual Report 2016 on Trafficking and Smuggling of Human Beings: Beggars in the Hands of Traffickers* (Myria 2017) 5. Myria replaces the Centre for Equal Opportunities and Opposition to Racism. Royal Decree 21 July 2014 (n 879) art 1(1).

<sup>881</sup> Government Bill 1997/98:55 (n 403) 51.

<sup>882</sup> Anna G Korvinus, *Trafficking in Human Beings: First Report of the Dutch National Rapporteur* (BNRM 2002) 34.

<sup>883</sup> (The Hague, 24-26 April 1997) para III.1.4.

<sup>884</sup> Law 1109/2008 *Laki vähemmistövaltuutetusta ja syrjintälautakunnasta annetun lain muuttamisesta* s 1.

Finnish Non-Discrimination Ombudsman<sup>885</sup> is responsible for monitoring and reporting on the implementation of the Non-Discrimination Act.<sup>886</sup> The Analysis and Strategies Unit acts as the Czech Rapporteur since 2003 and it is the only mechanism not to have undergone significant institutional changes as part of legal developments, such as the criminalisation of additional forms of exploitation, which, therefore, need to be brought within the scope of the Rapporteur's mandate, or administrative reforms at the domestic level to facilitate better functioning of the mandate.<sup>887</sup> As the primary function of the Czech Rapporteur is to gather and analyse crime data, and monitor trends and patterns with a view to designing security policies, since trafficking in the Czech Republic is primarily a crime and security issue.<sup>888</sup> At the same time, the Romanian National Agency against Trafficking in Persons that serves as Rapporteur since 2005 is an instructive example of a stand-alone institution that has been administratively placed within different ministries with the subsequent broadening or curtailing of its mandate to the detriment of its proper functioning.<sup>889</sup> Yet, it is also the most notable in terms of the scope of mandate and the size of the institution.

The mandates of the case studies include at a minimum the tasks identified in the EU Trafficking Directive. There is provision in each of the mandates for strengthening victim protection and assistance. Myria coordinates cooperation between the three specialised reception centres, namely Pag-Asa, Payoke, and Sürya, which provide support services within the framework of the system of residence permits for foreign victims. Similarly, the Czech Rapporteur coordinates the Programme on Supporting and Protecting Victims of Trafficking in Human Beings, which is provided by the NGO, La Strada.<sup>890</sup> The Finnish Rapporteur bridges the weak cooperation between local NGOs and the government-run system of victim assistance, in particular, as there are few specialised NGOs in Finland, which increases their

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<sup>885</sup> Law 1325/2014 *Yhdenvertaisuuslaki* s 19. The Non-Discrimination Ombudsman replaces the Ombudsman for Minorities to deal comprehensively with discrimination on all grounds, not only discrimination against minority groups.

<sup>886</sup> Law 22/2004 *Laki vähemmistövaltuutetusta annetun lain muuttamisesta* s 2(1).

<sup>887</sup> Government Resolution 849/2003 *Národní strategii boje proti obchodování s lidmi za účelem sexuálního vykoristování v České republice* measure 1.

<sup>888</sup> *ibid* pt A.VI.

<sup>889</sup> Government Decision 1584/2005 *pentru înființarea, organizarea și funcționarea Agenției Naționale de Prevenire a Traficului de Persoane și Monitorizare a Asistenței Acordate Victimelor Traficului de Persoane*; Emergency Ordinance 20/2009 *pentru modificarea art. 13 alin. (2) și (3) din Ordonanța de urgență a Guvernului nr. 30/2007 privind organizarea și funcționarea Ministerului Administrației și Internelor și pentru reorganizarea unor unități din subordinea Ministerului Administrației și Internelor*. The National Agency against Trafficking in Persons replaces the National Office for the Prevention of Trafficking in Human Beings and Victims Protection Monitoring to extend the Rapporteur's mandate beyond prevention and the monitoring of victim assistance. GRETA (2012) (n 451) 11.

<sup>890</sup> Government Resolution 849/2003 (n 887) pt B.II.

value in referring to the system any detected victims, especially sex trafficking victims who are neglected by authorities because of the negative attitudes around prostitution.<sup>891</sup> The Romanian Rapporteur, however, has the broadest role in promoting victim assistance as it manages the national integrated system for monitoring and assessing trafficking victims, and through the Agency's regional centres makes the system accessible to NGOs to strength processes of victim referral and assistance.<sup>892</sup> The Romanian Rapporteur also directly manages and monitors government-funding of NGO anti-trafficking programmes. The Dutch and Swedish Rapporteur's contribute indirectly to victim support. As a result of the focus on monitoring anti-trafficking policies and reporting on the nature and scale of trafficking, the Dutch Rapporteur's contribution is primarily research-based. At the same time, the placement of the Swedish Rapporteur within the Police has not contributed positively to the development of a victim-oriented approach to trafficking, even though the Rapporteur evaluates the capacity of the police to investigate trafficking cases, which includes strengthening processes for early identification. Raising awareness of discrimination and providing training to authorities is also part of the Finnish mandate. Two notable features are the possibility of the Belgian and Finnish Rapporteurs to initiate civil proceedings on trafficking or provide legal advice and assistance to victims, as well as, the possibility of the Dutch<sup>893</sup> and Finnish Rapporteurs<sup>894</sup> to report and make recommendations to parliament every four years. The Belgian, Czech, and Romanian mandates also make provision for the transmission of data and information collected as part of their mandates to the ATC at the EU level to facilitate the biennial reporting of the European Commission under the EU Trafficking Directive.

#### **4.4.2. Independence and Accountability of the Belgian, Czech, Dutch, Finnish, Romanian, and Swedish NREMs**

The European Commission maintains that independence is not a required feature of the NREM under article 19 of the EU Trafficking Directive as 'neither the Council Conclusions nor the [Directive] refer to the concept of independence'.<sup>895</sup> However, explicit reference is made to independence in the explanatory report of the COE Trafficking Convention by way of example

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<sup>891</sup> Biaudet (2014) (n 376) 8-9.

<sup>892</sup> Government Decision 1083/2006 *privind modificarea și completarea Hotărârii Guvernului nr. 1.584/2005 pentru înființarea, organizarea și funcționarea Agenției Naționale de Prevenire a Traficului de Persoane și Monitorizare a Asistenței Acordate Victimelor Traficului de Persoane.*

<sup>893</sup> Corinne E Dettmeijer-Vermeulen, *Trafficking in Human Beings: Ten Years of Independent Monitoring* (BNRM 2010) 9.

<sup>894</sup> Law 660/2001 *Laki vähemmistövaltuutetusta* s 2a(2).

<sup>895</sup> Commission Staff Working Document (2016) (n 68) 6.

of the independent status of the Dutch Rapporteur.<sup>896</sup> Moreover, in the third general report on its activities, GRETA reiterates an exchange of views with the European Commission Experts Group on Trafficking in Human Beings and the ATC on ‘the important difference’ between the independence of the NREM and the coordination authority of the National Coordinator.<sup>897</sup> There also appears to be a common understanding among NREMs, according to the conclusions of the consultative meeting between the SRTIP and 17 NREMs from different regions, that only in cases of smaller states where the National Coordinator is independent and working closely with authorities at the operation level to facilitate information-gathering is it acceptable for the coordination and monitoring roles to be assigned to the same institution or authority.<sup>898</sup> Otherwise, the independence of the monitoring and evaluating functions might be jeopardised. Moreover, separate roles are considered to increase the effectiveness of the monitoring function. Thus, it is seen in relation to the case studies, in particular, the Belgian mechanism that there is a separation between the coordination function of the Belgian Coordination Platform and the monitoring and evaluating function of Myria. In fact, the coordination function of Myria was removed upon the formalisation of the bipartite structure as the Belgian Rapporteur. Moreover, in matters giving rise to a conflict of interest, such as the role and organisation of the three specialised reception centres, which it manages, Myria with representative status in the Belgian Coordination Platform cannot vote.<sup>899</sup> By contrast, the Romanian Rapporteur performs the roles of both National Rapporteur and National Coordinator. This is problematic, in particular, because it is a stand-alone institution and the checks and balances for independence appear to be non-existent. For example, there are only traces of self-review of its combined coordination and monitoring functions in the Rapporteur’s reports, which are best described as a showcase of positive results, rather than an objective evaluation of the impact of anti-trafficking policies.<sup>900</sup> The Coordinator responsible for the formulation of national strategies and plans of action cannot as the Rapporteur objectively assess their impact, since there is always a conflict of interest. In the case of the Finnish Rapporteur, the administrative reorganisation of the mandate from the Ministry of the Interior to the Ministry of Justice provided a legal separation from executive, operational, or policy

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<sup>896</sup> Explanatory Report (n 185) para 298.

<sup>897</sup> GRETA (2013) (n 853) para 51.

<sup>898</sup> UNCHR ‘Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo’ (21 March 2014) UN Doc A/HRC/26/37/Add.1 para 34.

<sup>899</sup> Royal Decree 21 July 2014 (n 879) arts 2-3, 5.

<sup>900</sup> See Adrian G Petrescu, *Rapport Privind Evoluția Traficului de Persoane în Anul 2013* (National Agency against Trafficking in Persons 2014) 33, 56.

coordination performed by the Anti-Trafficking Coordinator under the Ministry of the Interior.<sup>901</sup> It could also facilitate greater collaboration with the Ombudsman for Equality and the Ombudsman for Children already placed under the Ministry of Justice in the detection of trafficking victims in a greater number of situations, in particular, as more victims of labour trafficking receive assistance from the government-run system than victims of sex trafficking.<sup>902</sup> Thus, the Rapporteur and the Ombudsman for Equality, for example, could work together to strengthen monitoring of sex trafficking as a form of gender-based violence.

The Dutch mandate is an instructive example of the checks and balances in place to ensure independence, which, in turn, can enhance the accountability of the monitoring mechanism, in particular, where the mechanism is an independent institution. First, the Rapporteur and the staff of the office of the Rapporteur are directly appointed by the Minister of Security and Justice.<sup>903</sup> Second, the Rapporteur has a maximum tenure of eight years.<sup>904</sup> Third, the mandate receives contributions from the five Ministries of Security and Justice, of Home and Kingdom Affairs, of Foreign Affairs, of Public Health, Welfare and Sport, and of Social Affairs and Employment.<sup>905</sup> Finally, the formalisation of the mandate, according to the Global Slavery Index, has strengthened coordination and accountability of the Dutch government's anti-trafficking efforts.<sup>906</sup>

Even though the EU Trafficking Directive allows member states to establish different structures of NREMs according to their internal organization, and the structures of the Rapporteurs examined here comply with the Directive's requirements, it is observed that when the mandate is carried out by an office in a government institution, such as the Czech and Swedish mandates, there is an overt focus on the crime dimension of the trafficking problem to the detriment of victim protection. This will also influence reporting habits. For example, the Czech Analysis and Strategies Unit produces crime reports with largely quantitative data on the coordination of government initiatives and cooperation among domestic stakeholders.<sup>907</sup> Even the 'success stories' of police operations, including international cooperation efforts, and

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<sup>901</sup> Biaudet (2014) (n 376) 56.

<sup>902</sup> *ibid* 10.

<sup>903</sup> Law 6 November 2013 (n 365) art 3A (art 2(3)).

<sup>904</sup> *ibid* art 3A (art 3(1)). The current mandate-holder has been in office since 2006, having already served two terms of four years. However, the formal institutionalisation of the mandate in 2013 has renewed the tenure, at a maximum, until 2020.

<sup>905</sup> Korvinus (n 882) 38.

<sup>906</sup> Walk Free Foundation, *The Global Slavery Index 2014* (Hope for Children Organization Australia Ltd 2014) 110.

<sup>907</sup> See generally Status Report on Trafficking in Human Beings in the Czech Republic <<http://www.mvcr.cz/clanek/obchod-s-lidmi-dokumenty-982041.aspx>> accessed 5 February 2017.

information on the profile of victims aim to strengthen law enforcement through increased knowledge production, rather than qualitatively analyse the impact of anti-trafficking policies on victims. Initial proposals on the appropriate structure of the Czech Rapporteur considered an independent institution akin to the Dutch Rapporteur. However, there was a shortage of staff to ensure the proper functioning of such mechanism and previously established independent bodies in other policy areas reminded of the unfeasibility of such structure, in particular, as those bodies appeared too distanced from the practicalities of policymaking and policy-coordination, could not adequately react to ‘real’ problems or exert enough influence on government ministries for change, and had no access to confidential information.<sup>908</sup> The Swedish Rapporteur also argues that its structure allows access to confidential information precisely because it is placed within the Police. But as a result, its reports provide only an analysis of police investigations, prosecutions, and convictions with disaggregated data to inform future police investigations and enhance the methodology and skills of authorities in early identification. In fact, both the Swedish National Council for Crime Prevention and the Task Force on Trafficking in Human Beings of the Council of the Baltic Sea States are of the opinion that the Rapporteur’s placement within the Police compromises its independence and is incompatible with international requirements of independence.<sup>909</sup> Moreover, the danger of a government structure is the reluctance of victim services providers to readily share data that is collected as part of the services they provide to victims because of data privacy concerns. According to the Dutch Rapporteur, this reluctance is effectively tackled through the perceived independence of the monitoring mechanism.<sup>910</sup> Thus, a greater degree of independence can have a positive effect on objective reporting and genuine policy recommendations, as well as, cooperation of civil society organisations, in particular, NGOs providing victim support services.

#### **4.4.3. Adequate Resources for the Belgian, Czech, Dutch, Finnish, Romanian, and Swedish NREMs**

The inadequacy of resources is a serious problem for the Rapporteurs in all case studies. Even though its effects are more severe in relation to the Belgian and Finnish mandates, rather than

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<sup>908</sup> Jakub Švec, ‘National Monitoring and Report Mechanisms to Address THB: The Role of National Rapporteurs’ (OSCE conference, Vienna, 21 May 2007) <<http://www.osce.org/cthb/25266?download=true>> accessed 8 November 2014.

<sup>909</sup> Stina Holmberg and others, *Prostitution och människohandel för sexuella ändamål: Slutredovisning av regeringens handlingsplan* (Rapport 2011:18, Brottsförebyggande rådet 2011) 146-147.

<sup>910</sup> Dettmeijer-Vermeulen (2007) (n 686) 93-94.



the Czech, Dutch, Romanian, and Swedish mandates. The Czech and Swedish Rapporteurs as government offices are financed from the regular budget allocated by the respective ministry. Even though there is no information on whether a specific budget is set aside for the functioning of their mandates. However, any budgetary shortcomings can be mitigated through maximum utilisation of existing human, financial, and material resources. This point also applies to the Belgian Coordination Platform. Whereas Myria seems to have suffered from the government imposed cost-saving measures on federal bodies in 2014. In fact, the government budget allocated to Myria was lower than the statutory budget of EUR 1.5 million,<sup>911</sup> which Myria argues has sent a wrong message about the political will to implement anti-trafficking policies. As the budgetary reduction immediately followed the formalisation of the bipartite mechanism by Royal Decree in 2014, and placed Myria in a difficult situation in the short-term, since ‘the line of budgetary savings will worsen its situation’ in the forthcoming years.<sup>912</sup> For example, the analysis of statistical and demographic data typically analysed by the Centre for Demographic Research at the Université catholique de Louvain had to be delegated to part-time staff. Moreover, the necessary data had to be voluntarily acquired from different stakeholders, including from the national database of the police, the social inspection services, and the three specialised victim reception centres.<sup>913</sup> Similarly, it is observed that among the 20 staff of the office of the Finnish Rapporteur, including 11 senior officers, only one senior officer is responsible for reporting on trafficking.<sup>914</sup> However, already during the first year of operation it was evident that managing daily operations and preparing periodic reports ‘required the work input of more than one [senior officer]’.<sup>915</sup> In particular, the budget of EUR 15,000 for daily operations ‘is already exceeded by the translation and printing costs of the statutory annual report’.<sup>916</sup> Additionally, the Rapporteur must provide training and disseminate information to authorities, provide legal advice and assistance to victims, and cooperate with international actors by attending conferences and meetings. Perhaps, then, it is a major feat that the Rapporteur managed to publish annual reports between 2012 and 2014 before independent reporting was discontinued in 2015 and incorporated into the broader annual report on

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<sup>911</sup> De Smet (2017) (n 880) 8.

<sup>912</sup> *ibid.*

<sup>913</sup> François De Smet, *Annual Report 2015 on Trafficking and Smuggling of Human Beings: Tightening the Links* (Myria 2016) 133.

<sup>914</sup> Biaudet (2012) (n 433) 39.

<sup>915</sup> Eva Biaudet, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2010* (Ombudsman for Minorities 2010) 15.

<sup>916</sup> *ibid.*

discrimination prepared by the Finnish Rapporteur as the Non-Discrimination Ombudsman.<sup>917</sup> This means that the Finnish Rapporteur need only produce an extensive report every four years for parliament, along with concrete recommendations based on policy monitoring.<sup>918</sup> By contrast, the 11 dedicated staff of the office of the Dutch Rapporteur, with five researchers focusing on trafficking and four researchers on sexual violence against children, have successfully prepared reports that are typically some hundred pages in length. For example, the seventh periodic report was over 600 pages long and provided a first-ever extensive research on sex trafficking in the commercial sex industry based on case-law obtained through the Public Prosecution Service. It is also observed that the Dutch Rapporteur uses interns and thesis writers to prepare parts of the report as an effective cost-cutting measure. The quantitative data that is collected primarily from the National Police, the Immigration and Naturalisation Service, and Central Fine Collection Agency,<sup>919</sup> as well as, the Public Prosecution Service is analysed by the Statistical Information Supply and Policy Analysis Department. Additional sources of quantitative and qualitative data are directly gathered by the Rapporteur during meetings and consultations with stakeholders.<sup>920</sup> Thus, the Rapporteur has a strong knowledge base for subsequent reporting. The inadequacy of human resources is least relevant to the office of the Romanian Rapporteur that currently has 88 staff of a maximum statutory allocation of 95 staff, including police officers, civil servants, and the staff of its 15 regional centres, one for each court of appeal district, which monitor domestic realities and identify victims' specialised needs.<sup>921</sup> The centres are an instrumental feature of the Rapporteur's coordination and monitoring functions as they act as intermediaries between law enforcement agencies and victim support service providers represented in the National Identification and Referral Mechanism for trafficking victims. The mandate also provides for receipt of external funding in the form of donations,<sup>922</sup> and until the withdrawal of US funding following Romania's accession to the EU and the inception of EU funding through the DAPHNE programme for supporting victims of violence, the mandate was arguably adequately funded.<sup>923</sup> In particular,

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<sup>917</sup> See Kirsi Pimiä, *Annual Report 2015 of the Non-Discrimination Ombudsman* (Non-Discrimination Ombudsman 2015).

<sup>918</sup> Eva Biaudet, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2011* (Ombudsman for Minorities 2011) 14.

<sup>919</sup> See Dettmeijer-Vermeulen (2010) (n 893) 7.

<sup>920</sup> *ibid* 11.

<sup>921</sup> Government Decision 460/2011 *privind organizarea și funcționarea Agenției Naționale împotriva Traficului de Persoane* art 6.

<sup>922</sup> *ibid* art 8.

<sup>923</sup> Rebecca Surtees and Fabrice de Kerchove, 'Who Funds Re/integration? Ensuring Sustainable Services for Trafficking Victims' (2014) 3 *Anti-Trafficking Review* 64, 71-73.

since the withdrawal of US funding, the subsequent funding of NGOs providing victim support has become irregular and as a result a number of NGOs reportedly seized operation without any exit plan for victims under their care. Thus, the annual budget of the Rapporteur's mandate was outlined in the 2013 report in the hopes of encouraging the government to allocate proportionate funds based on its funding of various government and NGO actions and programmes against trafficking.<sup>924</sup>

#### **4.4.4. Cooperation between NGOs and the Belgian, Czech, Dutch, Finnish, Romanian, and Swedish NREMs**

As part of their mandates, each Rapporteur regularly cooperates with NGOs to enhance data collection for reporting purposes, facilitate training of authorities with a view to early identification of victims and referral to appropriate support bodies, and develop victim support services. In Belgium, the Czech Republic, the Netherlands, and Romania, victim support is directly provided by NGOs. The most notable involvement is the formalisation of three specialised centres, namely Pag-Asa, Payoke, and Sürya, to provide victim protection and assistance services within the framework of the system of residence permits for trafficking victims for a renewable period of five years.<sup>925</sup> This means that all victims brought within the care of one of three centres will receive support during the 45-day reflection period. In cases of cooperating victims, the reception centre is responsible for lodging applications for a six-month residence permit on behalf of victims. As a further means of upholding human rights, the reception centres are authorised to initiate such proceedings against traffickers in their own name or on behalf of victims.<sup>926</sup> The three centres operate in three separate Belgian cities, namely Brussels, Antwerp, and Liège, thus, offering wide-reaching support, which some remark is 'pioneering'.<sup>927</sup> Moreover, as a result of their formalisation, these centres have representative status in the annual meetings of the Belgian Coordination Platform.<sup>928</sup> As Myria argues, it was necessary and normal to include the victim reception centres in the Platform, since '[t]hey play a decisive role in the implementation of measures relating to victim protection'.<sup>929</sup> Their formalisation also affords the reception centres greater authority over the

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<sup>924</sup> Petrescu (n 900) 37.

<sup>925</sup> Royal Decree 18 April 2013 *Koninklijk besluit inzake de erkenning van de centra gespecialiseerd in de opvang en begeleiding van slachtoffers van mensenhandel en van bepaalde zwaardere vormen van mensensmokkel en inzake de erkenning om in rechte op te treden* art 9.

<sup>926</sup> *ibid* art 2.

<sup>927</sup> De Smet (2016) (n 913) 2.

<sup>928</sup> See Royal Decree 21 July 2014 (n 879) art 5.

<sup>929</sup> De Smet (2016) (n 913) 53.

assistance that is provided directly or indirectly, since they can conclude agreements with other associations for the reception of victims requiring special supervision, such as children.<sup>930</sup> Moreover, government funding offers some financial security and continuity of services. In fact, it is generally observed that during the recession in Europe NGO funding became irregular or was substantially reduced. The changing policy-priorities, such as immigration, are another reason for the irregularity or inadequacy of NGO funding.<sup>931</sup>

The Czech Programme on Supporting and Protecting Victims of Trafficking in Human Beings is streamlined through La Strada, which is the initial recipient of all trafficking victims, and offers basic crisis assistance, consultancy, and shelter to Czech nationals and documented foreign victims during a 60-day reflection period.<sup>932</sup> Victims who decide to cooperate with authorities are housed by La Strada and after three months foreign victims are transferred to the care of Catholic charities.

The Coordination Centre Human Trafficking (CoMensha) in the Netherlands is one of the longest standing organisations offering victim support services,<sup>933</sup> even though its mandate has considerably broadened from caring for prostitutes in the 1980s to currently female and male victims of trafficking. It is entrusted with ‘the central reporting, placement and national records of victims’ and for resource purposes has merged with the national reception federation. Thus, all victims, whether detected or identified, should be reported by authorities to CoMensha to enhance centralised reporting. Comensha works closely with La Strada to coordinate regional NGO networks and strengthen support provisions for victims of transnational trafficking. This also provides for greater synergies between local NGOs in the Czech Republic and the Netherlands that are constituted in La Strada’s international anti-trafficking programme. Thus, NGO involvement has not only facilitated domestic victim support but also regional cooperation.

NGO involvement is an important aspect of the Romanian mandate due to early focus on victim assistance of the National Office for the Prevention of Trafficking in Human Beings and Victims Protection Monitoring, which was replaced by the office of the Rapporteur. NGOs are, thus, consulted in the drafting and implementation of the national strategy, the collection of trafficking data, and the provision of legal advice and assistance in criminal proceedings

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<sup>930</sup> Royal Decree 18 April 2013 (n 925) art 1(2)(5).

<sup>931</sup> De Smet (2016) (n 913) 1.

<sup>932</sup> Department of Security Policy and Crime Prevention, *2008 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2009).

<sup>933</sup> The Dutch Foundation against Trafficking established in 1987 was renamed ‘Coordination Centre Human Trafficking’ (CoMensha) to better reflect its work with both female and male victims of trafficking.

against their traffickers.<sup>934</sup> Their role in policymaking is further strengthened by the possibility to attend, upon invitation, the meetings of the Inter-ministerial Working Group on Combating Trafficking in Persons, which evaluates implementation of the national plan of action.<sup>935</sup> Currently, 15 NGOs are constituted in the ‘Antitrafic’ network that focuses to different extents on prevention measures, victim assistance, or the running of shelters. Even though cooperation between NGOs and the Romanian Rapporteur have been sour on account of irregular funding by the latter. However, there are increased efforts to conclude cooperation agreements with civil society representatives in relation to prevention, as well as, NGOs in relation to victim violence.<sup>936</sup> Besides irregular funding, an incipient problem is funding of typically short-term biannual rehabilitation projects that are insufficiently short as rehabilitation and reintegration of victims into society is a slow and labour-intensive service.<sup>937</sup>

By contrast, in Finland and Sweden victim support is provided by government institutions, which can perhaps explain the general shortage of specialised victim services in Finland. Pro Centre and Victim Support are two NGOs that regularly cooperate with the Rapporteur. Both NGOs focus on different aspects of trafficking, which makes their contribution to increasing the Rapporteur’s knowledge base as part of its monitoring function somewhat unique. Pro Centre offers counselling to sex workers in three cities and is partially funded by the Ministry of Social Affairs and Health.<sup>938</sup> Its work with sex workers makes it easier for the Centre to detect and refer sex trafficking victims to the victim assistance system, as well as, provide victim profiles to the Rapporteur. While Victim Support helps all victims of crime, which means their service is more general. Yet, it plays an important role as the coordinator of the Finnish NGO platform composed of six charitable and religious communities.<sup>939</sup> Its role in providing practical and legal advice and support also facilitates the function of the Rapporteur in providing legal assistance to victims, in particular, as Victim Support has access to information on pre-trial investigations and closed criminal cases, which can be inaccessible to the Rapporteur.<sup>940</sup>

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<sup>934</sup> Government Decree 220/2012 *pentru aprobarea Regulamentului de organizare și funcționare a Agenției Naționale împotriva Traficului de Persoane* arts 11(b), 14(i).

<sup>935</sup> Government Decision 299/2003 *pentru aprobarea Regulamentului de aplicare a dispozițiilor Legii nr. 678/2001 privind prevenirea și combaterea traficului de personae* art 7(3).

<sup>936</sup> Petrescu (n 900) 52.

<sup>937</sup> Surtees and de Kerchove (n 923) 70.

<sup>938</sup> See generally services offered and statement on funding received from five domestic and/or regional bodies to the Pro Centre <<http://pro-tukipiste.fi/en/who-we-are/>> accessed 9 February 2017.

<sup>939</sup> See generally services offered and resources available to the Victim Support <<http://www.riku.fi/binary/file/-/id/120/fid/1606>> accessed 9 February 2017.

<sup>940</sup> Baudet (2012) (n 433) 35.

While in Sweden, the National Board of Health and Welfare is primarily responsible for monitoring prostitution-related trafficking. Even though it relies on NGO cooperation because most prostitution takes place indoors and, therefore, cannot be effectively monitored by the government institution.<sup>941</sup> The importance of NGO involvement in reducing the demand for prostitution, raising awareness of sex trafficking, and offering victim support services is also explicitly mentioned in the national plan of action, and government funding is available to develop NGO services.<sup>942</sup> As mentioned already, cooperation between NGOs and the Swedish Rapporteur, however, is minimal because of the latter's placement in the Police and the subsequent reluctance of NGOs to readily share any information about victims and offered services. NGO involvement in the work of the Swedish Rapporteur, thus, reflects the weakest form of cooperation among the case studies. Above all, this limits the possible influence of a human rights approach in the monitoring and reporting functions of the Swedish Rapporteur.

#### **4.4.5. Preliminary Conclusions**

The national exploration draws four preliminary conclusions. First, the six NREMs are mandated at a minimum to monitor and report on the progress of domestic anti-trafficking efforts due to their proximity to government and victims, which means they can better assess trafficking trends and measure the practical effects of anti-trafficking policies. This reporting complements review by international and European enforcement mechanisms, in particular, by the SRTIP and the ATC as NREMs participate in international meetings and are constituted in an informal EU network. Second, the Belgian, Dutch, and Finnish Rapporteurs because they are sufficiently independent from government can offer victim support, such as the possibility of initiating proceedings against traffickers or providing legal advice and assistance to victims as part of securing their human rights. A victim-oriented approach is less likely among structures of the NREM that are instituted within government, such as the Swedish Rapporteur, or have a dual role of coordination and monitoring, such as the Romanian Rapporteur. In particular, this duality decreases the perceived independence of the NREM and the subsequent credibility of its findings. At the same time, government structures benefit most from existing resources, since, third, the inadequacy of financial and/or human resources is an impediment to the proper functioning of the six NREMs. Fourth, the six NREMs work with NGOs as part of their data collection mandates but independent structures benefit most from this cooperation,

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<sup>941</sup> Law 2007/08:167 (n 388) pt 2.2.

<sup>942</sup> *ibid* measures 4, 17.

as NGOs are more likely to share information on victims and the practical effects of anti-trafficking policies with actually independent NREMs that follow a victim-orientated approach.

#### **4.5. Conclusions**

This chapter critically appraised the enforcement mechanisms attaching directly or indirectly to the preeminent anti-trafficking instruments identified in chapter 2, taking into account the scope of their mandates, the degree of independence and accountability of their offices, the adequacy of resources, and the extent of NGO cooperation. The international, European, and national mechanisms respectively examined in sections 4.2 to 4.4 are integral to addressing some of the systemic challenges to implementation of those preeminent instruments, as will become evident from the impact study in the next chapter, because through their monitoring and reporting functions they can change the compliance behaviours of state parties, with a view to promoting international cooperation by increasing knowledge production and international regulation. Also the mechanisms examined here are complementary as their mandates explicitly mention their cooperation with other relevant mechanisms, in part, to avoid the duplication of efforts. Since the inadequacy of resources remains a primary concern for all mechanisms.

The shortage of resources is a common problem for enforcement mechanisms established within the UN's legal system, in particular, its human rights mechanisms as it would appear that more independent structures, such as the CEDAW Committee and the SRTIP, receive less attention from states because the more independent the mechanism the more credible its work. This presents a danger for states that are generally less accommodating of intrusive enforcement tools, such as the individual complaints and inquiry procedures or country visits, because they cannot control how much information about the negative effects of their anti-trafficking policies becomes a matter of international scrutiny. For this reason, the COP that directly attaches to the UN Trafficking Protocol relies on a system of self-reporting and the proposed review mechanism to assist the COP envisages a system of peer-review so that monitoring remains in the hands of states. Even the European Commission that directly attaches to the EU Trafficking Directive prefers constructive dialoguing with noncompliant member states as evidenced by the early closure of infringement proceedings against member states that had failed to notify the Commission of their transposition measures or to transpose the Directive's provisions by the stipulated deadline.

No state willingly submits to international scrutiny because its international reputation of compliance will influence existing commitments and future cooperation in other foreign policy matters. Thus, the inadequacy of resources can be an indirect attempt to curtail the proper functioning of independent mechanisms. For example, the special procedures, including the SRTIP, argue that the state-imposed code of conduct because of the way it is used by states to hold mandate-holders accountable, in fact, stifles their monitoring function. Even independent structures of the NREM at the national level complain about the negative effects of reducing allocated budgets on the intent of governments to prevent and combat trafficking through increased cooperation. For example, Myria reports that the budget cut immediately following the formalisation of the Belgian Rapporteur had sent a wrong message about the political will to implement anti-trafficking policies. The appointment of only one staff within the office of the Finnish Rapporteur to monitor anti-trafficking policies within an annual budget of EUR 15,000, which does not even cover the preparation of annual reports, is another example of waning political will for objective assessments and genuine recommendations. Even additionally entrusting the Romanian Rapporteur with coordination functions curtails the credibility of reporting because the same institution cannot design anti-trafficking policies and make genuine recommendations. In fact, the coordination function of the Romanian Rapporteur explicates why its reports assessing anti-trafficking policies are primarily a showcase of positive results with quantitative data and little qualitative analysis.

Given the inadequacy of resources, there is increased involvement of NGOs in the monitoring processes of enforcement mechanisms. Some mechanisms, such as the CEDAW Committee and GRETA, have established guidelines for the submission of information or shadow reports by NGOs. Similarly, the CEDAW Committee and the SRTIP allow the submission of complaints alleging human rights violations on behalf of trafficking victims by NGOs. In Belgium, the Czech Republic, and the Netherlands, NGOs can be formally instituted into the government system of victim protection and assistance, and such NGOs are coordinated by the National Rapporteur, which, therefore, maintains a direct link between the work of NGOs and the Rapporteur without infringing on their independent status. In Finland, NGOs provide information on the practical effects of anti-trafficking policies, which government authorities are obliged to provide but do not because of the Finnish Rapporteur's independent status.

At the same time, cooperation with NGOs becomes more difficult in the absence of a victim-orientated approach, thus, NGOs continue to struggle for access rights in UN forums,



including in the meetings of the UN Trafficking Protocol's COP as observers that can make only oral statements. The anti-prostitution loyalty oath also prevents cooperation between the TIP Office that directly attaches to the TVPA and NGOs that provide assistance to victims of sexual exploitation, with valuable information on the effectiveness of measures to discourage the demand for sexual exploitation or to better protect victims. While the placement of the Swedish Rapporteur in the National Police is an important reason behind the crime-oriented approach of its reports.

It follows that the enforcement mechanisms examined here with the primary purpose of monitoring and reporting on national anti-trafficking efforts have different enforcement tools to measure progress in the field. The mechanisms with independent status have broader mandates and subsequently a wider range of enforcement tools. Given their independent status, they are also more likely to cooperate with and receive information from NGOs providing victim services. However, independent enforcement mechanisms are also less likely to receive information on the practical effects of anti-trafficking policies from government authorities. Yet, in the case of NREMs there is no obligation of independence according to the EU Trafficking Directive. Thus, it remains to be seen whether independence is a determining factor in increasing knowledge production and international regulation around the trafficking problem.

There is already a preferred general direction of anti-trafficking responses as observed in chapter 2, which is rooted in the UN Trafficking Protocol. There are also systemic challenges to implementation of the anti-trafficking framework around the Protocol as observed in chapter 3. While the enforcement mechanisms attaching directly or indirectly to the preeminent anti-trafficking instruments operate under different settings as observed here, taking into account their mandates, the independence and accountability of their offices, the inadequacy of resources, and NGO cooperation. The impact of their work forms the focus on the next chapter, in particular, to what extent the mechanisms identified in this chapter are able to contribute to knowledge production and international regulation in the field.

## **Managing the Main Systemic Challenges to Implementation of the Legal Framework of Sex Trafficking through the Legal Mechanisms of Enforcement: An Impact Study**

### **5.1. Introduction**

There is increased recognition of the absence of reliable information and statistics in the field, which can feed into the development of appropriate responses to the trafficking problem. Such information is necessary for assessing meaningful implementation of the substantive content of norms and obligations, manifest in the preeminent anti-trafficking instruments examined in this thesis, namely the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive. Additional protection of victims' human rights under the CEDAW and the Trafficking Principles and Guidelines reinforce the complexity of the trafficking problem, on account of its multidimensional nature. That trafficking in persons now constitutes a fundamental violation of human rights under article 4 of the ECHR affirms the importance of the integrated, holistic, and human rights-based approach to trafficking under the EU Trafficking Directive. There is a preferred general direction of national responses based on the minimum standards developed at the international and European levels. Within the possibilities of international and European legal systems to appropriately deal with the trafficking problem, states have adopted mechanisms of enforcement to reinforce their commitments to the fight against trafficking in persons. There is also an innate acknowledgement that states cannot be entrusted wholly with the task of monitoring proper implementation of the international anti-trafficking framework. At the same time, there is a need for expertise to address the ambiguity of key norms and obligations, which undermine effective and wide cooperation as the paramount objective of international regulation of the trafficking problem. The enforcement mechanisms established directly or indirectly under the preeminent instruments have a formidable task of remedying this ambiguity to facilitate cooperation around prevention, prosecution, and protection. At the same time, those mechanisms must learn to work around their own systemic limitations, since their legitimacy and authority derives from or is otherwise connected to those ambiguous anti-trafficking instruments. The inherent tension between their

independence as a prerequisite for objective reporting and their accountability to states both as a means of ensuring the credibility of their work and controlling the monitoring process was observed in the previous chapter. The inadequacy of human, financial, and/or administrative resources to enhance their ability to effectively carry out their reporting mandates was also demonstrated. While the extent of cooperation with NGOs involved in the field of action was an instructive example of how those mechanisms could work around their intentionally flawed design, as none of those formal mechanisms possess coercive enforcement powers to hold states accountable and improve compliance with international norms and obligations.

This chapter appraises the impact of the work of the enforcement mechanisms identified in the previous chapter. It focuses on their ability to increase knowledge production and international regulation through their monitoring and reporting mandates. The ‘tools’ of enforcement, thereby, identified, namely thematic and country-specific reports, country visits, and the individual communications and inquiry procedures, have all contributed significantly to understanding the trafficking problem. However, normative development in the field is infeasible without reliable information and statistics. That the vast majority of academic research in the field is not based on empirical data was observed early on, and remains true even today, as there is a heavy reliance on overviews, commentaries, and anecdotal information.<sup>943</sup> According to Goździak, some of the challenges involved in conducting empirical research on trafficking in persons relate to the biased portrayal of ‘victims’, which, therefore, excludes whole groups of trafficked persons and influences how their agency and vulnerability are understood. The overlapping between trafficking and smuggling in persons and the inadequate definitional guidance in the additional protocols on trafficking and smuggling or by the Conference of the Parties to the UNCTOC regime are another obstacle, as well as, the difficulty of gaining access to victims for research projects or accurately assessing the scope of involvement of criminal networks.<sup>944</sup> The national rapporteur or equivalent mechanism (NREM) in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden contribute in a meaningful way to the production of knowledge about the scope of trafficking and the appropriateness of current policy and practice. Since they are the central locus at the national level for data collection and analysis on trafficking trends and the results of anti-trafficking efforts. Yet, there have been very few studies on their valuable role. This point relates broadly to the enforcement mechanisms examined here, as the academic interest

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<sup>943</sup> Goździak (2014) (n 33) 613.

<sup>944</sup> *ibid* 615-626.

in the overall impact of the international anti-trafficking framework has not extended to the very mechanisms responsible for enforcing its implementation. This is a general problem with human rights treaty literature.<sup>945</sup>

This chapter, then, contributes to the literature gap in the field in the hopes of yielding more insights into the relationship between the design and impact of anti-trafficking enforcement mechanisms. It is inspired by a functional comparative analysis that considers both the operating institution and the law in action, and follows a similar structure to the previous chapter. In order to fully grasp their individual contributions to knowledge and regulation in the field, the international and regional enforcement mechanisms are examined individually, with appropriate comparisons. The international mechanisms in section 5.2 are the Conference of the Parties (COP), with a special focus on the Working Group on Trafficking in Persons (WGTIP), the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Special Rapporteur on Trafficking in Persons, especially Women and Children (SRTIP), and the Office to Monitor and Combat Trafficking in Persons (TIP Office). The European mechanisms in section 5.3 are the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, with a special focus on the former, and the European Commission, with a brief mention of the Anti-Trafficking Coordinator (ATC). The national enforcement mechanisms, namely the NREM in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, are studied comparatively in section 5.4 as their role derives from the same source, namely article 19 of the EU Trafficking Directive. Finally, the core conclusions of this chapter are laid out in section 5.5.

## **5.2. International Responses**

The section begins by examining the work of the COP mechanism, in particular, that of the WGTIP, which is followed by an impact assessment of the work of two human rights enforcement mechanisms, namely the CEDAW Committee and the SRTIP, in sections 5.2.2 and 5.2.3 respectively. Section 5.2.4 studies the work of the TIP Office in terms of increasing knowledge production in the field, compared to the above international enforcement mechanisms. The four preliminary conclusions to this core section are laid out in section 5.2.5.

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<sup>945</sup> See Yvonne M Dutton, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34(1) *University of Pennsylvania Journal of International Law* 1, 9.

### 5.2.1. The COP: The WGTIP as a Supplementary Review Mechanism, and the Proposed Peer-Review Process of State Reporting

The absence of an effective enforcement mechanism under the UN Trafficking Protocol is evident in the voluminous and repetitive reporting of the COP mechanism, with the assistance of the WGTIP, which currently reviews the national implementation of the Protocol. Between 2004 and 2016, the COP held eight sessions to improve the capacity of state parties to the UNCTOC regime, including the UN Trafficking Protocol, to combat transnational organised crime. There was immediate recognition of trafficking in persons as ‘one of the most complex, nefarious and multifaceted forms of transnational organized crime’, which required concerted action at the national, regional, and international levels, and above all the political will and determination of governments.<sup>946</sup> As part of the initial review, the COP endorsed two sets of questionnaires on the basic adaptation of national anti-trafficking legislation, the criminalisation of trafficking offences, international cooperation, and victim protection and assistance.<sup>947</sup> Taking into account responses received before and after the closure of the two reporting cycles, 47 percent of the state parties to the UN Trafficking Protocol responded to the first questionnaire and 35 percent to the second questionnaire.<sup>948</sup> Belgium, the Netherlands, Romania, and Sweden responded to both questionnaires as state parties, while the Czech Republic and Finland responded as signatories. The decision to send questionnaires to signatories took into consideration the advantages of gaining a full picture of implementation, in particular, as some signatories regularly participated in the meetings of the COP and the WGTIP.<sup>949</sup> However, the overall response rate for both reporting cycles was low and comparably less for the second reporting cycle. There was also discrepancy in the quality of responses, with better quality responses from Latin American and Caribbean state parties than Eastern European state parties with a very high response rate.<sup>950</sup> Moreover, less than half of

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<sup>946</sup> COP (2005) (n 820) para 54.

<sup>947</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Draft questionnaire on implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ (6 July 2004) UN Doc CTOC/COP/2004/L.1/Add.1; UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Draft questionnaire on the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’ (17 October 2005) UN Doc CTOC/COP/2005/L.8.

<sup>948</sup> COP (2006) (n 757) figures I, II.

<sup>949</sup> See generally the list of participants in the reports of the COP and the WGTIP <<http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP.html>> <[http://www.unodc.org/unodc/en/treaties/CTOC/working-groups.html#Review\\_of\\_Implementation](http://www.unodc.org/unodc/en/treaties/CTOC/working-groups.html#Review_of_Implementation)> accessed 15 October 2017.

<sup>950</sup> COP (2006) (n 757) para 12.

the responding states provided further clarification to the COP on their noncompliance with certain provisions of the Protocol.<sup>951</sup> Even though the UNODC secretariat acknowledged that requests for individual clarification were not an effective means of review and could not provide the full implementation picture, which was necessary for the COP to formulate evidence-based policy.<sup>952</sup> Nonetheless, the COP's decision to approach responding state parties individually indicated to the UNODC secretariat an emerging tendency towards a peer-review approach, which it argued could augur well for the future.<sup>953</sup> In fact, the proposed review mechanism to assist the COP's monitoring function envisages a system of peer-review by two other state parties, with the active involvement of the state party under review.<sup>954</sup>

As the primary medium for collecting the necessary information for review purposes, subsequent questionnaires were simplified and upgraded to an online platform.<sup>955</sup> However, due to resource constraints, those questionnaires were available in only three of the six official languages of the UN, namely, English, French, and Spanish, and 60 state parties and signatories provided new or updated responses within the first two months of their circulation.<sup>956</sup> At the same time, the WGTIP was established to assist the COP's monitoring function in identifying weaknesses, gaps, and challenges to the implementation of the UN Trafficking Protocol through the exchange of information with experts and practitioners.<sup>957</sup> In doing so, the WGTIP recommends to the COP how state parties can better implement the Protocol's provisions, as well as, how the COP can better coordinate the activities of the UNODC secretariat and with other international stakeholders.

Between 2009 and 2017, the WGTIP held seven sessions, which primarily focused on the adequacy of national anti-trafficking legislation and the clarity of key concepts, prevention and awareness-raising, non-punishment and non-prosecution of trafficking victims, protection and assistance, and cooperation and coordination at the international, regional, national, and local levels. Some of the pertinent recommendations include the preparation of issue papers by the UNODC secretariat on the definitions of key concepts, such as consent, harbouring, receipt

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<sup>951</sup> *ibid.*

<sup>952</sup> *ibid* para 14.

<sup>953</sup> *ibid* para 9.

<sup>954</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Mechanism for the review of implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: draft procedures and rules for the functioning of the mechanism' (21 February 2017) UN Doc CTOC/COP/WG.9/2017/2 annex para 18.

<sup>955</sup> COP (2008) (n 791) para 12

<sup>956</sup> *ibid* para 11.

<sup>957</sup> COP (2008) (n 792) decision 4/4 para o.

and transport, abuse of a position of vulnerability, exploitation, and transnationality.<sup>958</sup> The UNODC secretariat consequently released three issue papers on the concepts of abuse of a position of vulnerability, consent, and exploitation. The first paper recognises that the term ‘abuse of a position of vulnerability’ was unique to the UN Trafficking Protocol and reflected a general desire of the drafters to cover more subtle means of coercion without addressing the debate on whether to include non-coerced adult migrant prostitution within the Protocol’s definition.<sup>959</sup> With reference to national anti-trafficking legislation, including the Dutch and Belgian trafficking definitions, the issue paper observes how the Dutch Supreme Court in 2009 held that conditional intent is sufficient so that it is enough that the trafficker was aware of the state of affairs that must be assumed to give rise to power or a vulnerable position.<sup>960</sup> This reading reportedly led to a rise in the number of prosecutions and convictions for labour trafficking in the Netherlands, since the judgment concerned employment of irregular migrants below the statutory minimum wage with the knowledge that they were desperate for work and feared detection by authorities. While the Belgian definition focused on the act and purpose of trafficking so that sexual and labour exploitation that was contrary to human dignity would amount to trafficking, regardless of the use of any means, including abuse of a position of vulnerability.<sup>961</sup>

The second issue paper observes that the most expansive determination on the issue of consent is found in the UNODC Model Law against Trafficking in Persons,<sup>962</sup> which affirms that consent is irrelevant when any of the acts and means of the Protocol’s definition are proven to be used.<sup>963</sup> This means that persons willingly employed in the sex industry can be trafficking victims where they were deceived about the conditions of work, even if they knew about the nature of work. While the third issue paper acknowledges the definition of ‘exploitation of prostitution of others’, again, in the UNODC Model Law, namely ‘the unlawful obtaining of financial or other material benefit from the prostitution of another person’.<sup>964</sup> Even though it observes that the term can be addressed differently, with reference to states, including Sweden

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<sup>958</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010’ (17 February 2010) UN Doc CTOC/COP/WG.4/2010/6 para 31(b).

<sup>959</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ within the Definition of Trafficking in Persons* (UN 2013) 17-18.

<sup>960</sup> *ibid* 34.

<sup>961</sup> *ibid* 43.

<sup>962</sup> UNODC, *Model Law against Trafficking in Persons* (UN 2009).

<sup>963</sup> UNODC, *Issue Paper: The Role of ‘Consent’ in the Trafficking in Persons Protocol* (UN 2014) 27-28.

<sup>964</sup> UNODC, *Issue Paper: The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol* (UN 2015) 29.

where the respective term ‘sexual purposes’ is undefined because of the presence of strong alternative domestic offences.<sup>965</sup> Then, in an important way, the WGTIP’s recommendations help to raise awareness among states about the extensive array of existing interpretative and implementation guidance developed by the UNODC secretariat to clarify the Protocol’s ambiguous provisions.<sup>966</sup>

The WGTIP affirms the irrelevance of victim consent where any of the means in the Protocol’s definition are employed, since the determination of consent is the all-important link between the identification of persons as trafficking victims and their subsequent entitlement to protections under the Protocol, which are not available to irregular migrants or illegal prostitutes.<sup>967</sup> To this end, the WGTIP also clarifies that trafficking in persons can be established before the act of exploitation has occurred, since trafficking is a process and there can be an overlapping between trafficking in persons and smuggling of migrants so that a person smuggled one day can be trafficked the next.<sup>968</sup> As mentioned already, neither the Protocol nor its accompanying travaux préparatoires provide any guidance on this issue. Moreover, the WGTIP draws attention to domestic situations, which appear to be on the rise, by mentioning that transit or transportation is unnecessary for establishing a trafficking offence.<sup>969</sup> Finally, it recommends defining the term ‘victim’ for better identification of trafficked persons, since front-line law enforcement officials typically lack awareness of the different forms of trafficking due to its constantly evolving nature.<sup>970</sup> While the explanatory note accompanying the COE Trafficking Convention, which already defines ‘victim’ as any natural person subjected to trafficking-related exploitation, explains that the definition helps to link identification to immediate human rights protection.<sup>971</sup>

Besides its value in interpreting some of the key concepts of the Protocol’s definition, the WGTIP has played an important role in raising awareness of the importance of compensation as part of victims’ human rights protection and fostering debate on the different measures to discourage the demand for trafficking-related services. Article 6(6) of the Protocol

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<sup>965</sup> *ibid* 85.

<sup>966</sup> See generally the publications of the UNODC secretariat on the UN Trafficking Protocol <<http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside>> accessed 15 October 2017.

<sup>967</sup> COP (2010) (n 958) para 32.

<sup>968</sup> *ibid*.

<sup>969</sup> *ibid* para 33.

<sup>970</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011’ (15 November 2011) UN Doc CTOC/COP/WG.4/2011/8 paras 23-25.

<sup>971</sup> Explanatory Report (n 185) para 99.



only requires that state parties provide victims the possibility of obtaining compensation for damage suffered. However, as mentioned already, very few victims actually receive compensation because they are unaware of such possibility or the state does not make sufficient provision for funds by linking it to confiscated assets or special funds for trafficking victims.<sup>972</sup> The WGTIP devoted a specific session to the issue,<sup>973</sup> and recommends that states should award compensation to all victims, even those with irregular status and those not present in the territory of the granting state.<sup>974</sup> Moreover, compensation should be awarded independent of a criminal case and regardless of whether the trafficker can be identified, sentenced, and punished.<sup>975</sup> The WGTIP, then, identifies three ways of providing compensation based on existing national practices, namely through civil action against the trafficker, civil claims against the trafficker within a criminal case, or government compensation schemes.<sup>976</sup>

The WGTIP is also increasingly considering measures to discourage the demand side of trafficking, which echoes regional attention to the issue by the European Commission under the EU Trafficking Directive.<sup>977</sup> It also reaffirms the importance of addressing demand as a root cause of trafficking and raising the effectiveness of law enforcement to discourage demand as stipulated in the Trafficking Principles and Guidelines.<sup>978</sup> Thus, the WGTIP recommends research on the root causes, such as the unequal opportunities for women, and the possibility of offering disadvantaged persons employment and practical training opportunities, based on a multidisciplinary, comprehensive, human rights-based, and targeted approach.<sup>979</sup> It follows that states should consider measures to enforce labour and human rights standards through labour inspections, as well as, regulate, register, license, and monitor private recruitment and employment agencies, and prohibit them from directly or indirectly charging workers fees for recruitment and placement, which fosters vulnerability.<sup>980</sup>

The pertinent recommendations of the WGTIP provide important guidance on the interpretation and implementation of the Protocol's provisions, which can go beyond the minimum requirements of the Protocol. However, those recommendations are not concrete and,

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<sup>972</sup> Meshkovska and others (n 180) 84-85.

<sup>973</sup> COP (2011) (n 6) para 19.

<sup>974</sup> COP (2011) (n 970) paras 51(f)-(g).

<sup>975</sup> *ibid* para 51(h).

<sup>976</sup> *ibid* para 51(i).

<sup>977</sup> See Commission Report (2016c) (n 396).

<sup>978</sup> Trafficking Principles and Guidelines (n 52) principle 4 and guidelines 5, 7

<sup>979</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 6 to 8 November 2013' (26 November 2013) UN Doc CTOC/COP/WG.4/2013/5 paras 16-17.

<sup>980</sup> *ibid* paras 21-22.

therefore, the work of the WGTIP does not amount to an adequate review of the national implementation of the Protocol, compared to more rigorous enforcement mechanisms, such as GRETA under the COE Trafficking Convention. Gallagher's review of the work of the COP and the WGTIP until mid-2010 confirms that the reporting procedure is 'a relatively crude mechanism for promoting or measuring compliance' because assessments based on state responses to questionnaires can 'provide, at best, a highly generalized picture of compliance patterns and trends'.<sup>981</sup> In fact, at the fifth session of the COP, the representative of Israel observed how the COP's sessions 'had been marred by those who repeatedly chose to politicize the forum' to the detriment of important discussions around the Protocol's provisions.<sup>982</sup>

It remains to be seen whether the proposed review mechanism to assist the COP's monitoring function will produce more rigorous reporting on state compliance. The mechanism will promote national implementation, technical assistance, and international cooperation, and operate under transparency, non-intrusiveness, non-adversariness, and flexibility.<sup>983</sup> Moreover, there is consensus among states and even NGOs that the mechanism should be non-ranking and non-punitive, which Gallagher argues is a direct reaction to unilateral ranking in the TIP Reports.<sup>984</sup> The proposed system based on peer-review is akin to the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (IRM),<sup>985</sup> since state parties to this Convention and the UNCTOC regime already share their information gathering tools as the UNODC serves as the secretariat to both Conventions.<sup>986</sup> The main advantage of peer review appears to be its inclusiveness and comprehensive nature, in particular, as it allows for the participation of a larger number of stakeholders in the review.<sup>987</sup> While the main disadvantage is that peer review is costly and states would be expected to respond to questionnaires, which typically attract low response rates, or information that is incomplete,

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<sup>981</sup> Gallagher (2010) (n 40) 469.

<sup>982</sup> COP (2010) (n 30) para 71.

<sup>983</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of experts on possible mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime held in Vienna on 30 September 2009' (14 October 2009) UN Doc CTOC/COP/WG.1/2009/3 paras 21-22.

<sup>984</sup> Gallagher (2010) (n 40) 472-73.

<sup>985</sup> (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 (UN Corruption Convention) art 63(7).

<sup>986</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Chair on the open-ended intergovernmental meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto held in Vienna from 28 to 30 September 2015' (14 October 2015) UN Doc CTOC/COP/WG.8/2015/3 para 20.

<sup>987</sup> *ibid* paras 20-21.

ambiguous, or of poor quality.<sup>988</sup> In the context of the IRM, it is also argued that peer review functions as ‘an instrument for formalizing cooperation’ so that it is considered to be a cooperative mechanism rather than a strict monitoring mechanism, based on value sharing, commitment, mutual trust, and credibility.<sup>989</sup> An instinctive problem relates to the transparency of monitoring and reporting under the proposed mechanism. Currently, state reports under the UNCTOC regime and the UN Corruption Convention are publically inaccessible. This restricts the participation of civil society, ‘which adds public pressure to the existing peer pressure’.<sup>990</sup> As explained in the previous chapter, NGOs have valuable insights about the practical effects of national anti-trafficking policies because they regularly encounter trafficking victims. Thus, the transparency concern decreases the credibility of reporting as a primary objective of peer review.

### **5.2.2. The CEDAW Committee: State Reports, General Recommendations, Concluding Observations, and the Individual Complaints Procedure**

The CEDAW Committee is the first treaty-based enforcement mechanism examined here to address trafficking in women in the context of the CEDAW. The international legal instruments adopted pre-International Covenant on Civil and Political Rights, including the 1950 Trafficking Convention, did not have specific mechanisms for monitoring national implementation.<sup>991</sup> Even though in the specific case, the mandates of the Working Group on Slavery and the Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others covered the issue in lieu.<sup>992</sup> Both mandates considered prostitution as a form of slavery<sup>993</sup> but as Nanda and Bassiouni rightly note the international control scheme around the 1950 Trafficking Convention was unable to transform the basic values, which support or tolerate the social behaviour sought to be altered, compared to the abolition of slavery and the slave trade.<sup>994</sup> In particular, the Working Group on Slavery

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<sup>988</sup> *ibid* para 20.

<sup>989</sup> Ophelie Brunelle-Quraishi, ‘Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis’ (2012) 2(1) *Notre Dame Journal of International and Comparative Law* 101, 138.

<sup>990</sup> *ibid*.

<sup>991</sup> ECOSOC ‘Contemporary Forms of Slavery: Updated Review of the Implementation of and follow-up to the Conventions on Slavery: Working Paper Prepared by Mr. David Weissbrodt and Anti-Slavery International’ (26 May 2000) UN Doc E/CN.4/Sub.2/2000/3 paras 57, 62-63.

<sup>992</sup> ECOSOC ‘Suppression of the traffic in persons and of the exploitation of the prostitution of others’ Res 1982/20 (4 May 1982).

<sup>993</sup> ECOSOC ‘Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others’ (17 March 1983) UN Doc E/1983/7 paras 8, 17.

<sup>994</sup> VP Nanda and MC Bassiouni, ‘Slavery and the Slave Trade: Steps Towards Eradication’ (1972) 12 *Santa Clara Lawyer* 424, 440.

observed that state parties to the 1950 Trafficking Convention were not transmitting reports regularly or not at all.<sup>995</sup> Moreover, the image of trafficking victims in need of protection from the ‘evils of prostitution’ under the Convention was ineffective in terms of human rights protection, since it disregarded women as ‘independent actors endowed with rights and reason’.<sup>996</sup> While the trafficking coverage in the CEDAW protects women by providing remedies for the human rights violations committed during their trafficking. This coverage remains relevant post-UN Trafficking Protocol because of the CEDAW’s Optional Protocol, even though the CEDAW Committee considered only two individual communications on trafficking violations under article 6 of the CEDAW and both were inadmissible. However, those communications, already examined in the previous chapter, reveal the significant potential of the individual communications procedure to improve the human rights of trafficked women. In particular, the dissenting opinion of the three Committee members affirmed the importance of early identification as a prerequisite for protection, as well as, the responsibility of states to exercise due diligence to this end to avoid further victimisation.<sup>997</sup> The Committee also affirmed the responsibility of states when deciding to repatriate victims to their origin country where re-trafficking is a necessary and foreseeable consequence.<sup>998</sup> This is important in relation to states, such as Sweden, which immediately repatriate victims after the expiration of the mandatory reflection period, which GRETA argues does not allow sufficient time for a proper assessment of the possible risks of re-trafficking.<sup>999</sup>

The CEDAW Committee also played an important role pre-UN Trafficking Protocol in interpreting the terms ‘trafficking’ and ‘exploitation of prostitution’ under article 6 of the CEDAW, which are undefined in both the CEDAW and the 1950 Trafficking Convention. As mentioned already, the General Recommendation 19 on violence against women considers trafficking a form of gender-based violence and explicitly identifies as forms of sexual exploitation sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organised marriages between women from developing countries and foreign nationals.<sup>1000</sup> The Committee also explicitly identifies poverty and unemployment

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<sup>995</sup> ECOSOC ‘Report of the Working Group on Slavery on its Second Session’ (19 August 1976) UN Doc E/CN.4/SUB.2/AC.4/373, 3.

<sup>996</sup> UNCHR ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women’ (29 February 2000) UN Doc E/CN.4/2000/68 para 22.

<sup>997</sup> CEDAW Committee (2007) (n 747) para 8.1.

<sup>998</sup> CEDAW Committee (2014) (n 750) para 8.10.

<sup>999</sup> GRETA (2014) (n 459) para 185.

<sup>1000</sup> General Recommendation 19 (n 193) para 14.

as the root causes of trafficking in women, which, therefore, requires that states address those factors as part of guaranteeing to trafficking victims their human rights under the CEDAW.<sup>1001</sup> In connection with the societal attitudes that maintain vulnerabilities, the Committee confirms that the stigmatisation around prostitution creates vulnerability to sexual violence.<sup>1002</sup> In the General Recommendation 24, the Committee also notes the particular vulnerability of prostitutes to sexually transmitted diseases because of the different demands of sex buyers so that states should grant prostitutes, including illegal migrant prostitutes, the right to sexual health information, education, and services.<sup>1003</sup> This means that the criminalisation of trafficking under the CEDAW entails a far-reaching obligation to transform the basic societal values that maintain vulnerabilities by improving the conditions of disadvantaged women. However, it is a serious shortcoming that the Committee does not connect the obligation to address the root causes with specific provisions of the CEDAW, which makes its recommendations ‘broadly programmatic’.<sup>1004</sup> According to Chuang, the programmatic nature reflects ‘the deep divides within the international feminist community over prostitution reform’ and similar divides appear to exist between the Committee members on how to address prostitution.<sup>1005</sup> For example, in the General Recommendation 26, the Committee links women migrant workers and women migrant workers who become trafficking victims without any elaboration of the trafficking issue so that it effectively escapes any determination of whether women migrant prostitutes are covered by article 6 of the CEDAW.<sup>1006</sup>

It follows from the General Recommendation 19 that state parties should include in their reports information on the extent of the trafficking problem and the effectiveness of anti-trafficking policies to prevent trafficking through research and awareness-raising and to protect victims with effective remedies, including compensation.<sup>1007</sup> The case studies are currently in different reporting cycles based on their ratification of the CEDAW. The most recent review of Belgium and Finland took place in 2014, of the Czech Republic, the Netherlands, and Sweden in 2016, and of Romania in 2017. The Committee focuses on the issue of trafficking

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<sup>1001</sup> *ibid.*

<sup>1002</sup> *ibid* para 15.

<sup>1003</sup> UN Committee on the Elimination of Discrimination against Women ‘General Recommendation No. 24’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II) para 18.

<sup>1004</sup> Chuang (2012) (n 529) 173.

<sup>1005</sup> *ibid.*

<sup>1006</sup> UN Committee on the Elimination of Discrimination against Women ‘General recommendation No. 26 on women migrant workers’ (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R para 4.

<sup>1007</sup> General Recommendation 19 (n 193) paras 24(c)-(d), 24(f)-(i).

in women for the purpose of prostitution, rather than exploitation of prostitution, and the list of issues typically identified by the Committee includes measures to protect women engaged in prostitution against sexual exploitation<sup>1008</sup> and measures to address the vulnerability of migrant women to trafficking for the purpose of forced prostitution.<sup>1009</sup> The subsequent recommendations of the Committee in the concluding observations centre on rehabilitation and reintegration programmes<sup>1010</sup> or alternative income-generating opportunities for women who wish to leave prostitution,<sup>1011</sup> as well as, adequate assistance for foreign victims who are unable or unwilling to cooperate with the prosecutorial authorities.<sup>1012</sup> An instinctive conclusion on the Committee's concluding observations is their formalistic nature, except in relation to Romania where the observations and recommendations are more concrete. For example, the Committee recommends proactive inspections for the identification of victims in recruitment agencies and workplaces, such as textile enterprises and domestic households, which addresses one of the shortcomings of prevention measures examined in chapter 2, since so far no recruitment agency has been sanctioned for facilitating the exploitation of Romanian nationals abroad.<sup>1013</sup> The absence of sufficient information appears to be a serious challenge to review by the Committee as it repeatedly requests states to provide disaggregated data on trafficking and the exploitation of prostitution, 'with a view to fully understanding the impact of legal and policy measures aimed at addressing gender-based discrimination in the State party'.<sup>1014</sup> For this reason, there is significant participation from civil society organisations.

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<sup>1008</sup> UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the seventh periodic report of Finland' (2 August 2013) UN Doc CEDAW/C/FIN/Q/7 para 14; UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the sixth periodic report of the Czech Republic' (3 August 2015) UN Doc CEDAW/C/CZE/Q/6 para 10.

<sup>1009</sup> UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the seventh periodic report of Belgium' (10 March 2014) UN Doc CEDAW/C/BEL/Q/7 para 11; UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the sixth periodic report of the Netherlands' (16 March 2016) UN Doc CEDAW/C/NLD/Q/6 para 9.

<sup>1010</sup> UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the sixth periodic report of the Czech Republic' (14 March 2016) UN Doc CEDAW/C/CZE/CO/6 para 21(c).

<sup>1011</sup> UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the seventh periodic report of Finland' (10 March 2014) UN Doc CEDAW/C/FIN/CO/7 para 21(e); UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the seventh periodic report of Belgium' (14 November 2014) UN Doc CEDAW/C/BEL/CO/7 para 27(c); UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined eighth and ninth periodic reports of Sweden' (10 March 2016) UN Doc CEDAW/C/SWE/CO/8-9 para 29; UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the sixth periodic report of the Netherlands' (24 November 2016) UN Doc CEDAW/C/NLD/CO/6 para 30(a); UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined seventh and eighth periodic reports of Romania' (24 July 2017) UN Doc CEDAW/C/ROU/CO/7-8 para 23(e).

<sup>1012</sup> CEDAW Committee (2017) (n 1011) para 21(d).

<sup>1013</sup> *ibid* para 21(c).

<sup>1014</sup> CEDAW Committee (2015) (n 1008) para 1.

The shadow reports of NGOs have been especially useful in understanding the practical effects of anti-trafficking policies, in particular, in states, such as Sweden, where there is no involvement of civil society organisations in the design and implementation of those policies.<sup>1015</sup> Thus, in their combined shadow report on Sweden, the Swedish Federation for LGBTQ Rights (RFSL), the Swedish Association for Sexual Education (RFSU), and the Swedish Disability Federation (Handikappförbunden) identify the inadequacy of assistance, which is currently directed to the three largest cities in Sweden so that particularly vulnerable victims in rural areas remain without effective protection.<sup>1016</sup> At the same time, the Swedish Women's Lobby underlines the negative results of the criminalisation of sex-buying, which the CEDAW Committee itself regards as an innovative approach to discouraging the demand for prostitution,<sup>1017</sup> namely that the criminalisation has resulted in about 80 percent of Swedish nationals buying sex abroad.<sup>1018</sup> This means that the reduction of prostitution in Sweden as a direct consequence of the criminalisation has actually increased the demand for prostitution in other states.<sup>1019</sup> Thus, the criminalisation has shifted the problem of exploitation of prostitution in Sweden to other states. While the shadow reports on Belgium<sup>1020</sup> and Finland<sup>1021</sup> highlight that those governments do not prioritise the fight against trafficking by adopting national strategies and action plans that tackle the root causes and trafficking-related exploitation to increase human rights protection of victims.

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<sup>1015</sup> GRETA (2014) (n 459) para 225.

<sup>1016</sup> RFSL, RFSU and Handikappförbunden, 'Written submission regarding the combined eight and ninth periodic review of Sweden Response to CEDAW/C/SWE/Q/8-9/Add.1' (*OHCHR*, 22 January 2016) para 17 <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT\\_CEDAW\\_NGO\\_SWE\\_22854\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT_CEDAW_NGO_SWE_22854_E.pdf)> accessed 16 October 2017; Crossing Borders, 'List of issues and questions regarding the combined eight and ninth periodic reports of Sweden' (*OHCHR*, 2015) para 20 <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT\\_CEDAW\\_NGO\\_SWE\\_20852\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT_CEDAW_NGO_SWE_20852_E.pdf)> accessed 16 October 2017.

<sup>1017</sup> CEDAW Committee (2016) (n 1011) para 29.

<sup>1018</sup> The Swedish Women's Lobby, 'The Swedish CEDAW Network's Shadow Report to the Swedish Government's Eighth and Ninth Periodic Reports on the Implementation of the CEDAW Convention' (*OHCHR*, 2015) 17 <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT\\_CEDAW\\_NGO\\_SWE\\_22781\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SWE/INT_CEDAW_NGO_SWE_22781_E.pdf)> accessed 16 October 2017.

<sup>1019</sup> See Government Report 2010:49 (n 387) 34.

<sup>1020</sup> Conseil des Femmes Francophones de Belgique and Nederlandstalige Vrouwenraad, 'Shadow Report 2014 on Belgium' (*OHCHR*, 2014) 9 <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BEL/INT\\_CEDAW\\_NGO\\_BEL\\_18376\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BEL/INT_CEDAW_NGO_BEL_18376_E.pdf)> accessed 16 October 2017.

<sup>1021</sup> Coalition of Finnish Women's Associations, 'Submission to the United Nation's Committee on the Convention on the Elimination of All Forms of Discrimination against Women' (*OHCHR*, January 2014) 28-29 <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/FIN/INT\\_CEDAW\\_NGO\\_FIN\\_16086\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/FIN/INT_CEDAW_NGO_FIN_16086_E.pdf)> accessed 16 October 2017.

### 5.2.3. The SRTIP: Thematic and Country-Specific Reports, and Communications

The special procedures are often described as the ‘crown jewel’ of the UN’s human rights system because they constitute an essential part of the human rights machinery through their periodic monitoring and reporting on human rights violations.<sup>1022</sup> Yet, there is a dearth of literature on the special procedures as ‘a system of human rights protection’, and mandate-holders themselves as legal scholars typically assess the special procedures.<sup>1023</sup> The appointment of the Special Rapporteur on trafficking in persons affirms the prevalence of trafficking and, more importantly, the inadequate human rights coverage under the UN Trafficking Protocol as its mandate focuses on the human rights aspects of trafficking victims. The work of the SRTIP is considered complementary to human rights treaty-based enforcement mechanisms, such as the CEDAW Committee, and through its mandate, the SRTIP regularly participates in the meetings of the WGTIP under the Protocol.<sup>1024</sup> In fact, the WGTIP recommends cooperation between its UNODC secretariat and the SRTIP in clarifying the key concepts of the Protocol’s definition as a major impediment to the Protocol’s implementation.<sup>1025</sup>

The SRTIP’s role in interpreting anti-trafficking norms and standards is certainly one of the benefits of its mandate, which, in turn, has led to a broader understanding of the trafficking problem beyond the principal concerns of states around migration, security, and public order.<sup>1026</sup> For example, in its first annual report, the SRTIP recommends that human rights should be at the centre of all anti-trafficking efforts, which ‘should not adversely affect the human rights and dignity of the persons concerned’.<sup>1027</sup> Thereby, affirming the primacy of human rights as espoused by the Trafficking Principles and Guidelines. The mandate further affirms the human rights approach to trafficking in its promotion of an effective and rights-based response based on protection, prosecution, and prevention in line with the Protocol’s focus, as well as, international cooperation, and redress, rehabilitation, and reintegration of victims.<sup>1028</sup> This victim-orientated response highlights the discriminatory practices and

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<sup>1022</sup> Subedi (n 766) 203.

<sup>1023</sup> *ibid* 205. Subedi was the Special Rapporteur on the Situation of Human Rights in Cambodia.

<sup>1024</sup> COP (2011) (n 970) para 53.

<sup>1025</sup> COP (2013) (n 979) para 6.

<sup>1026</sup> UNCHR ‘Report of the Special Rapporteur on trafficking in persons, especially women and children’ (22 December 2004) UN Doc E/CN.4/2005/71 para 10

<sup>1027</sup> *ibid* para 11.

<sup>1028</sup> UNHRC ‘Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo’ (20 February 2009) UN Doc A/HRC/10/16 pt V.



inequalities, which create vulnerabilities and maintain impunity for traffickers, as well as, the adverse impact of prevention measures on individual rights and freedoms guaranteed under international law.

An instructive example of the mandate's influence on normative development in the field is the subsequent adoption of the principle of non-punishment of trafficking victims for status-related offences, such as illegal entry, illegal stay, or illegal work, in the resolutions of the HRC<sup>1029</sup> and the UNGA,<sup>1030</sup> as well as, the reports of the CEDAW Committee<sup>1031</sup> and the WGTIP.<sup>1032</sup> This principle as originally espoused by the Trafficking Principles and Guidelines and affirmed under article 26 of the COE Trafficking Convention is now a well-established part of the broader international anti-trafficking framework because of its consistent mention in the SRTIP's thematic and country-specific reports.<sup>1033</sup>

Through the thematic and country-specific reports, the SRTIP has uncovered poorly understood or new areas of concern, such as the denial of a right to a remedy,<sup>1034</sup> prosecution for status-related offences,<sup>1035</sup> conditionality of assistance on cooperation with authorities,<sup>1036</sup> and forced repatriation of victims in danger of reprisals or re-trafficking.<sup>1037</sup> The persistence of these practices, according to the SRTIP, underscores the importance of a human rights approach to the trafficking problem.<sup>1038</sup> Moreover, those studies have encouraged the drafting of, for example, basic principles on the right to an effective remedy for trafficked persons.<sup>1039</sup> At the same time, the SRTIP's approach to prostitution has been less helpful because different mandate-holders have interpreted the relationship between prostitution and trafficking differently. The first mandate-holder recommended against 'legalization of prostituted persons' to discourage the demand for trafficking based on observations that most prostitution involved

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<sup>1029</sup> UNHRC Res 11/3 (17 June 2009) UN Doc A/HRC/RES/11/3 para 3.

<sup>1030</sup> UNGA Res 67/145 (27 February 2013) UN Doc A/RES/67/145 para 20.

<sup>1031</sup> UN Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women on Singapore' (16 January 2012) UN Doc CEDAW/C/SGP/CO/4/Rev.1 para 25.

<sup>1032</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009' (21 April 2009) UN Doc CTOC/COP/WG.4/2009/2 para 12.

<sup>1033</sup> UNCHR 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (6 June 2012) UN Doc A/HRC/20/18 paras 23-28, 89.

<sup>1034</sup> UNHRC (2011) (n 740) para 9.

<sup>1035</sup> UNHRC (2012) (n 1033) para 23.

<sup>1036</sup> UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (12 August 2009) UN Doc A/64/290 para 50.

<sup>1037</sup> *ibid* para 94.

<sup>1038</sup> Gallagher and Ezeilo (n 41) 922.

<sup>1039</sup> UNHRC (2011) (n 740) annex I.

sexual exploitation and, thus, amounted to trafficking.<sup>1040</sup> The second mandate-holder also found that prostitution was a major site of trafficking-related exploitation but opted for a different approach, since international law does not equate prostitution and trafficking.<sup>1041</sup> The debate has shifted to the obligation of states to tackle the root causes of trafficking because it cannot be concluded definitively from the latter's fact-finding missions that criminalising prostitution discourages demand.<sup>1042</sup> Chapter 3 concluded similarly in relation to the prostitution regimes promulgated by the Netherlands and Sweden, and this more nuanced position is preferable because research-based evidence suggests that criminalisation actually promotes vulnerability.<sup>1043</sup> This position is also more in line with the position of the CEDAW Committee that requires states to address poverty and unemployment as root causes of prostitution-related trafficking.

The SRTIP has not visited any of the case studies in this thesis, since the decision to visit a specific country is based on the prevalence of trafficking in that territory and the perceived contribution of its fact-finding mission to understanding the trafficking problem. Yet, the thematic reports have been used by states, such as Belgium, even in the absence of a country visit to elaborate or strengthen anti-trafficking institutions and policies, as reference documents for further research, and to raise awareness of the issue covered.<sup>1044</sup> There also appears to be an increased acknowledgement of the SRTIP's work in Sweden given its participation in a conference on regional cooperation to combat trafficking, which was organised by the Swedish Ministry of Foreign Affairs.<sup>1045</sup> At the same time, Finland was one of few UN member states to respond frequently to information requests by the SRTIP in the initial years of its mandate, when thematic reports played an especially important role in clarifying the substantive content of relevant rights and obligations.<sup>1046</sup> Since the international

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<sup>1040</sup> UNCHR 'Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda' (20 February 2006) UN Doc E/CN.4/2006/62 paras 48, 52.

<sup>1041</sup> UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (9 August 2010) UN Doc A/65/288 para 34.

<sup>1042</sup> *ibid* paras 35-36.

<sup>1043</sup> Roth (n 94) 235.

<sup>1044</sup> UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (6 August 2014) UN Doc A/69/269 para 15.

<sup>1045</sup> UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (27 March 2014) UN Doc A/HRC/26/37/Add.2 45.

<sup>1046</sup> UNGA (2009) (n 1036) para 35; UNHRC (2009) (n 1028) 27; UNHRC 'Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda' (24 January 2007) UN Doc A/HRC/4/23 para 14; UNCHR (2006) (n 1040) para 24.

human rights system's own contribution was meagre and the UN Trafficking Protocol makes only general references to victims' human rights.<sup>1047</sup>

In relation to the case studies, the SRTIP has sent three communications, namely to the Netherlands and Romania in 2006 and the Czech Republic in 2010. The first communication concerned the trafficking of Somalian children to the Netherlands to facilitate social benefit fraud, who were later returned to and abandoned in Somalia.<sup>1048</sup> In its response letter, the Netherlands distinguished between trafficking and smuggling in children, noting that the present case did not constitute trafficking because the children attended school and were fed and clothed so that the exploitative element was not immediately clear.<sup>1049</sup> Even though smuggling from Somalia 'is entirely a Somali affair' when both the smuggler and smuggled person are Somalian nationals, the Netherlands sent a delegation to Somalia to gather information on child smuggling and informed its embassy in Somalia of the issue for early identification.<sup>1050</sup>

The second communication involved trafficking in Romanian children for sexual exploitation in Italy.<sup>1051</sup> In its response letter, Romania informed about the adoption of a programme to prevent and counter sexual abuse against minors and a national action plan to prevent and counter child trafficking, as well as, its law on the freedom of movement of citizens abroad, which prohibited travel of unaccompanied minors.<sup>1052</sup> There was also evidence of cooperation with Italian authorities, which it argued was 'satisfactory', while Romania recognised as a serious obstacle that Italian law does not allow authorities to inform diplomatic missions in Italy of the situations of foreign minors without their express consent.<sup>1053</sup> Moreover, the failure of the Italian authorities to identify any of the children as trafficking victims meant that those were not entitled to protection and assistance.<sup>1054</sup> However, there is no information on whether the Romania-Italy cooperation framework, which was underway actually resulted in fewer situations of child trafficking. To this end, it is a major shortcoming that the mandate does not stipulate a follow-up procedure.

The third communication sought clarification on an amendment to the Criminal Code on trafficking in persons, which places a duty on any person to report trafficking offences, if

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<sup>1047</sup> Gallagher and Ezeilo (n 41) 924.

<sup>1048</sup> UNHRC (2007) (n 811) para 195.

<sup>1049</sup> *ibid* paras 206-207.

<sup>1050</sup> *ibid* paras 205, 208.

<sup>1051</sup> *ibid* para 218.

<sup>1052</sup> *ibid* paras 222-223.

<sup>1053</sup> *ibid* paras 226-227.

<sup>1054</sup> *ibid* para 225.

they receive plausible information, and failure to immediately report to the authorities is punishable by up to three years of imprisonment.<sup>1055</sup> By law, only lawyers in connection with their practice of law and a cleric of a registered church exercising a right similar to confession are exempt from the duty to report. This means that NGOs and other services providers offering support to trafficking victims have a duty to report the trafficking offence, which could hamper the relationship of trust and confidence with victims, which is necessary for effective assistance.<sup>1056</sup> The amendment also serves as a disincentive for third parties, particularly those from migrant communities, who typically report trafficking offences to NGOs, because they want to avoid contact with the authorities.<sup>1057</sup> While the Czech Republic confirmed that social workers are presumably exempt from such duty, the SRTIP rightly expressed concern that such exemption was not explicitly mentioned in the amendment.<sup>1058</sup> The CEDAW Committee also considered the issue that same year as part of its review of the implementation of the CEDAW and recommended an explicit exemption of social workers assisting trafficking victims under the law.<sup>1059</sup> However, the Committee did not pursue the issue in its subsequent review.

#### **5.2.4. The TIP Office: TIP Reports**

The TIP Reports are the cornerstone of the TIP Office's monitoring and reporting mandate, which currently covers 188 countries around the globe, including the US, which consistently ranks high along with countries that fully meet the minimum standards on combating trafficking under the TVPA.<sup>1060</sup> The Office does not assess compliance per se. Instead, it ranks states into tiers of compliance with the TVPA's minimum standards to demonstrate the level of progress in fighting trafficking in individual states compared to the previous assessment year.<sup>1061</sup> Periodic assessments of the results of anti-trafficking efforts are important because of the constantly evolving nature of trafficking. Thus, one TVPA criteria explicitly asks whether governments are systematically monitoring their efforts and making publically available those assessments.<sup>1062</sup>

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<sup>1055</sup> UNHRC (2011) (n 740) paras 14-16.

<sup>1056</sup> *ibid* para 17.

<sup>1057</sup> *ibid* para 18.

<sup>1058</sup> *ibid* para 23.

<sup>1059</sup> UN Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women on the Czech Republic' (10 November 2010) UN Doc CEDAW/C/CZE/CO/5 para 25.

<sup>1060</sup> TIP Office (2017) (n 28) 415.

<sup>1061</sup> TVPRA 2003 (n 47) s 6(d)(3).

<sup>1062</sup> *ibid*.

There have been a myriad of impact studies on the positive effects of the TIP Report in encouraging individual states to combat trafficking and the promotion of a state's tier-ranking is often taken to imply the direct influence of the Report on the domestic trafficking situation.<sup>1063</sup> For example, Holman argues that the threat of losing aid under the economic sanctions regime and the stigma around a low ranking had created the necessary impetus for Belize, Cambodia, and Indonesia to actively work to improve their responses to international sex trafficking.<sup>1064</sup> Hacker also notes that the TIP Report pressured Israel into compliance with the TVPA's minimum standards.<sup>1065</sup> While Gallagher observes the strong influence of the TIP Report on the anti-trafficking responses of Australia, Malaysia, and Nigeria.<sup>1066</sup> However, merely looking at the tier-ranking of a state reveals very little about the actual domestic realities. Moreover, some of the assessment criteria stipulated by the TVPA are subjective. For example, how does one determine whether the percentage of foreign trafficking victims in the territory of a state is in fact 'insignificant', when neither the TVPA nor the TIP Report provides any definitional clarification on the use of subjective terms?<sup>1067</sup> There is no possibility to hold constructive dialogues with assessed states during which they can challenge the TIP Office's ranking or contribute to its knowledge base as happens with international and regional enforcement mechanisms, such as the CEDAW Committee or GRETA. In addition, the TIP Office does not undertake country visits that would allow it to collect the necessary information, and after 'reasonable' information requests the TIP Office will presume that that state does not meet the TVPA's minimum standards.<sup>1068</sup> By contrast, international and regional reporting recognises that implementation is a gradual process and that noncompliance will be remedied eventually. Despite the implications of maintaining vulnerability through noncompliance, non-ranking at the international and regional levels, at least, does not promote a perception of compliance, which is actually non-existent, especially by using the term 'compliance' in its guide to the tiers in the TIP Report.<sup>1069</sup>

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<sup>1063</sup> AG Friedrich, AN Meyer and DG Perlman, 'The Trafficking in Persons Report: Strengthening a Diplomatic Tool' (2006) UCLA School of Public Affairs Project, 10-11 <[https://issuu.com/uclapubaffairs/docs/the\\_trafficking\\_in\\_persons\\_report](https://issuu.com/uclapubaffairs/docs/the_trafficking_in_persons_report)> accessed 24 February 2017.

<sup>1064</sup> Holman (n 561) 113-114.

<sup>1065</sup> Hacker (n 557) 13-14.

<sup>1066</sup> Gallagher (2011) (n 93) 388-389.

<sup>1067</sup> TVPRA 2003 (n 47) s 6(d)(3).

<sup>1068</sup> TVPRA 2003 (n 47) ss 6(d)(1)(B), 6(d)(2)

<sup>1069</sup> TIP Office (2017) (n 28) 28.

Table 5. Tier rankings between 2001 and 2017.<sup>1070</sup>

	<b>Belgium</b>	<b>Czech Republic</b>	<b>Finland</b>	<b>Netherlands</b>	<b>Romania</b>	<b>Sweden</b>
<b>2001</b>	1	2	n/a	1	3	2
<b>2002</b>	1	1	n/a	1	2	1
<b>2003</b>	1	1	2	1	2	1
<b>2004</b>	1	1	2	1	2	1
<b>2005</b>	1	1	2	1	2	1
<b>2006</b>	1	2	1	1	2	1
<b>2007</b>	1	1	1	1	2	1
<b>2008</b>	1	1	1	1	2	1
<b>2009</b>	1	1	1	1	2	1
<b>2010</b>	1	1	1	1	2	1
<b>2011</b>	1	2	1	1	2	1
<b>2012</b>	1	1	1	1	2	1
<b>2013</b>	1	1	1	1	2	1
<b>2014</b>	1	1	1	1	2	1
<b>2015</b>	1	1	1	1	2	1
<b>2016</b>	1	1	1	1	2	1
<b>2017</b>	1	1	1	1	2	1

It follows that the consistently high rankings of the case studies in this thesis, as illustrated in the table above, are a poor indication of actual progress in fighting trafficking.<sup>1071</sup> Even though the Czech Republic was demoted in 2006 for inadequate sentences for traffickers and concern over forced labour,<sup>1072</sup> and in 2011 again for inadequate concern over forced labour.<sup>1073</sup> Moreover, the Czech Republic, Finland, Romania, and Sweden did not initially fully meet the TVPA's standards,<sup>1074</sup> and Romania remains a tier 2 state that does not fully meet the TVPA's standards, including inadequate victim assistance.<sup>1075</sup> However, their demotions and promotions do not make the TIP Report a definitive factor in increasing national anti-trafficking responses. As illustrated in chapter 3, different factors determine compliance with different groups of states. Moreover, there is a real danger that states with high tier-rankings will use the TIP Report to demonstrate that it does enough to fight trafficking, even if the TIP

<sup>1070</sup> Data source: Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: 10<sup>th</sup> Edition* (US Department of State 2010); TIP Office (2017) (n 28).

<sup>1071</sup> TIP Office (2017) (n 28) 86, 149, 170, 296, 376.

<sup>1072</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: June 2006* (US Department of State 2006) 103.

<sup>1073</sup> Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: June 2011* (US Department of State 2011) 142.

<sup>1074</sup> TIP Office (2010) (n 1070) 130, 148, 278, 310.

<sup>1075</sup> TIP Office (2017) (n 28) 334.

Office measures progress in relation to the previous assessment year.<sup>1076</sup> The political nature of the TIP Report is increasingly exposed, since the US uses the TIP Report to promote its foreign policies. This means that strategically important states will receive assessments that are more favourable. For example, Szep and Spetalnick exposed that the 2015 TIP Report was politically marred after the Interagency Task Force had promoted the low rankings, originally determined by the TIP Office, of 11 states of political significance to the US.<sup>1077</sup> As the rankings determined by the Office are subject to approval and change by the Interagency Task Force and the Office has no independence in this regard. Even though the Office's initial determination based on available information clearly indicated that those states did not meet the TVPA's standards and were not making significant efforts to fight trafficking, in which case they can be liable to unilateral sanctions.<sup>1078</sup> The subsequent year, Spetalnick and Wroughton observed the promotion of Thailand's ranking to 'smooth' US relations 'at a time when Washington seeks Southeast Asian unity against China in the South China Sea'.<sup>1079</sup> While the 2016 TIP Report explicitly mentions 'widespread forced labour' in the Thailand's vital seafood industry.<sup>1080</sup>

It is unsurprising, then, that states, especially those with low rankings will outright reject any influence of the TIP Report. For example, China openly criticises the TIP Report and argues that US monitoring threatens the principle of non-interference in the domestic affairs of other states.<sup>1081</sup> However, unilateral monitoring by the US through the TIP Report has not developed in a vacuum. There is a tradition of congressional oversight in relation to human rights, religious freedom, and drug trafficking, and the US has been monitoring international human rights protection through the Country Reports on Human Rights Practices since 1977 and religious freedom through the International Religious Freedom Report since 1999. Moreover, the economic sanctions regime under the TVPA resembles sanctioning through the International Narcotics Control Strategy Report since 1987. Yet, those reports are consistently criticised for their bias and politicisation, as they are also important foreign policy

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<sup>1076</sup> TVPRA 2003 (n 47) s 6(d)(3).

<sup>1077</sup> Szep and Spetalnick (n 775).

<sup>1078</sup> TVPA (n 47) s 110(a).

<sup>1079</sup> Matt Spetalnick and Lesley Wroughton, 'U.S. Downgrades Myanmar, Raises Thailand in Human Trafficking Report' (*Reuters*, 1 July 2016) <<http://www.reuters.com/article/us-humantrafficking-usa-idUSKCN0ZG1U3>> accessed 11 November 2016.

<sup>1080</sup> TIP Office (2016) (n 74) 364.

<sup>1081</sup> 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on July 4, 2016' (*Ministry of Foreign Affairs, the People's Republic of China*, 4 July 2016) <[http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1377405.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1377405.shtml)> accessed 11 November 2016.

tools of the US.<sup>1082</sup> As mentioned in the previous chapter, the reputation for good policy is an effective compliance factor and states use reputation tools to exert ‘soft’ pressure on other states.<sup>1083</sup>

Nonetheless, since the first TIP Report in 2001, there has been a dramatic shift in scope, methodology, and approaches to increase the perceived credibility of assessments. For example, the initial TIP Reports covered only 83 countries of origin, transit, and destination. However, increased ratification of the UN Trafficking Protocol necessitated wider coverage of states, in particular, because the TIP Office monitors anti-trafficking efforts as the Protocol’s de facto treaty-monitoring mechanism. Its current coverage of 188 countries affected by the trafficking problem includes non-parties to the Protocol. Thus, there is an increased benefit of reporting through the TIP Report because this means that the anti-trafficking efforts of those states are still subject to international scrutiny. There is no doubt that the TIP Report contributes to knowledge production in the field about different trafficking forms and different national responses. Despite their formalistic nature, the country narratives in the TIP Report also limit the extent to which individual states can control the flow of information as otherwise ‘even the most egregious failure on the part of a state to deal with trafficking-related exploitation would likely come at little reputational or other cost’.<sup>1084</sup> However, it is surprising that the TIP Report does not refer to or cite its information sources, which would lend greater support to its assessments, which do not directly involve the assessed states. For this reason, the TIP Report is not typically incorporated into international legal research in the field.<sup>1085</sup> Even though a comparative study on the different assessment methodologies of the TIP Office and GRETA found a strong correlation between their ‘compliance’ indices, which gives further credibility to their assessments.<sup>1086</sup> A final point relates to the more nuanced position of the TIP Report on the relationship between prostitution and trafficking since 2010, namely that consensual prostitution ‘regardless of whether it is legalized, decriminalized, or criminalized’ is not trafficking.<sup>1087</sup> This position is in line with international law that does not equate prostitution

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<sup>1082</sup> Thomas Melito, ‘Report to the Chairman, Committee on the Judiciary and the Chairman, Committee on International Relations, House of Representatives’ (2006) U.S. Government Accountability Office GAO-06-8252006, 9 <<http://www.gao.gov/new.items/d06825.pdf>> accessed 24 February 2017.

<sup>1083</sup> Koh (n 716) 1500-1501.

<sup>1084</sup> Gallagher (2011) (n 93) 392.

<sup>1085</sup> Feasley (n 776) 8.

<sup>1086</sup> Jan Van Dijk and Fanny Klerx-Van Mierlo, ‘Quantitative Indices for Anti-Human Trafficking Policies: Based on Reports of the U.S. State Department and the Council of Europe’ (2014) 61(2) *Crime, Law and Social Change* 229, 247.

<sup>1087</sup> TIP Office (2010) (n 1070) 8.



and trafficking. Yet, the TIP Office continues to assess whether states, including those with legalised sex industries, reduce the demand for prostitution as part of their efforts to combat trafficking.<sup>1088</sup> While states continue to determine individually measures to discourage the demand for trafficking, this assessment criteria would appear to unnecessarily lower some states tier-ranking.

### **5.2.5. Preliminary Conclusions**

The international study draws four preliminary conclusions. First, the implementation of the UN Trafficking Protocol is monitored through a crude enforcement mechanism, even though the WGTIP has played some role in interpreting key concepts around the Protocol's definition. Second, article 6 of the CEDAW has been of limited focus to the work of the CEDAW Committee, and the general recommendations and the concluding observations are broadly programmatic. Third, through the thematic and country-specific reports, the SRTIP has played an important role in clarifying the substantive content of anti-trafficking rights and obligations, and the communications have helped to highlight the most prevalent trafficking risks. Even though the tangible results of its work depend upon long-term human rights protection by states. Fourth, the tension between the use of the TIP Report to encourage other states to combat trafficking and further other US foreign policy reduces the credibility of reporting by the TIP Office. Yet, the TIP Report remains the most influential document in the field in terms of knowledge production.

## **5.3. European Responses**

This section focuses on the added-value of the work of GRETA, in section 5.3.1, and of the European Commission, in section 5.3.2, in terms of increasing knowledge production and international regulation in the field. The two preliminary conclusions to this core section are laid out in section 5.3.3.

### **5.3.1. GRETA: Country Reports based on Country Visits**

A number of features that make for an effective enforcement mechanism are present in the structure of the bipartite mechanism composed of GRETA and the Committee of the Parties, even though the work of the latter becomes relevant only after the completion of GRETA's

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<sup>1088</sup> TVPRA 2008 (n 47) s 106(2)(D).

reporting of implementation of the COE Trafficking Convention. For example, GRETA has independence to determine the rules of procedure for evaluating implementation of the Convention so that it can select the specific provisions of the Convention on which each evaluation, which is divided into rounds, shall be based.<sup>1089</sup> This also means that GRETA has sufficient time to consider implementation of the specific provisions of the Convention, much like the COP that establishes a programme of work that it reviews at regular intervals to cover different subject areas of the UNCTOC and its additional Protocols.<sup>1090</sup> By contrast, the CEDAW Committee, which is more akin to GRETA as both are human rights enforcement mechanisms composed of independent experts, reviews overall implementation of the CEDAW at its sessions and the length of such sessions is predetermined under the CEDAW. Consequently, there is a backlog of state reports to the Committee.<sup>1091</sup> Even though the Committee's work applies to four times the number of state parties to the COE Trafficking Convention and resources for effective review are comparably inadequate. While there were initial doubts about the feasibility of GRETA's evaluation procedure because of the limited resources, the COE does increase the operational budget for country visits to accommodate evaluation of new state parties.<sup>1092</sup> Country visits are another added-value of monitoring by GRETA, compared to the CEDAW Committee that cannot effectively undertake visits to each state party on account of the sheer number of ratifications to the CEDAW and the already inadequate resources. The country visits serve a two-fold purpose of corroborating information, which is collected from states through questionnaires to initiate the evaluation round,<sup>1093</sup> and increase its knowledge base about the Convention's implementation by the visited state. More importantly, GRETA does not require an invitation of visit from state parties, which as a necessary component of visits undertaken by the SRTIP hampers its work on studying the prevalent trafficking risks because a number of states repeatedly postpone issuing an invitation, and others refuse to do so.<sup>1094</sup> To this end, it is also favourable that the delegation of GRETA members decides on the programme of the country visit to reduce the possible control of the government over the flow of information that becomes readily available to GRETA during its

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<sup>1089</sup> GRETA 'Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties' THB-GRETA(2014)52 (GRETA Evaluating Rules of Procedure) rules 1, 4.

<sup>1090</sup> COP (2004) (n 556) para 38.

<sup>1091</sup> Hodson (n 522) 563.

<sup>1092</sup> GRETA (2012) (n 856) para 26.

<sup>1093</sup> GRETA Evaluating Rules of Procedure (n 1089) rule 3.

<sup>1094</sup> Gallagher and Ezeilo (n 41) 921.

visit.<sup>1095</sup> It follows that the COP had considered the feasibility of establishing a supplementary review mechanism resembling the ‘advantageous’ structure of GRETA, which encouraged ‘more active government ownership of the review process and outcomes’ on account of its independent composition and involvement of government in response to the draft country report.<sup>1096</sup> Even though a detailed evaluation was not possible at the time as GRETA had just marked its first anniversary and it had yet to begin formally evaluating implementation of the COE Trafficking Convention. In the lead-up to finalising the proposed mechanism under the UNCTOC regime based on peer-review, GRETA’s structure was considered anew but states ultimately decided on a peer-review model in which governments are most likely to have an active involvement in the review process and its outcomes.<sup>1097</sup>

Table 6. First and second evaluation rounds.<sup>1098</sup>

	<b>Questionnaire sent</b>	<b>Deadline for replies</b>	<b>Country visit</b>	<b>Draft GRETA report</b>	<b>Final GRETA report</b>
<b>Belgium</b>	31/01/12 04/01/16	01/06/12 06/06/16	01-05/10/12 12-16/12/16	Mar 2013 Mar 2017	25/09/13 Jul 2017
<b>Czech Republic</b>	n/a	n/a	n/a	n/a	n/a
<b>Finland</b>	18/09/13 01/09/17	18/01/14 01/02/18	09-13/06/14 Apr-Jun 2018	Nov 2014 Nov 2018	20/03/19 Mar 2019
<b>Netherlands</b>	31/01/12 01/02/17	01/06/12 01/07/17	03-07/06/13 Sep-Dec 2017	Nov 2013 Mar 2018	21/03/14 Jul 2018
<b>Romania</b>	11/02/10 03/09/14	01/09/10 03/02/15	23-27/05/11 12-16/10/15	Sep 2011 Mar 2016	31/05/12 08/07/16
<b>Sweden</b>	31/01/12 10/11/16	01/06/12 10/04/17	27-31/05/13 May-Jun 2017	Nov 2013 Nov 2017	21/03/14 Mar 2018

GRETA is currently in its second evaluation round, which began in 2014 and lasts four years. As of October 2017, only Belgium and Romania have completed both evaluation rounds, as illustrated in the table above. The Czech Republic as the most recent state to ratify the COE

<sup>1095</sup> GRETA Evaluating Rules of Procedure (n 1089) rule 9.

<sup>1096</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Possible mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (26 August 2008) UN Doc CTOC/COP/2008/3 para 25.

<sup>1097</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Compilation of comments and views received from States on all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ (5 August 2015) UN Doc CTOC/COP/WG.8/2015/2 para 97(d).

<sup>1098</sup> Data source: GRETA (2012) (n 451) 8 (Romania); GRETA (2013) (n 427) 9 (Belgium); GRETA (2014) (n 459) 9-10 (Sweden); GRETA (2014) (n 457) 10-11 (the Netherlands); GRETA (2015) (n 430) 9-10 (Finland); GRETA ‘Provisional timetable for the Second evaluation round’ GRETA(2014)14rev2.

Trafficking Convention will begin its first evaluation round by addressing GRETA's questionnaire at the latest two years following the entry into force of the Convention, namely by July 2019.<sup>1099</sup> The first evaluation round focused on the Convention's provisions that would provide GRETA with an overview of national implementation, namely key concepts and definitions, and specific measures on prevention, prosecution, and protection.<sup>1100</sup> While the second evaluation round centres on the impact of legislative, policy, and practical measures on prevention, prosecution, and protection.<sup>1101</sup> However, only GRETA's final evaluation report on Romania is currently publically available. That GRETA does not make publically available its draft evaluation reports reduces the transparency of reporting and prevents early NGO involvement in the reporting process, as well as, public discussion at the national level. Planitzer argues that the public availability of GRETA's draft reports would ensure more focused shadow reports by NGOs and more focused discussions with GRETA during country visits.<sup>1102</sup> By contrast, the CEDAW Committee reviews state reports and enters into constructive dialogues with states in a public setting.

There is a strong correlation between the concluding observations of the CEDAW Committee and GRETA in relation to the case studies. For example, both mechanisms recommend that Romania intensify its efforts to train labour inspectors to identify labour trafficking victims, including in domestic households, through proactive and unannounced inspections.<sup>1103</sup> There is also concerted recognition of bilateral and multilateral cooperation by Sweden and the support it provides to anti-trafficking efforts in other states.<sup>1104</sup> This correlation reinforces the importance of the recommendations made by both mechanisms to improve human rights protection of victims, and helps to identify the priority areas of a human rights-based and victim-oriented approach. However, GRETA's reports are comparably more detailed, which lends support to concrete recommendations. For example, GRETA recommends that the Netherlands should involve more stakeholders in the identification process, such as NGOs that regularly encounter victims, because identification currently rests

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<sup>1099</sup> GRETA Evaluating Rules of Procedure (n 1089) rule 3.

<sup>1100</sup> GRETA 'Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties: First evaluation round' GRETA(2010)1 rev4.

<sup>1101</sup> GRETA 'Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties: Second evaluation round' GRETA(2014)13.

<sup>1102</sup> Julia Planitzer, 'GRETA's First Years of Work: Review of the Monitoring of Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' (2012) 1 *Anti-Trafficking Review* 31, 36.

<sup>1103</sup> GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania: Second evaluation round' (8 July 2016) GRETA(2016)20 para 56; CEDAW Committee (2017) (n 1011) para 21(c).

<sup>1104</sup> GRETA (2014) (n 459) para 221; CEDAW Committee (2017) (n 1011) para 29.

with law enforcement agencies ‘giving it a criminal-law bias that may be prejudicial to the situation of victims’.<sup>1105</sup> Another example is the importance, which GRETA attaches to the involvement of NGOs, trade unions, and other civil society actors in the planning and implementation of anti-trafficking policies in Sweden for effective human rights protection.<sup>1106</sup>

The human rights-based and victim-orientated approach allows GRETA to affirm the substantive content of human rights norms and obligations, such as early identification of victims by training all professionals who may encounter trafficking victims.<sup>1107</sup> Moreover, it clarifies that the identification obligation includes identifying as victims of trafficking such persons whenever there are reasonable grounds to do so, and to provide immediate and effective access to protection and assistance, including a reflection period, a residence permit, and compensation.<sup>1108</sup> GRETA also reaffirms in relation to Belgium,<sup>1109</sup> Finland,<sup>1110</sup> the Netherlands,<sup>1111</sup> Sweden,<sup>1112</sup> and Romania<sup>1113</sup> that access to those protection and assistance entitlements should not depend upon the potential of investigations and prosecutions, or their continuation.

At the same time, in Romania’s second evaluation report, GRETA repeats its recommendation on providing victims with effective access to their protection and assistance entitlements.<sup>1114</sup> This implies a problem in the proper implementation of GRETA’s recommendations by states. Even though the Committee of the Parties promotes cooperation with the concerned state for the proper implementation of measures recommended by it and based on GRETA’s report.<sup>1115</sup> However, in the specific case, the Committee had endorsed wholly GRETA’s original recommendations, thereby, recommending *inter alia* that all assistance measures provided for in law are guaranteed in practice.<sup>1116</sup> There is a high overlap between the reports of GRETA and the Committee, which implies that the latter has yet to develop a clear identity separate to GRETA. Gallagher makes a similar remark in relation to

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<sup>1105</sup> GRETA (2014) (n 457) para 240.

<sup>1106</sup> GRETA (2014) (n 459) para 225.

<sup>1107</sup> *ibid* para 226.

<sup>1108</sup> GRETA (2016) (n 1103) paras 103, 119.

<sup>1109</sup> GRETA (2013) (n 427) para 237. See also CEDAW Committee (2014) (n 1011) para 25(d).

<sup>1110</sup> GRETA (2015) (n 430) para 228. See also CEDAW Committee (2014) (n 1011) para 21(c).

<sup>1111</sup> GRETA (2014) (n 457) para 241.

<sup>1112</sup> GRETA (2014) (n 459) para 223. See also CEDAW Committee (2016) (n 1011) para 29.

<sup>1113</sup> GRETA (2012) (n 451) para 207. See also CEDAW Committee (2017) (n 1011) para 21(d).

<sup>1114</sup> GRETA (2016) (n 1103) para 119.

<sup>1115</sup> Committee of the Parties Council of Europe Convention on Action against Trafficking in Human Beings ‘Rules of procedure of the Committee of the Parties’ THB-CP(2008)2 rule 1(b).

<sup>1116</sup> Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings Recommendation CP(2012)7 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania para 1

the overlap of reports during their first year of operation.<sup>1117</sup> Nonetheless, non-implementation of a specific recommendation does not necessarily reduce the Committee's potential to promote proper implementation of the COE Trafficking Convention, since the divergence in human rights protection is not always the result of a lack of political will. According to Gallagher and the SRTIP, the complexity of the trafficking problem, the uncertainty of aspects of the solution, and that states are rarely directly complicit in the trafficking all complicate the task of securing proper implementation of norms and obligations.<sup>1118</sup>

GRETA possesses certain features to emerge as a key player in terms of developing, articulating, and applying international law to the trafficking problem.<sup>1119</sup> In particular, its reporting covers a significant number of countries of origin, transit, and destination within the Eurasian context, and through the significant possibility for non-COE member states to become party to the COE Trafficking Convention, GRETA additionally monitors implementation by Belarus. Moreover, its work in clarifying international norms and obligations partly offsets weak monitoring by the WGTIP, and, more importantly, complements more robust monitoring by other human rights enforcement mechanisms, such as the CEDAW Committee, which benefits from a vital but underutilised individual complaints procedure to increase human rights protection. The jurisdiction of the ECtHR over trafficking offences under article 4 of the ECHR compensates for the absence of this procedure under GRETA. Even though the PACE had proposed the right of international and national NGOs with consultative status with the COE to submit to GRETA complaints of 'unsatisfactory application' of the COE Trafficking Convention by state parties, since NGOs cannot submit collective complaints to the ECtHR on behalf of individuals.<sup>1120</sup> As Scarpa rightly observes, this inclusion would have transformed the Convention into a model convention.<sup>1121</sup>

### **5.3.2. The European Commission: Biennial Progress and Assessment Reports, and the Infringement Procedure**

It is too early to evaluate the effectiveness of the work of the European Commission under article 20 of the EU Trafficking Directive. So far, it has prepared just one biennial report on the progress made in the fight against trafficking, based on information on trafficking trends, the results of anti-trafficking efforts, and statistics submitted by NREMs, civil society

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<sup>1117</sup> Gallagher (2010) (n 40) 476.

<sup>1118</sup> Gallagher and Ezeilo (n 41) 932.

<sup>1119</sup> Gallagher (2010) (n 40) 476.

<sup>1120</sup> PACE Opinion 253 (n 857) para 14(xxiii).

<sup>1121</sup> Scarpa (n 239) 159.

organisations, and EU agencies.<sup>1122</sup> The report also considers GRETA's reports to ensure the complementarity of reporting with its regional counterpart, thus, there is a high overlap between the conclusions of GRETA and the European Commission.<sup>1123</sup> The ATC, which collects and coordinates the flow of information at the EU level and between the Commission and member states, has worked proactively in the preparation of this report. Even though the ATC's voice does not surface in the report, and there is only brief mention in the accompanying Commission staff working document of the ATC's work with NREMs in creating a template for reporting under the Directive and with EU agencies for information exchanges.<sup>1124</sup> The progress report together with the accompanying document, which were published on 19 May 2016, provide detailed and comprehensive factual information on action taken by member states, as well as, by the Commission and other stakeholders under the EU anti-trafficking strategy, which expired in 2016.<sup>1125</sup> Thus, the report also serves to feed into the development of a new strategy post-2016. But a post-2016 strategy has not yet been presented, even though it was one of the main topics discussed during the April 2017 plenary session of the European Parliament.<sup>1126</sup> The report highlights a number of key challenges, including addressing all forms of trafficking-related exploitation, increasing the number of investigations and prosecutions, improving data collection, early identification of victims, offering protection and assistance to all victims, and cooperating meaningfully with civil society.<sup>1127</sup> The report also notes the importance of regular participation of NREMs in the informal EU network in which they are constituted 'to work at an operational, strategic, and monitoring level'.<sup>1128</sup>

In addition to the biennial progress report, the European Commission is mandated to prepare two assessment reports on the extent of transposition of the EU Trafficking Directive in applicable member states and the impact of existing national laws, which criminalise the use of services provided by trafficking victims, with a view to preventing trafficking.<sup>1129</sup> Those reports were examined in chapters 2 and 3 in relation to the national responses of the case

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<sup>1122</sup> Commission Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims COM(2016)267 final.

<sup>1123</sup> *ibid* 8.

<sup>1124</sup> Commission Staff Working Document (n 68) 6, 7.

<sup>1125</sup> Commission Communication The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 COM(2012)286 final.

<sup>1126</sup> European Parliament Answer given by Mr Avramopoulos on behalf of the Commission E-002889-17 (5 July 2017).

<sup>1127</sup> Commission Report (2016a) (n 1122) 14-15.

<sup>1128</sup> *ibid* 15.

<sup>1129</sup> EU Trafficking Directive (n 24) art 23.

studies in this thesis. The first report concludes that there is significant room for improvement in realising complete and correct transposition of the Directive followed by its meaningful implementation in the domestic context, in particular, with regard to victim and witness protection before and during criminal proceedings, unconditional access to assistance, compensation, non-punishment of victims for status-related crimes, and prevention.<sup>1130</sup> The second report demonstrates a diverse legal landscape on the demand side of the trafficking problem, ‘which fails to effectively contribute to discouraging demand for [trafficking] services’, since the complete absence of or inadequate criminalisation of the use of such services creates legal uncertainty and fosters a culture of impunity.<sup>1131</sup> However, both reports are rather formalistic in nature. An instinctive conclusion based on the late release of both reports is that data collection is an incipient problem of monitoring by the Commission. Since a proper assessment of the transposition measures of member states depends upon the timely transmission of the text of such measures to the Commission by the stipulated deadline. This could also explicate the added-value of considering GRETA’s reports in relation to the biennial progress report. Member states were required to bring their laws into compliance with the Directive by 6 April 2013, and to notify the Commission that they had done so by transmitting to it the texts of updated or new laws. The Commission would then have two years to assess formal legal compliance with the Directive and to submit its report to this end by 6 April 2015. The second report on existing measures to discourage the demand for trafficking services was due the following year by 6 April 2016.

However, half of the member states failed to transpose the Directive by the stipulated deadline or to notify the Commission that they had done so. The infringement proceedings, which were subsequently initiated against those states for noncompliance with their transposition obligation under the Directive, were indicative of the Commission’s ability to monitor member state compliance with the Directive, and the effectiveness of the infringement procedure to induce subsequent compliance. The two assessment reports by the Commission, which were finally released on 5 December 2016, do not cover the transposition measures of Germany, which transposed the Directive late because the parliamentary term was coming to end and new measures could not be adopted in the remaining timeframe.<sup>1132</sup> At the same time, late notification of the transposition measures by infringing states had forced the Commission

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<sup>1130</sup> Commission Report (2016b) (n 438) 17.

<sup>1131</sup> Commission Report (2016c) (n 396) 10.

<sup>1132</sup> Commission Report (2016b) (n 438) 3.



to postpone the publication of both reports, since effective monitoring of overall transposition of the Directive requires the necessary information to be readily available. Germany's response would have been especially useful when assessing measures to discourage the demand for prostitution as part of the second assessment report. Since Germany has legalised prostitution and the trafficking inflow to Germany is reportedly very high.<sup>1133</sup>

As mentioned already, noncompliance with anti-trafficking norms and obligations is rarely the result of a lack of political will, especially with democratic states that value international reputation for good policy. This also explicates the importance afforded by the Commission to constructive dialoguing with noncompliant states over their sanctioning for noncompliance under the infringement procedure.<sup>1134</sup> While some note the benefits of a threat of coercion as a deterrent to noncompliance with EU law, others point out that consistent infringement by some states reduces the perceived weight of a threat of coercion.<sup>1135</sup> For example, König and Mäder observe that there is a compliance deficit based on their study of the extent of transposition of 21 different EU directives, and that the Commission has been especially unsuccessful in its attempts to prevent noncompliance by Portugal, Luxembourg, and Ireland.<sup>1136</sup> This, the authors argue, rests on the ability of member states as cooperating actors to anticipate the ability and willingness of the Commission as a monitoring actor to sanction noncompliance.<sup>1137</sup> Then, compliance for purposive member states is a complex strategic compliance game. However, the Commission insists on constructive dialoguing to maintain the noncompliant state in the enforcement process towards compliance and uphold the instrument's legitimacy. Moreover, the Commission recognises the need for flexibility in assessing the transposition efforts of member states with different legal systems, on account of the EU's growing membership. The different political, social, economic, and cultural backgrounds, in particular, between the 'old' and 'new' member states requires that monitoring by the Commission is sufficiently flexible to accommodate difference. The Commission makes a similar remark in relation to the characteristics and guiding principles of any review

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<sup>1133</sup> Jakobsson and Kotsadam (n 102) 103-104.

<sup>1134</sup> TFEU (n 72) arts 258, 260.

<sup>1135</sup> See Jonas Tallberg, 'Explaining the Institutional Foundations of European Union Negotiations' (2010) 17(5) *Journal of European Public Policy* 633, 641-642.

<sup>1136</sup> Thomas König and Lars Mäder, 'Compliance in the European Union: A Strategic Analysis of the Interaction between Member States and the Commission in the Implementation Process of Directives' (PEIO conference, Mannheim, January 2012) 14.

<sup>1137</sup> *ibid* 3.

mechanism under the UN Trafficking Protocol, which means that the review process should be considered as a ‘helping mechanism’ for states.<sup>1138</sup>

The entry into force of the Lisbon Treaty has streamlined the infringement procedure so that the Commission can directly apply to the CJEU to sanction noncompliance, thereby, circumventing the ‘obstacles’ of formal notice and reasoned opinion. However, those remain necessary in cases of unintentional noncompliance arising from misinterpretation or legal uncertainty with ambiguous instruments. Pre-Lisbon Treaty, the early closure of infringement proceedings for noncompliance was taken to imply that the Commission’s enforcement of EU law was highly successful.<sup>1139</sup> However, as Andersen notes, this high success rate was linked to the fact that the Commission typically only initiated infringement proceedings, which it was most likely to win, because there would be support among member states to condone noncompliance of that specific matter.<sup>1140</sup> This also meant that serious infringements, if they were widespread and member states were subsequently less likely to support the Commission’s decision, would foster, thus, undermining that instrument’s legitimacy. The failure of the Commission to sanction member states for noncompliance with the Maastricht criteria for a common currency because Germany and France refused to enforce the criteria in 2004 is an instructive example.<sup>1141</sup> The selectivity, thus, exercised by the Commission in deciding which enforcement matters to flag-up undermined the overall legitimacy of the infringement procedure. As Smith observes, the procedure traditionally operated as a ‘discretionary, secretive and diplomatic process of negotiation between the Commission and Member States’, which became infeasible as EU membership grew and there was increased acknowledgment of the need for transparency in the Commission’s enforcement process.<sup>1142</sup> This concern relates fundamentally to the democratic deficit in EU governance, on account of the growing number of subject matters, which now fall within the competence of the EU system, and the perceived illegitimacy on grounds of democracy and loss of state sovereignty.<sup>1143</sup> That the EU legislator

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<sup>1138</sup> UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime ‘Compilation of contributions received from States on all options regarding an appropriate and effective review mechanism for UNTOC and the protocols thereto’ (3 June 2016) UN Doc CTOC/COP/WG.8/2016/CRP.1 para 21.

<sup>1139</sup> Jonas Tallberg, ‘Paths to Compliance: Enforcement, Management, and the European Union’ (2002) 56(3) *International Organization* 609, 610.

<sup>1140</sup> Andersen (n 294) 19.

<sup>1141</sup> *ibid* 23.

<sup>1142</sup> Melanie Smith, ‘Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process’ (2008) 33(6) *European Law Review* 777, 779, 777.

<sup>1143</sup> Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20(1) *European Journal of International Law* 23, 25.

had provided no guidance on the objectives or methodology of enforcing EU law further promoted the Commission's selectivity of infringement cases. Smith notes that until 2002 the Commission had refused to publish any guidance on the criteria it used to determine the infringements it would pursue.<sup>1144</sup> Thus, the streamlining of the infringement procedure and subsequent improvements to the data management system provide less scope for discretionary, secretive, and diplomatic negotiations between the Commission and noncompliant states because detection and pursuit of non-communication of transposition measures are almost automatic now.<sup>1145</sup> Toshkov observes that the streamlining, in fact, has contributed to the low level of compliance deficits.<sup>1146</sup>

Nonetheless, the degree of flexibility, which the Commission is able to grant to its enforcement process, is advantageous to transposition of the EU Trafficking Directive as an ambitious anti-trafficking framework. As mentioned already, the successful transposition of the Directive encompasses transposition of specific measures on residence permits for non-EU citizens and sanctioning employers who employ illegal migrants under two separate EU directives, in addition to the measures directly under the Directive.<sup>1147</sup> Additional measures on settling conflict of jurisdiction in criminal proceedings, the European arrest warrant, confiscation of crime-related assets, the rights of EU citizens and their families to free movement within the EU area, and the rights of victims of crime all form part of this ambitious anti-trafficking framework, according to the preamble of the Directive. Those measures, which are manifest in different EU instruments, make for the integrated, holistic, and human rights-based approach to fighting trafficking under the Directive.<sup>1148</sup> The vast majority of member states will already have transposed those measures as part of their transposition obligations under the relevant instruments, or will do so as part of their transposition obligation under the Directive. But states are most likely to encounter difficulties in the practical implementation of this ambitious EU anti-trafficking framework, which the European Commission has yet to assess for its quality and practical impact. An assessment of the impact of the transposition measures notified to the Commission under Directive will hopefully take place in the next biennial progress report on fighting trafficking, which is due mid-2018.

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<sup>1144</sup> Melanie Smith, 'Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties under Article 228 EC (now Article 260 TFEU)' (2010) 16(4) *European Public Law* 547, 553.

<sup>1145</sup> Dimiter Toshkov, 'Compliance and Enforcement of EU Law: Who Wins, Who Loses, and Who Settles' (Ninth Annual Conference on the Political Economy of International Organizations, Salt Lake City, January 2016) 4.

<sup>1146</sup> *ibid.*

<sup>1147</sup> See EU Trafficking Directive (n 24) preamble para 7.

<sup>1148</sup> *ibid.*

### 5.3.3. Preliminary Conclusions

The European examination draws two preliminary conclusions. First, GRETA has a real potential to emerge as a key player in terms of developing, articulating, and applying international law to the trafficking problem, on account of the number of different countries of origin, transit, and destination, which it can monitor, as well as, its reporting process as an independent human rights enforcement mechanism with significant state involvement. Second, the examination of the first biennial progress report and the two assessment reports prepared by the Commission do not provide a definitive conclusion on the effectiveness of monitoring under the EU Trafficking Directive. Even though those reports imply that the Commission's enforcement process will be largely formalistic.

## 5.4. National Responses

This section examines collectively the impact of the work of the NREMs of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, with a preliminary conclusion in section 5.4.2.

### 5.4.1. The NREMs of Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden: Research, Report, Review, and Recommend

The reporting by national rapporteurs and equivalent mechanisms serves a two-fold purpose of gathering information on the scope of the trafficking problem in individual states and of self-assessment of existing national responses. According to Goździak, the vast investments in the field of action are unparalleled to empirical research on trafficking in persons so that responses have developed 'without a clear idea of the extent of the problem or a uniform methodology for determining the scope of the issue'.<sup>1149</sup> The limited knowledge, in fact, impedes victim identification, obstructs provision of culturally appropriate and effective services, limits prevention of repeat victimisation, and reduces the possibility of successfully prosecuting traffickers.<sup>1150</sup> The reporting mandates of the National Rapporteurs examined here, therefore, play a vital role in increasing knowledge about domestic realities and provide the foundational knowledge base for implementing the integrated, holistic, and human rights-based approach most recently espoused by the EU system. The obligation under article 19 of the EU Trafficking

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<sup>1149</sup> Goździak (2014) (n 33) 613.

<sup>1150</sup> *ibid* 614.

Directive to establish the NREM within states' domestic legal systems to assess trafficking trends and the results of anti-trafficking efforts, and gather statistics affirms the need for evidence-based policies. Yet, the essential reporting mandates of the National Rapporteurs have not received adequate academic attention. Mattar provided the first comprehensive study on the reporting mandates of National Rapporteurs almost a decade ago.<sup>1151</sup> The study advocated establishing an independent and competent national rapporteur or equivalent mechanism to assess government actions to combat the problem and recommend changes that should be implemented to reform existing policies. Similarly, Paterson and Vermeulen in their 2010 EU-funded research project to address the fragmented and often partial and incomplete nature of existing trafficking data recommended assuming an independent national rapporteur with a mandate 'to identify a central place at national level where information from different sources is brought together and analysed'.<sup>1152</sup> The NREMs examined here fulfil similar functions of research, report, review, and recommend. The main differences relate to the kind of research, the range of sources, and the discretion to make actionable recommendations to government and parliament, which are specific and amenable to implementation.

Belgium prepares two separate annual reports given the bipartite structure of the National Rapporteur. The Criminal Policy Department on behalf of the Belgian Coordination Platform prepares the biennial government report on trafficking and smuggling in persons, which provides a general assessment of all initiatives on trafficking and smuggling in persons taken by the ministerial departments represented on the Platform. The French, Dutch, and English versions of those reports since 2002 are available on its website.<sup>1153</sup> The information is collected directly from the ministerial departments every two years and additionally from the magistrates and police officers involved also every two years during an information exchange workshop on trafficking and smuggling in persons. Myria publishes a separate annual report on trafficking and smuggling in persons, and the French and Dutch versions since 1999 and the English version since 2005 are all available on its website.<sup>1154</sup> The website includes reports by the former reporting mechanism, namely the Centre for Equal Opportunities and Opposition to Racism. Those reports provide a short analytical commentary on information

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<sup>1151</sup> Mattar (n 40).

<sup>1152</sup> Paterson and Vermeulen (n 37) 11.

<sup>1153</sup> See 'Rapport Bisannuel du Gouvernement Traite des êtres humains/Mensenhandel Regeringsrapport/Governmental Report on combatting human trafficking' <[http://www.dsb-spc.be/web/index.php?option=com\\_content&task=view&id=41&Itemid=65](http://www.dsb-spc.be/web/index.php?option=com_content&task=view&id=41&Itemid=65)> accessed 16 October 2017.

<sup>1154</sup> See 'Rapport annuel traite et trafic des êtres humains/Jaarrapport mensenhandel en mensensmokkel/Annual Report on human trafficking and smuggling' <<http://www.myria.be/fr/publications>> accessed 16 October 2017.

voluntarily provided by the police, the social inspection services, the College of Public Prosecutors, the Immigration Office, the three specialised victim reception centres, and the Criminal Policy Services.<sup>1155</sup>

The Czech Republic publishes annual ‘status reports’ on trafficking since 2008 and both the Czech and English versions are available on the Ministry of the Interior’s website.<sup>1156</sup> Those reports provide ‘detailed information on the situation in the area of trafficking in human beings in the Czech Republic’ and appropriate information on foreign cases and situations connected to the Czech Republic.<sup>1157</sup> The information is collected from the ministerial departments represented on the Inter-Ministerial Coordination Group for Combating Trafficking in Human Beings, as well as, specialised NGOs and IGOs, and Czech consulates and embassies. Those reports also make recommendations on the primary areas of attention for the Inter-ministerial Coordination Group when implementing the national anti-trafficking strategy. Trafficking as a fundamental issue of internal security is additionally covered in the annual ‘reports on public order and internal security in the Czech Republic’, which provide ‘an overview of the development, structure, and dynamics of crime, its perpetrators and victims’.<sup>1158</sup>

In Finland, trafficking as a discriminatory practice is covered by the annual reports of the Non-Discrimination Ombudsman, and the Finnish, Swedish, and English versions can be found on its website.<sup>1159</sup> The website includes reports since 2009 by the former reporting mechanism, namely the Ombudsman for Minorities. Between 2012 and 2014, three annual reports on trafficking were released under the mandate of the National Rapporteur but those reports had to be discontinued due to meagre personnel resources. The current annual reports submitted to government are less comprehensive, typically covering the trafficking problem within a few pages. A comprehensive report under the mandate of the National Rapporteur is prepared once every four years with actionable recommendations for parliament. The information is gathered from authorities, the judiciary, and civil society organisations under a

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<sup>1155</sup> De Smet (2016) (n 913) 133.

<sup>1156</sup> See ‘Zpráva o stavu obchodování s lidmi v České republice/Status Report on trafficking in human beings in the Czech Republic’ <<http://www.mvcr.cz/clanek/obchod-s-lidmi-dokumenty-982041.aspx>> accessed 16 October 2017.

<sup>1157</sup> Department of Security Policy and Crime Prevention, *2016 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2016) 2.

<sup>1158</sup> Department of Security Policy and Crime Prevention, *Report on Internal Security and Public Order in the Czech Republic in 2015 (as compared to 2014)* (Ministry of the Interior 2016) 1.

<sup>1159</sup> See ‘Annual Report of the Non-Discrimination Ombudsman’ and ‘Vähemmistövaltuutetun vuosikertomus/Minoritetsombudsmannens årsberättelse/Annual Report of the Ombudsman for Minorities’ <<https://www.syrjinta.fi/web/en/publications>> accessed 16 October 2017.

legal right to obtain free information as necessary from authorities.<sup>1160</sup> However, the National Rapporteur often notes the non-responsiveness of authorities to information requests. As part of the mandate of the Non-Discrimination Ombudsman to assist victims of discrimination in legal proceedings, information is directly collected from trafficking victims whom the Ombudsman assists.

The Netherlands submits annual reports on trafficking in persons since 2002 and both the Dutch and English versions are available on the website of the independent National Rapporteur.<sup>1161</sup> Those reports contain information on the scope of the trafficking problem in Finland and the results of anti-trafficking efforts. In addition to those reports, the National Rapporteur prepares comprehensive studies to improve the knowledge base in terms of quantitative data<sup>1162</sup> and trafficking cases.<sup>1163</sup> With regard to the latter study of case-law on exploitation in the sex industry, the National Rapporteur observes its direct impact on growing attention to this area in the judiciary.<sup>1164</sup> De Vries and the National Rapporteur argue that such studies aim to ‘lay the foundation for guiding measures to counter trafficking’, in particular, by informing policy, exposing bottlenecks, and identifying areas for further research.<sup>1165</sup> The information is primarily collected from the National Police, the Immigration and Naturalisation Service, the Central Fine Collection Agency, and the Public Prosecution Service.<sup>1166</sup> Those reports are prepared taking into consideration their potential to facilitate cross-country comparisons and to help other states to identify more easily trafficking inflows from and to the Netherlands.

Romania produces ‘annual development reports’ on trafficking and reports published since 2011, when the National Agency against Trafficking in Persons was administratively reinstated under the Minister of Administration and the Interior, are available on its website, however, only in the Romanian language.<sup>1167</sup> It is the only reporting mechanism examined here

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<sup>1160</sup> Law 22/2004 (n 886) s 7.

<sup>1161</sup> See ‘Rapportage van de Nationaal rapporteur/Report of the Dutch National Rapporteur’ <<https://www.dutchrapporteur.nl/Publications/>> accessed 16 October 2017.

<sup>1162</sup> Corinne E Dettmeijer-Vermeulen, *Trafficking in Human Beings: Visible and Invisible. A Quantitative Report 2007-2011* (BNRM 2012); — *Trafficking in Human Beings: Visible and Invisible II. Summary of the Quantitative Report 2008-2012* (BNRM 2014).

<sup>1163</sup> Corinne E Dettmeijer-Vermeulen, *Trafficking in Human Beings. Case Law on Trafficking in Human Beings 2009-2012. An Analysis* (BNRM 2012).

<sup>1164</sup> Dettmeijer-Vermeulen (2010) (n 893) 139.

<sup>1165</sup> Ieke de Vries and Corinne E Dettmeijer-Vermeulen, ‘Extremely Wanted: Human Trafficking Statistics—What to Do with the Hodgepodge of Numbers?’ (2015) 8 UN Forum on Crime and Society 15, 22-23.

<sup>1166</sup> See Dettmeijer-Vermeulen (2010) (n 893) 7.

<sup>1167</sup> See ‘Raport privind evoluția traficului de persoane’ <<http://www.anitp.mai.gov.ro/categoria/cercetare/rapoarte-anuale/>> accessed 16 October 2017.

that does not translate its annual reports, even though the office of the National Rapporteur is the largest in terms of personnel and organisational structure, with a dedicated department, namely the Research and Public Awareness Centre, to carry out assessments of the scope of trafficking. Since Romania is the primary origin country for sex trafficking within the EU area, translations of those reports would be beneficial for cross-country comparisons and improving the knowledge base of other states that experience a trafficking inflow of Romanian nationals.<sup>1168</sup> Moreover, it should consider making readily available on its website the pre-2011 annual reports, in the interest of comprehensive reporting. Nonetheless, since 2007, the National Rapporteur benefits from direct access to information ‘on the socio-demographic population of victims of trafficking; on the history of trafficking; the purpose of exploitation; and on all elements of the repatriation process, coordination or assistance in criminal proceedings’, as it is responsible for managing the national integrated system for monitoring and assessing trafficking victims.<sup>1169</sup>

Finally, Sweden reports on the scope of trafficking and the Swedish and English versions of the annual ‘situation reports’ between 2010 and 2015 are available on the website of the National Police.<sup>1170</sup> Those reports primarily aim to raise awareness among the police, which, therefore, analyses police investigations, prosecutions, and convictions, and provides disaggregated data on the profile of trafficking victims. Like the Czech status reports, the situation reports include ‘success stories’, which Mattar argues can have a powerful influence on government action.<sup>1171</sup> One example concerns the deportation decision of the county police of a Romanian national on grounds that her status as a prostitute threatened public order and security in Sweden.<sup>1172</sup> In accepting her appeal, the Swedish Migration Board affirmed that only sex-buying was illegal in Sweden and that her deportation, when prostitution is legal and does not represent a genuine, present, and sufficiently serious threat to society on account of any criminal conduct, violated her right as an EU citizen to free movement within the EU area.<sup>1173</sup> The information necessary for the preparation of the situation reports is gathered from

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<sup>1168</sup> Commission Staff Working Document (2016) (n 68) 90.

<sup>1169</sup> Adrian G Petrescu, *Trafficking in Persons for Begging: Romania Study* (National Agency against Trafficking in Persons 2013) 21.

<sup>1170</sup> See ‘Lägesrapport Människohandel för sexuella och andra ändamål/Situation Report Trafficking in human beings for sexual and other purposes’ <<https://polisen.se/Aktuellt/Rapporter-och-publikationer/Manniskohandel/>> accessed 16 October 2017.

<sup>1171</sup> Mattar (n 40) 13.

<sup>1172</sup> Kajsa Wahlberg, *Trafficking in Human Beings for Sexual and Other Purposes: Situation Report 13* (Swedish National Police Board 2012) 13.

<sup>1173</sup> *ibid* 14.



its source at the seven regional Criminal Intelligence Units and the National Operations Department, which coordinate and monitor action taken by the authorities involved.<sup>1174</sup>

Over the course of their mandates, the National Rapporteurs examined here have made some notable recommendations to create a stronger foundation for designing and amending anti-trafficking policy but as the Dutch National Rapporteur rightly notes in the third report ‘what is important is the way in which policymakers actually use this information’.<sup>1175</sup> The Dutch National Rapporteur, therewith, recommends the adoption of a national action plan to ‘give real substance to all the good intentions’ expressed by government in response to its first report.<sup>1176</sup> With the subsequent adoption of the national action plan for trafficking in human beings, the government wholly implements the recommendations made in the first and third reports.<sup>1177</sup> The Dutch example is notable because of the sheer number of recommendations made, which by 2010 had amounted to 200 recommendations on different areas of policy concern.<sup>1178</sup> The vast majority of recommendations were implemented and those that remained were repeated in subsequent reports or abandoned because they became irrelevant.<sup>1179</sup> The follow-up of recommendations made is essential for their effective implementation. The establishment of the national integrated system for monitoring and assessing trafficking victims,<sup>1180</sup> which is now the primary source of information for the reports of the Romanian National Rapporteur, is another example of the value of making actionable recommendations.<sup>1181</sup> At the same time, recommendations of a more fundamental nature can contribute to the development of a vision. For example, the need for ‘sufficient realistic capacity’ for relevant organisations as proposed by the Dutch National Rapporteur is not a goal in itself but it requires governments to consider whether the policy objectives formulated are achievable within the resources available.<sup>1182</sup> The crippling of adequate resources for the work of the National Rapporteurs or of NGOs as service providers and the negative impacts of victim rehabilitation were noted in the previous chapter.

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<sup>1174</sup> Kajsa Wahlberg, *Människohandel för sexuella och andra ändamål: Lägesrapport 16* (Swedish National Police Board 2015) 39.

<sup>1175</sup> Anna G Korvinus, *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur* (BNRM 2005) 1.

<sup>1176</sup> *ibid* 170.

<sup>1177</sup> Anna G Korvinus, *Trafficking in Human Beings Supplementary Figures: Fourth Report of the Dutch National Rapporteur* (BNRM 2005) 1.

<sup>1178</sup> Dettmeijer-Vermeulen (2010) (n 893) 7.

<sup>1179</sup> *ibid*.

<sup>1180</sup> Government Decision 1083/2006 (n 892).

<sup>1181</sup> Adrian G Petrescu, *Report on Trafficking in Persons in Romania 2006* (National Agency against Trafficking in Persons 2007) 7.

<sup>1182</sup> Dettmeijer-Vermeulen (2010) (n 893) 139.

In their recommendations, the National Rapporteurs also refer to international norms and obligations in assessing the effectiveness of national policies. The Czech National Rapporteur refers to the EU directive on residence permits for non-EU citizens when evaluating the immigration status of trafficking victims who cooperate with national authorities.<sup>1183</sup> This is notable because at the time the Czech Republic was neither party to the UN Trafficking Protocol nor the COE Trafficking Convention, which address the conditionality of assistance on victim cooperation. The Czech National Rapporteur recommended that foreign victims must always be informed about the possibility of obtaining the residence permit, of at least six months, and that they must be granted adequate time for reflection, during which they are entitled to assistance.<sup>1184</sup> In connection therewith, the National Rapporteur also highlighted that the absence of codification of criminal liability of legal persons was a serious obstacle to accession to those international instruments and that government should consider codifying criminal liability of legal persons to enable the state to fully meet obligations stemming therefrom.<sup>1185</sup> Even though codification took place only in 2012. At the same time, the recommendation of the Finnish National Rapporteur to remove the overlapping of penal provisions on trafficking in persons and pandering, as well as, to strengthen the legal status of persons subjected to pandering as an injured party in the criminal procedure ‘motivated’ the setting-up of a working group to amend the Criminal Code.<sup>1186</sup> The Finnish National Rapporteur underlined with reference to the COE Trafficking Convention and the Trafficking Principles and Guidelines that criminal procedures and court hearings were also important for securing victims’ human rights, including the right to compensation.<sup>1187</sup> So that from the victim’s perspective, correct identification as a trafficked person, rather than procured prostitute was, in fact, relevant.<sup>1188</sup> The National Rapporteur’s recommendation had helped not only to clarify the law but also to highlight the more subtle forms of coercion under the terms ‘abuse of power’ and ‘position of vulnerability’, which the UN Trafficking Protocol does not define.

An important element of their reporting is political and social mobilisation to influence policy outcomes. This means raising awareness of trafficking until it causes political and social

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<sup>1183</sup> Department of Security Policy and Crime Prevention, *National Strategy of the Fight against Trafficking in Human Beings (for the period of 2005-2007)* (Ministry of the Interior 2005) 22.

<sup>1184</sup> *ibid* 23.

<sup>1185</sup> *ibid*.

<sup>1186</sup> Biaudet (2012) (n 433) 10.

<sup>1187</sup> Eva Biaudet, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2010* (Ombudsman for Minorities 2010) 125-126.

<sup>1188</sup> *ibid* 125, 130.

mobilisation to proactively fight the trafficking problem. The theory of mobilisation is advanced most notably by Simmons in the context of a domestic politics theory of treaty compliance.<sup>1189</sup> In relation to hard enforcement and the role of the courts in inducing treaty compliance, Simmons argues that ‘litigation’s power resides not so much in its ability to provide every victim with a decisive win in court. Litigation is also a *political* strategy ... to mobilise political movements’.<sup>1190</sup> The publicity of cases, particularly where the injustice is great, can cause social mobilisation that forces governments as political actors and representatives of the people to show greater concern for what groups in society ‘want’. Political actors are accountable to citizens and must therefore balance the costs of noncompliance against the support of citizens ‘who benefit from the particular treaty or from the state’s compliance with international law more broadly’.<sup>1191</sup> But courts currently do not possess the expertise to deal effectively with trafficking cases and the training of the judiciary is often recommended in the reports of the CEDAW Committee and GRETA. At the same time, the ability of Myria to provide legal assistance to victims can encourage a similar effect of mobilisation, further reinforced through its annual reports. However, for this to happen recommendations must be specific and amenable to implementation.

One point of contention is that most of the reports of the National Rapporteurs do not cover action taken or proposed by NGOs, even though they remain an important information source for the reports prepared by the National Rapporteurs. This suggests an information gap on NGOs as service providers. Nonetheless, they are included in appropriate recommendations. For example, the Swedish National Rapporteur proposes increased collaboration between the judicial system and NGOs to improve understanding of victims’ situations and to reinforce the judicial system’s handling of trafficking cases.<sup>1192</sup> There is, therefore, an implicit recognition of their relevance in improving human rights protection. The obvious exception to this contention is Myria’s reports, since Myria additionally coordinates the three specialised reception centres assisting victims. In light of the emphasis on human rights protection in the current national anti-trafficking action plan, Myria proposes to maintain and stabilise the structural financing of those centres ‘whose expertise and efficiency has been proved’ but has not been adequately dealt with despite efforts to find a temporary solution.<sup>1193</sup>

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<sup>1189</sup> Simmons (n 38) 135.

<sup>1190</sup> *ibid* 132.

<sup>1191</sup> Von Stein (n 657) 483.

<sup>1192</sup> Wahlberg (2012) (n 1172) 41.

<sup>1193</sup> De Smet (2016) (n 913) 2.

### 5.4.2. Preliminary Conclusion

The national exploration draws the preliminary conclusion that the harmonisation of national responses as a prerequisite for effective and wide cooperation is best guaranteed through domestic monitoring of the implementation of the preeminent anti-trafficking instruments by domestically-grown mechanisms of enforcement that are sufficiently close to government to pressure reform, as well as, to victims and their representatives to study the practical effects of anti-trafficking policies. As Kotiswaran rightly notes, domestic anti-trafficking law is a critical site for conceptualising solutions and domestic law is more easily amended to cater for more creative developments in the field, such as the setting-up of national rapporteurs and equivalent mechanisms.<sup>1194</sup>

### 5.5. Conclusions

This chapter studied the impact of the work of the enforcement mechanisms directly or indirectly attaching to the UN Trafficking Protocol, the CEDAW, the Trafficking Principles and Guidelines, the COE Trafficking Convention, and the EU Trafficking Directive. It additionally covered within the international study the TVPA given its extraterritorial scope and the significant influence of its enforcement mechanism, namely the TIP Office, in raising international awareness of the trafficking problem and holding states accountable to anti-trafficking norms and obligations around prevention, prosecution, and protection through their ranking in the TIP Report. The work of the TIP Office examined in section 5.2.4, in particular, has raised some important questions about the appropriateness of international regulation and the responses developed and adopted by states within the formal processes of international and European law. However, the impact study on the work of the TIP Office does not provide a definitive conclusion on the effectiveness or appropriateness of more coercive enforcement in terms of the Office's sanctioning power over governments it deems not to have made serious and sustained efforts to fight trafficking, in particular, whether such efforts demonstrate 'appreciable progress' as one of its main assessment criteria. The subjectivity of some assessment terms, including the 'insignificant' percentage of foreign victims in the territory a state, and the failure of the TVPA and the TIP Report to specify how those terms are determined, appears to undermine the objectivity of reporting by the TIP Office. At the same time, that the tier-rankings determined by the Office are subject to approval and change by the

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<sup>1194</sup> Kotiswaran (n 241) 51-53.

Interagency Task Force, which has been exposed for undermining the credibility of the Office's work and using the TIP Report to promote US foreign policy non-related to the fight against trafficking, has demonstrated the negative effects of US unilateralism not only on respect for the international principles of state sovereignty, territorial integrity, and non-interference but also on the need for cooperation. In particular, it questions to what the extent US unilateralism in the field actually promotes the paramount objective of cooperation, and whether states can really be expected to cooperate with the US that chooses to act unilaterally. US scrutiny of government efforts using purely domestic standards, which deviate in substantial ways from those expressed at the international level are also indicative of US exceptionalism. The context-specific nature of the trafficking problem and its scope in individual states creates problems in terms of US understanding of 'compliance'. In particular, when 'appreciable' progress appears to be more critical of the efforts of less powerful and strategically unimportant states. The unilateral sanctions regime employed by the US to encourage foreign adherence to the TVPA's minimum standards also raises concerns over the actual impact on victims' human rights protection. Are states applying US standards only for continued receipt of foreign aid, or is there an actual intention to protect and assist trafficking victims, with a view to preventing further exploitation and re-trafficking? The answer will directly influence anti-trafficking policy and practice, most likely to the detriment of victims' human rights. States will fight trafficking regardless of foreign aid and foreign rankings, if the problem threatens to thwart the rule of law, which trafficking in persons clearly does, as explained in chapter 1.

The constructive dialoguing, which takes places at the international and European levels, between the enforcement mechanisms and states provides an important opportunity for monitored states to raise implementation challenges and for mechanisms to clarify the substantive content of anti-trafficking norms and obligations. There is no means of challenging the tier-rankings of the TIP Office through a similar process, thus, states will most likely refuse to accept US interference in their domestic affairs. Yet, there is some credibility to reporting by the TIP Office, and its conclusions and recommendations are similar to those made by the other enforcement mechanisms examined here, such as GRETA. A comparative study on the assessments made by the TIP Office and GRETA corroborates a complementarity in their reporting.

However, the explicit human rights-based approach of the CEDAW Committee, the SRTIP, and GRETA, observed in sections 5.2.2, 5.2.3, and 5.3.1 respectively, have been instrumental in recognising and holding states accountable to the highest standard of human

rights protection in the field, manifest in the Trafficking Principles and Guidelines. This instrument is legally non-binding and there is little evidence of states applying or referring to its principles when designing and amending policies. Yet, two examples of national reference to specific principles under this instrument were highlighted in section 5.4 in relation to the recommendations of the Czech and Finnish National Rapporteurs on the immigration status of non-EU trafficking victims and the overlapping of trafficking and pandering offences. In the latter example, the removal of this overlapping by the Finnish government was an express recognition of the importance of human rights protection, since the legal reform was motivated, in particular, by the Finnish National Rapporteur's recommendation. The Finnish National Rapporteur had also recognised in this context the typical focus of pre-trial investigation authorities and courts on crime-fighting so that the status of the victim as a trafficked person or pandered prostitute was irrelevant. The Finnish National Rapporteur had, therefore, with reference to international standards both increased knowledge about the vulnerability of victims within the criminal justice response and promoted international regulation. The many examples identified throughout this chapter highlight the positive impact of human rights enforcement mechanisms on trafficking. The notable exception is the work of the European Commission under the EU Trafficking Directive, examined in section 5.3.2, but as explained therein it is too early to assess its impact as the Commission has released only one biennial progress report, while the two assessment reports provide a rather formalistic evaluation of transposition measures of member states. It is expected that subsequent reports will provide a more meaningful analysis of state progress in the fight against trafficking at the EU level, and that the work of the ATC in terms of coordinating information flow at the EU level will become more evident.

A major challenge to the exercise of the mandates of all mechanisms identified here is the absence of information that is necessary for making concrete recommendations. The unavailability, or inaccessibility in the specific case of the TIP Office, of information on the scope of trafficking has seriously hampered the ability of those mechanisms to adequately assess the extent of compliance with international anti-trafficking norms and obligations. The CEDAW Committee repeatedly requests state parties to include in their reports disaggregated data so that it has a better understanding of the practical effects of current responses. This is also important in relation to its general recommendations, which contain proposals of a more fundamental nature, such as the obligation of states to address the root causes of trafficking that maintain vulnerability and foster gender-based violence. The country visits undertaken by

the SRTIP and GRETA help to provide a glimpse of domestic realities and the conclusions drawn therefrom can feed into the development of more appropriate responses. However, the SRTIP visits only a limited number of states with prevalent trafficking forms, and GRETA's visits are discretionary upon the need to complement information already received from states in their responses to GRETA's questionnaire. Moreover, monitoring by the international and regional mechanisms is less frequent than required to grasp the constantly-evolving nature of trafficking. The backlog of state reports in the specific case of the CEDAW Committee, the absence of a follow-up procedure to the recommendations of the SRTIP, and the Eurasian-focus of monitoring by GRETA all augment the need for regular monitoring of government efforts. The absence of an effective review mechanism under the UN Trafficking Protocol as acknowledged by current efforts to establish a peer-reviewed mechanism also excludes the possibility that the main enforcement mechanism of the international anti-trafficking framework can provide a better outcome at the international level. Even though it is argued that there is a significant potential for GRETA to emerge as a key player in the field given its international context, despite its current focus on a specific number of Eurasian states.

For these reasons, the focus needs to shift to the domestic level and the national rapporteurs and equivalent mechanisms identified in this thesis need to be strengthened to provide a strong foundation for the design and implementation of evidence-based anti-trafficking policies. The Dutch National Rapporteur has been especially successful in increasing understanding of the trafficking problem as witnessed by its growing international recognition and explicit reference in the explanatory note accompanying the COE Trafficking Convention in relation to possible NREM models. Independent mechanisms, such as Myria and the Finnish and Dutch National Rapporteurs, are more likely to provide an objective assessment of domestic situations than government mechanisms, such as the Czech and Swedish National Rapporteurs, because of their increased willingness to address shortcomings and internal weaknesses. The recommendations by the Finnish National Rapporteur directed at the judicial system are an instructive example. Another example is the sheer number of recommendations made by the Dutch National Rapporteur, even though government has not acted upon all recommendations. Independent mechanisms are also more likely to adopt a human rights-based approach to the trafficking problem because there is less pressure to increase the number of investigations, prosecutions, and convictions through a crime-fighting focus. This pressure is a direct consequence of the absence of reliable information in the field so that governments naturally focus on those numbers as the only tangible results in the field.

However, those numbers are at a stagnating low level precisely because there is little understanding of the trafficking problem. There is, therefore, a valid reason for strengthening the roles of existing NREMs to better monitor and report on domestic realities, and their findings can feed into normative development at the international level, thereby, promoting international regulation. An appropriate framework for strengthening existing NREM models is laid out in the next chapter as part of developing more appropriate responses. Through their strengthening and increasing international presence, there will hopefully be more academic attention to their work.



## 6

### Conclusion

#### 6.1. Introduction

Trafficking in persons, particularly women, for sexual exploitation, is one of the most egregious violations of human rights that the international community now battles. It is a global challenge that requires a global response, manifest in the UN Trafficking Protocol, within a framework of transnational organised crimes. Today, 172 states from different regions of the world tackle human rights, crime, corruption, and trafficking in persons. Cooperatively, they address this global challenge at the international and regional levels by adopting multilateral legal instruments. Individually, they have legal obligations to implement the provisions of these instruments, in relation to prevention, investigation, and prosecution, whether transnational or national, whether or not connected with organised crime, as well as, protection of victims. The first step of a global response, then, is the harmonisation of national anti-trafficking legislation based on the Protocol's minimum standards, to have a real impact on the ability of international criminals to operate successfully and help citizens everywhere. Due to the clandestine nature of trafficking and the absence of reliable information, legal harmonisation is also the first indicator of progress in the field. Thus, this thesis set out to explore progress in the fight against trafficking, by way of example of six European states, namely Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, to illustrate the current challenges to international regulation and the general direction of the most appropriate national responses.

#### 6.2. Central Findings

It is almost two decades since the adoption of the UN Trafficking Protocol as the cornerstone of international regulation. Significant progress has been made in understanding the global challenge of trafficking in persons, particularly for sexual exploitation. There has been a flurry of legislative action at the international, regional, and national levels, with a growing body of mechanisms and tools of enforcement to ensure continued commitment of states in

harmonising their national legislations, policies, and practices because of their inability to individually tackle the transnational dimension of trafficking. International and regional legal instruments on trafficking, thus, serve to fortify international cooperation by elaborating minimum standards around the prevention of trafficking, the prosecution of traffickers, and the protection of victims. While key provisions do not dictate the manner in which states should operationalise the objective of international cooperation. These legal instruments cast a wide margin of discretion because many of the issues around trafficking are complex and contested. There is not even international consensus on whether the concept of sexual exploitation includes consensual prostitution. If the concept of sex trafficking is the cornerstone of any international cooperation, then, differing concepts impede this objective. Instead, it appears that short-term national interests around prostitution dictate the manner in which states should operationalise the objective of international cooperation, much to the detriment of long-term cooperation. Since trafficking affects states differently as countries of origin, transit, and/or destination. For example, the Czech Republic and Romania as origin countries should pay particular attention to preventive measures, while Belgium, Finland, the Netherlands, and Sweden as transit and/or destination countries focus on prosecutorial and protective measures.

The relative divergence between formal and practical compliance with international and regional obligations is instructive of the inherent challenges to realising effective and wider cooperation through a transnational cooperative framework. Such framework allows the narrow self-interests of state parties to coexist and foster because the effectiveness of the institutions managing cooperation depend upon the fragile foundations of state consent. Yet, it is most unlikely that the self-interests of states will be equally met by the respective institutions because power in international negotiations is asymmetric. The interests of more powerful states will trump those of weaker states, which depend most on international cooperation because they lack technical capacity. The negotiations of the UN Trafficking Protocol and the COE Trafficking Convention are instructive examples. Viewed in this light, it is most unlikely that states can realise long-term cooperation based on a transnational cooperative framework. Even if a state implements the framework fully and correctly, it can do little to prevent other states from deciding what constitutes ‘trafficking’ within their own national jurisdiction. But without a common crime there cannot be international cooperation, particularly in relation to issues of extradition, such as the double criminality principle and the application of extra-territorial jurisdiction.

The power asymmetry in international negotiations is also an important reason behind the adoption of soft law instruments that dispense with certain formalities around the output, the process, or the actors involved, traditionally linked to international law-making. Soft instruments, such as the Trafficking Principles and Guidelines can aspire to a higher standard of human rights protection, a goal unsatisfactorily realised in the transnational cooperative framework around trafficking, because, in this specific case, the narrow self-interests of states were overlooked. As understanding of trafficking increased, certain provisions of these very soft instruments found their way into hard law instruments, such as the COE Trafficking Convention. In this way, soft law can minimise impediments to international cooperation. Even though there is no guarantee that states will consult soft law when implementing their obligations and designing new policies. The emphasis of law enforcement and migration to the detriment of human rights protection in the preeminent legal instruments, even the COE Trafficking Convention that was forced to lower its human rights standard to match a largely migratory approach under EU anti-trafficking law, not only does little to promote the objective of victim protection and assistance but also necessitates soft law instruments in the field.

The inherent challenges to realising effective and wider cooperation are also visible in the mechanisms and tools of enforcement managed by those very institutions, which operate without any form of coercion to hold noncompliant states accountable. States have deliberately chosen less intrusive mechanisms to enforce compliance, which at least gives an impression that states are internationally accountable. This paradox has encouraged unilateral enforcement of international norms and standards by none other than the US. The hegemonic positioning of individual states in international regulation is not uncommon. However, in this specific case, US unilateralism serves a narrow self-interest of redefining the fight against sex trafficking to explicitly include consensual prostitution, following unsuccessful attempts at the negotiations of the UN Trafficking Protocol. Thus, US unilateralism does not serve international solidarity as a key value of the international community, when unilateralism is tolerated because the formal processes for enforcing international law are weak or absent. It is, then, a limitation of the same formal processes that they cannot restrain individual states from whimsically redirecting normative development around trafficking using the threat of low compliance rankings that would tarnish the international reputations of states in terms of human rights protection and of unilateral sanctions that reduce noncompliance to a lack of political will. Even though there is talk of waning political commitment on account of the low number of

prosecutions and identified victims, noncompliance can result from inadequate planning, agreement ambiguities, capacity limitations, and significant changes over time.

The formal enforcement of international and regional obligations using less intrusive practices that respect state sovereignty, however, has not been entirely ineffective. The transnational cooperative framework, which almost two decades ago was weak and ambiguous, is in much better shape now, as a result of the efforts of formal enforcement mechanisms to clarify any definitional, conceptual, and practical ambiguities, with the aim of enhancing international cooperation. Significantly, states are becoming much more adept at delivering the minimum of what is required under international and European anti-trafficking laws. Even though there are few indications of the impact of national responses on the nature or scale of trafficking, the EU Trafficking Directive addresses the lack of reliable information in the field by requiring that states appoint national rapporteurs or equivalent mechanisms (NREMs) to measure the results of domestic anti-trafficking actions, which necessarily includes evaluating compliance with international and regional obligations. NREMs have a significant potential to mobilise domestic stakeholders and exert internal pressure on their governments. The Dutch NREM is an instructive example. Thus, these mechanisms can compensate for the procedural deficiency in international law-making and help make the law effective again.

### **6.3. The Way Forward: A Framework to Strengthen Existing NREMs**

There is now international consensus on the general direction of appropriate responses to trafficking. Building on the norms and standards espoused by the UN Trafficking Protocol, the COE Trafficking Convention and the more recently adopted EU Trafficking Directive envisage an integrated, holistic, and human rights approach that aims to ensure that each form of exploitation of trafficking is tackled by the means of the most efficient measures. In the context of sex trafficking, the European Commission is currently assessing, with reference to existing laws, whether establishing as a criminal offence the use of services which are the objects of sexual exploitation of trafficking reduces the demand that fosters trafficking-related exploitation. Their proposals will have significant implications for regulation, not only in relation to its member states but also third countries with reported trafficking flows into and from the European Union (EU). Even within the EU, there is a relative divergence in responses to sex trafficking because of their linkage to policies on consensual prostitution that may be based on one or more of the issues of morality, public health and order, labour, immigration,

and crime. However, each of these issues necessarily dictates a different outcome of trafficking responses.

At the same time, the international community is preparing for the establishment of a review mechanism to assist the Conference of the Parties of the UNCTOC (COP) in the evaluation of implementation of the UNCTOC regime, including the UN Trafficking Protocol. However, in all likelihood, the review mechanism will be tainted by the same procedural deficiencies that make for a weak enforcement mechanism, since states have ensured that the process remains in their hands through peer-review. Yet, it will most likely challenge the role of the US in the international anti-trafficking discourse as it will struggle to maintain and extend its influence over how individual states and the international community respond to sex trafficking. One possible future for the annual reports as the cornerstone of the US enforcement mechanism's work is as 'a diagnostic tool' that is neither a condemnation nor a reprieve.<sup>1195</sup> The US government already refers to the annual reports as its 'principal diplomatic tool to engage foreign governments on human trafficking'.<sup>1196</sup> Then, building on its past experience and taking into account the principal of diplomacy, the US enforcement mechanism can emerge 'as a support and inspiration for genuinely global governance'.<sup>1197</sup>

Meanwhile, states will continue to implement their international and regional obligations with the aim of enhancing international cooperation in cases of transnational trafficking. An important obligation to this end is the appointment of NREMs that are strategically placed at the domestic level to improve the compliance behaviour of governments. It is not enough to merely call for concerted action. Instead, more practical efforts are required to foster international cooperation.

The national rapporteurs or equivalent mechanisms (NREMs) are gems of national responses. Their setting-up and strengthening is necessitated by the inadequacy of implementation of international, regional, and national anti-trafficking measures, the nature and extent of trafficking, the lack of reliable data and information, and the insufficiency of funding for anti-trafficking actions. Thus, they are appointed to assess trafficking trends, gather statistics, measure the results of anti-trafficking actions, and report regularly. They are constituted in an informal network at the EU level because they can act as a cornerstone of any EU wide strategy for data collection and analysis. There is even discussion at the global level

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<sup>1195</sup> COP (2016) (n 777) para 34.

<sup>1196</sup> Office to Monitor and Combat Trafficking in Persons, 'Annual TIP Report' (*US Department of State*, 2017) <<https://www.state.gov/j/tip/rls/tiprpt/index.htm>> accessed 8 September 2017.

<sup>1197</sup> Gallagher and Chuang (n 220) 343.

on how to foster cooperation among NREMs around the world, as well as, partnerships with international and regional organisations and mechanisms, such as the Special Rapporteur on trafficking in persons (SRTIP).<sup>1198</sup> Cooperation among NREMs can facilitate the exchange of expertise and good practices among countries of origin, transit, and/or destination, which, in turn, can raise the effectiveness of anti-trafficking actions. While cooperation between NREMs and the SRTIP, for example, can bolster coordination of an anti-trafficking response that is both multilateral and sufficiently close to domestic realities and specificities within a certain region.<sup>1199</sup> Partnerships of this nature are necessitated by the weak nature of cooperation among countries of origin, transit, and/or destination, since partnerships are a prerequisite to effective and wider cooperation.

In response to calls of international bodies, such as the United Nations General Assembly and the Office of the High Commissioner for Human Rights, states around the globe have established NREMs ‘to encourage the exchange of information and to report on data, root causes, factors and trends in trafficking in persons, especially women and girls, and to include data on victims of trafficking disaggregated by sex and age’,<sup>1200</sup> as well as, ‘to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions’.<sup>1201</sup> NREMs exist in Africa, such as the Nigerian National Agency for the Prohibition of Traffic in Persons and Other Related Matters, and the Ugandan National Anti-trafficking Task Force; in Asia, such as the Myanmar Anti-Trafficking in Persons Division, and the Israeli Government Coordinator of the Battle against Trafficking in Persons in the Ministry of Justice; in the Middle East, such as the Emirati National Committee to Combat Trafficking in Persons; and in Latin America, such as the Argentinian Inter-Ministerial Group on Anti-trafficking, and the Brazilian Coordinator of the National Policy for Combating Trafficking in Persons.<sup>1202</sup> Additionally, NREMs exist in Europe and chapter 4 evaluated those mechanisms in Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden. However, their evaluation revealed different structures. The international recommendations on setting-up NREMs do not mention

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<sup>1198</sup> See UNCHR (2014) (n 898); UNHRC ‘Report on the twenty-first annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council, including updated information on the special procedures’ (2015) UN Doc A/HRC/28/41.

<sup>1199</sup> UNHRC (2015) (n 1198) para 6.

<sup>1200</sup> UNGA (2013) (n 1030) para 21. See also UNGA Res 65/190 (11 March 2011) UN Doc A/RES/65/190 para 18; UNGA Res 63/156 (30 January 2009) UN Doc A/RES/63/156 para 13; UNGA Res 61/144 (1 February 2007) UN Doc A/RES/61/144 para 11; UNGA Res 59/166 (10 February 2005) UN Doc A/RES/59/166 para 10.

<sup>1201</sup> Trafficking Principles and Guidelines (n 52) guideline 1(7). See also COE Trafficking Convention (n 23) art 29(4).

<sup>1202</sup> See generally UNCHR (2014) (n 898); UNHRC (2015) (n 1198).

a uniform structure. In the European context, the EU Trafficking Directive requires member states to establish NREMs ‘in the way in which they consider appropriate according to their internal organisation’.<sup>1203</sup> While it recognises the need for a minimum structure around the four identified tasks of assessing trends, gathering statistics, measuring the results of anti-trafficking action, and regular reporting.<sup>1204</sup>

NREMs around the globe are often found to take one of four structures, namely inter-agency coordinating structures, stand-alone institutions, offices within government institutions, and institutions that are integrated into a broad-based human rights institution.<sup>1205</sup> The Belgian bipartite mechanism represents an inter-agency coordinating structure and a stand-alone institution. The Romanian mechanism embodies a stand-alone institution. The Czech and Swedish mechanisms are an office within government institutions. The Dutch and Finnish mechanisms are an independent institution that is integrated into a broad-based human rights institution. The advantages and shortcomings of each structure depend upon the size of the state, its geographical location, the extent of the domestic situation, and the availability of resources. The Belgian mechanism benefits from maximised utilisation of existing human, financial, and material resources because its response involves various stakeholders. But a ministerial lead can influence the choice of the most appropriate approach to trafficking as one of law enforcement or migration. Moreover, coordination among the various stakeholders may prove difficult and coordinating members will most likely need to deal with competing priorities within their government institutions. A stand-alone institution as in Romania or as supporting the Belgian inter-agency has a clear mandate to focus anti-trafficking actions in favour of the protection of the most vulnerable and excluded groups but at the expense of a comprehensive approach. The government offices of the Czech and Swedish mechanisms benefit from the relative flexibility granted to respond to the evolving nature of trafficking, although coordination among various stakeholders can be an impediment. The distinguishing feature of the Dutch and Finnish mechanisms is independence and the ability to build on the interdependence and indivisibility of human rights, and to mainstream the issue across all trafficking situations. The autonomy of staff ensures objectivity in evaluating the implementation of national responses and making comprehensive recommendations, which, in turn, increases the credibility of their work. However, a comprehensive approach based on

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<sup>1203</sup> EU Trafficking Directive (n 24) preamble para 27.

<sup>1204</sup> *ibid.*

<sup>1205</sup> UNHRC (2015) (n 1198) para 19.

cooperation with government institutions, civil society organisations, and victims depends upon the willingness of these stakeholders.

In the absence of a unified structure and drawing on the advantages and shortcomings of different structures of NREMs, this thesis proposes a uniform framework for NREMs to work together in cases of transnational trafficking and to complement international and regional mechanisms of enforcement. Such framework takes into account the four identified features of enforcement mechanisms in chapter 4, namely scope of mandate, degree of independence and accountability of office, availability of adequate resources, and extent of cooperation with NGOs. The primary objective of the framework is to build on the capacities of NREMs to offer greater coherence, reliability, comparability, and comprehensiveness of data collection and analysis, monitoring, evaluating, and reporting. The framework is most appropriately adopted at the regional level to contextualise the uniqueness of trafficking within a certain region. For example, the removal of internal borders facilitates trafficking of EU citizens within the EU area.

First, NREMs should have a clear legally-defined mandate that covers all forms and effects of trafficking for sexual and labour exploitation and the removal of organs, in both transnational and domestic situations, whether or not these involve organised crime. Situations of forced marriage, forced labour, and the removal of organs are still underexposed<sup>1206</sup> as are less visible situations of sexual exploitation outside the legalised sex industry, such as in hotels and private homes.<sup>1207</sup> In countries, such as Belgium and Finland, that register labour exploitation more than sexual exploitation research should be an integral part of the NREM's mandate.<sup>1208</sup> NREMs should report on both compliance with the preeminent legal instruments and the effectiveness of national legislation, policy, and practice, since international cooperation in cases of transnational trafficking necessitates legal harmonisation of international and regional obligations. Beyond reporting, the role of NREMs should include capacity building and the exchange of expertise. Based on the Belgian and Finnish mandates, NREMs may be granted legal powers to act in individual cases.

Second, the work of NREMs should be objective and independent. Thus, they should stand apart from all operational and policy coordination activity. Smaller states, which lack the capacity to establish a national coordinating mechanism for operational and policy coordination

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<sup>1206</sup> UNCHR (2014) (n 898) para 30.

<sup>1207</sup> Commission Staff Working Document (2016) (n 68) 14.

<sup>1208</sup> UNHRC (2015) (n 1198) para 13.



and a national rapporteur for reporting on such coordination, may have coordination and reporting performed by the same body but in such cases the body must be independent. The work of a body that is involved in the design and evaluation of national policies will have little perceived credibility. The organisational location of NREMs is an important consideration, even though different structures within and outside government institutions were described earlier. Their location should allow for open access to information and enhance the possibilities of influencing policy direction and practice. For example, the Swedish NREM has access to primary sources of information because it is organisationally placed within the police. At the same time, a legal right to obtain important information free of charge and notwithstanding the privacy of data grants the Finnish NREM access to primary sources of information held by government institutions. Meanwhile, the Dutch and Finnish NREMs can influence policy direction and practice because there is a clear legally-defined link with parliament, in relation to the submission of annual reports with recommendations by these NREMs. Thus, NREMs should report to both the government and parliament, which should determine the appropriate body for ensuring that the recommendations contained in such reports are implemented. The reports and recommendations of NREMs should be made accessible to the public because of their potential to stimulate public debate, which may provide the necessary impetus for political support.

Third, NREMs should conduct both quantitative and qualitative analysis of data and information on root causes, the nature, extent and type of trafficking, and emerging trends. For this purpose, information sources should include legal, criminal justice, law enforcement statistics, and information from NGOs. Their analysis and their work more generally should adopt both a human rights and legal perspective, since the human rights protection of victims is often a neglected area of analysis. Alongside a wide range of sources, there should be independence to decide on the kind of research to be undertaken to expose underexposed or neglected trafficking situations.

Fourth, there should be greater cooperation between NREMs and NGOs at all stages of the former's work. Besides the police, NGOs involved in victim rehabilitation and reintegration have access to primary sources of information. They can consequently ensure that NREMs work from both a human rights and legal perspective. NGO involvement in data collection and analysis may also minimise budgetary constraints that restrict the work of NREMs. As the mandate of NREMs should include capacity building and the exchange of expertise, they can depend upon NGO assistance in awareness-raising among the public and training stakeholders,

such as law enforcement, the judiciary, and service providers. An important consideration are the different forms of cooperation with NGOs, such as through a coalition, establishing more formal cooperation agreements, collaborating and providing state funding, setting-up discussion forums on trafficking-related matters to validate information and increase knowledge base, and involving NGOs in the victim assistance and identification efforts of government institutions.<sup>1209</sup> For example, in Romania, there is a coalition of NGOs known as ‘Antitrafic’ that raises awareness of domestic situations and assists victims but cooperation with the Romanian NREM is lacking because of irregular state funding. In Belgium, three specialised reception centres are formally instituted in the state-run assistance programme. While in Finland, NGOs regularly cooperate with the Finnish NREM to provide training and information events.

A number of factors determine the effectiveness of the work of NREMs. For example, when a recommendation by the NREM is not implemented the failure to implement can relate more broadly to the ineffectiveness of other government institutions. The effectiveness of the NREM is limited to the spheres of influence and activities as mandated. The domestic trafficking situation can be improved only when the behaviour of other institutions in their own spheres of influence and responsibility is also effective.<sup>1210</sup> NREMs can help to address many of the behavioural failures of other government institutions through independent reporting, with the assistance of NGOs. In the same way, they can help to address many of the challenges of the international and regional systems in ensuring objectivity and non-selectivity in the consideration of human rights issues and in eliminating double standards and politicisation that endanger the international and regional enforcement mechanisms.<sup>1211</sup> Above all, a uniform framework with standard operating procedures can ensure coordination and cooperation among NREMs in countries of origin, transit, and/or destination.

#### **6.4. Call for Further Impact Studies**

The international regulation of sex trafficking in women has reached a crossroads. Current responses manifest in the UN Trafficking Protocol, the COE Trafficking Convention, and the

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<sup>1209</sup> UNCHR (2014) (n 898) para 36.

<sup>1210</sup> Ryan Goodman and Thomas Pegram, ‘Introduction: National Human Rights Institutions, State Conformity, and Social Change’ in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012) 15.

<sup>1211</sup> Chris Sidoti, ‘National Human Rights Institutions and the International Human Rights System’ in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012) 99.

EU Trafficking Directive have failed to enhance international cooperation in the prevention of trafficking, the prosecution of traffickers, and the protection of victims. The mechanisms of enforcement attaching directly or indirectly to these instruments operate within the very limitations of the consent-based legal systems that allow the narrow self-interests of states to coexist and foster within the broader international legal framework around trafficking. Perhaps the proposed review mechanism under the UN Trafficking Protocol will give new expression to the fight against trafficking. Or, a revamped annual report on trafficking in persons as a diagnostic tool of the US enforcement mechanism can address the current challenges of US unilateralism to knowledge production and regulation in the field. However, as this thesis argues, the way forward is to strengthen existing domestic enforcement mechanisms, particularly NREMs, to assess trafficking trends, gather statistics, measure the results of anti-trafficking actions, and report regularly. Their proximity to the government and victims can bring about serious and necessary change in the domestic realities of trafficking.

The task of measuring progress in the fight against sex trafficking in women, particularly in individual states, is a difficult one. As a first measure of progress, this thesis has explored whether and to what extent individual states, namely Belgium, the Czech Republic, Finland, the Netherlands, Romania, and Sweden, have implemented the provisions of the preeminent legal instruments, namely the UN Trafficking Protocol, the COE Trafficking Convention, and the EU Trafficking Directive, into their domestic legal systems, as well as, whether and to what extent the enforcement mechanisms that attach directly or indirectly to these instruments have assisted individual states in their implementation processes. Correct and full implementation is a prerequisite to international cooperation among countries of origin, transit, and/or destination in cases of transnational trafficking. Thus, this thesis has concerned itself with legal developments in the field and linked these developments to the work of enforcement mechanisms, in relation to the case studies. However, this thesis has been unable to fully grasp the impact of anti-trafficking actions on the legal and political landscapes in these states because many of the issues around trafficking are complex and contested and, therefore, not amenable to an indicator-based measurement.<sup>1212</sup> In particular, key definitions and concepts are subject to multiple interpretations and the data required to accurately measure responses and impact is often unavailable or inaccessible. There is an urgent need for impact studies in the field, particularly in relation to the work of the enforcement mechanisms identified in this

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<sup>1212</sup> Gallagher and Chuang (n 220) 342.

thesis, such as the quality and value of their reports. While individual states are often in the best position to carry out such studies because they have access to primary sources of information, they cannot be trusted to provide honest insights. Thus, existing NREMs should be strengthened to report independently on international and regional compliance and the effectiveness of national legislation, policy, and practice. To this end, a global baseline study should be commissioned to provide guidance to NREMs and to help them build on their capacities.<sup>1213</sup>

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<sup>1213</sup> UNHRC (2015) (n 1198) para 45(c).

## Bibliography

### I. Cases

#### i. International

*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Judgment) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002)

#### ii. Council of Europe

See appendix I.

### II. Treaties

#### i. International

International Agreement for the Suppression of the 'White Slave Traffic' (signed 18 May 1904) 1 LNTS 83

International Convention for the Suppression of the White Slave Traffic (signed 4 May 1910) LNTS 8a

International Convention for the Suppression of the Traffic in Women and Children (signed 30 September 1921) 9 LNTS 415

ILO Convention C029: Forced Labour Convention (Convention concerning Forced or Compulsory Labour) (14th ILC Session Geneva 28 Jun 1930)

International Convention for the Suppression of the Traffic in Women of Full Age (signed 11 October 1933) 150 LNTS 431

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150

Slavery Convention, signed at Geneva on 25 September 1926 and amended by the Protocol (adopted 7 December 1953, entered into force 7 July 1955) 212 UNTS 17

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3

‘Rome Statute of the International Criminal Court’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (17 July 1998) UN Doc A/CONF.183/9

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83

United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209

Protocol to Prevent Suppress and Punish Trafficking in Person, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507

United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41

## **ii. Council of Europe**

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14 (adopted 4 November 1950, entered into force 1 June 2010) CETS 194

Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS 210

## **iii. European Union**

Joint Action 97/154/JHA adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children [1997] OJ L63/2.

Council Framework Decision 2002/629/JHA on combating trafficking in human beings [2002] OJ L203/1

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C306/1

Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L138/14

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168/24

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1

Commission Decision 2011/692/EU of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L271/49

Consolidated Version of the Treaty on European Union [2012] OJ C326/13

Consolidated Version of Treaty on the Functioning of the European Union [2012] OJ C326/47

Charter of Fundamental Rights of the European Union [2012] OJ C326/391

#### **iv. Belgium**

Law 15 December 1980 *Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*

Law 13 April 1995 *Wet van 13 april 1995 houdende bepalingen tot bestrijding van de mensenhandel en van de mensensmokkel*

Royal Decree 16 June 1995 *Koninklijk besluit van 16 juni 1995 tot uitvoering van artikel 11, § 5, van de wet van 13 april 1995 houdende bepalingen tot bestrijding van de mensenhandel en van de kinderpornografie*

Royal Decree 16 May 2004 *Koninklijk besluit betreffende de bestrijding van de mensensmokkel en mensenhandel*

Law 10 August 2005 *Wet tot wijziging van diverse bepalingen met het oog op de versterking van de strijd tegen mensenhandel en mensensmokkel en tegen praktijken van huisjesmelkers*

Royal Decree 18 April 2013 *Koninklijk besluit inzake de erkenning van de centra gespecialiseerd in de opvang en begeleiding van slachtoffers van mensenhandel en van bepaalde zwaardere vormen van mensensmokkel en inzake de erkenning om in rechte op te treden*

Law 24 June 2013 *Wet houdende bestraffing van de exploitatie van bedelarij en van prostitutie, mensenhandel en mensensmokkel in verhouding tot het aantal slachtoffers*

Royal Decree 29 June 2014 *Koninklijk besluit tot vaststelling van het organiek statuut van het federaal Centrum voor de analyse van de migratiestromen, de bescherming van de grondrechten van de vreemdelingen en de strijd tegen mensenhandel tot uitvoering van artikel 5 van de wet van 15 februari 1993 tot oprichting van een federaal Centrum voor de analyse van de migratiestromen, de bescherming van de grondrechten van de vreemdelingen en de strijd tegen mensenhandel*

Royal Decree 21 July 2014 *Koninklijk besluit tot wijziging van het koninklijk besluit van 16 mei 2004 betreffende de bestrijding van de mensensmokkel en mensenhandel*

Action Plan 2015-2019 *Actieplan Strijd tegen mensenhandel 2015-2019*

Law 31 May 2016 *Loi complétant la mise en oeuvre des obligations européennes en matière d'exploitation sexuelle des enfants, de pédopornographie, de traite des êtres humains et d'aide à l'entrée, au transit et au séjour irréguliers*

#### **v. The Czech Republic**

Constitution 1992 (revised 2013) *Ústava České republiky*

Government Resolution 849/2003 *Národní strategii boje proti obchodování s lidmi za účelem sexuálního vykoristování v České republice*

Law 40/2009 *trestní zákoník*

Law 418/2011 *Zákon o trestní odpovědnosti právnických osob a řízení proti nim*

Government Resolution 2014 *Strategie romské integrace do roku 2020*

Law 141/2014 *kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim, ve znění zákona č. 105/2013 Sb., 19. června 2014*

Government Resolution 360/2016 *Národní strategie boje proti obchodování s lidmi v České republice na období 2016-2019*

#### **vi. Finland**

Criminal Code 1889/39 *Rikoslaki*

Government Proposal LA 31/1996 *vp*



Government Proposal *HE 6/1997 PTK 77/1998 2888*

Law 660/2001 *Laki vähemmistövaltuutetusta*

Law 22/2004 *Laki vähemmistövaltuutetusta annetun lain muuttamisesta*

Law 743/2006 *Laki rikoslain 1 ja 20 luvun muuttamisesta*

Law 1109/2008 *Laki vähemmistövaltuutetusta ja syrjäntälautakunnasta annetun lain muuttamisesta*

Law 17.6.2011/746 *Laki kansainvälistä suojelua hakevan vastaanotosta sekä ihmiskaupan uhrin tunnistamisesta ja auttamisesta*

Law 1325/2014 *Yhdenvertaisuuslaki*

Government Programme 29/2016 *Valtioneuvoston ihmiskaupan vastainen toimintaohjelma 2016–2017*

## **vii. The Netherlands**

Constitution 1814 (revised 1983) *Grondwet voor het Koninkrijk der Nederlanden*

Law 32211-I *Regels betreffende de regulering van prostitutie en betreffende het bestrijden van misstanden in de seksbranche (Wet regulering prostitutie en bestrijding misstanden seksbranche); Brief inzake herbezinning wetsvoorstel Regulering prostitutie en bestrijding misstanden seksbranche*

Law 0910tkkst32211-2 *Regels betreffende de regulering van prostitutie en betreffende het bestrijden van misstanden in de seksbranche (Wet regulering prostitutie en bestrijding misstanden seksbranche)*

Law 1881/BWBR0001854 *Wetboek van Strafrecht, Wet van 3 maart 1881*

Law 1999/464 *Wet van 28 oktober 1999 tot wijziging van het Wetboek van Strafrecht, enige andere wetboeken en enige wetten (opheffing algemeen bordeelverbod)*

Law 2000/BWBR0012289 *Vreemdelingencirculaire 2000 (B)*

Law 6 November 2013 *Wet van 6 november 2013 tot implementatie van de richtlijn 2011/36/EU van het Europees Parlement en de Raad inzake voorkoming en bestrijding van mensenhandel, de bescherming van slachtoffers ervan, en ter vervanging van kaderbesluit 2002/629/JBZ van de Raad (PbEU L 101)*

Law 2013/84 *Wet van 28 februari 2013 inzake partiële wijziging van het Wetboek van Strafrecht en enkele andere wetten in verband met de aanpassing van het materieel strafrecht aan recente ontwikkelingen*

**viii. Romania**

Law 678/2001 *privind prevenirea și combaterea traficului de personae*

Emergency Order 194/2002 *Ordonanței de urgență a Guvernului privind regimul străinilor în România*

Government Decision 299/2003 *pentru aprobarea Regulamentului de aplicare a dispozițiilor Legii nr. 678/2001 privind prevenirea și combaterea traficului de personae*

Government Decision 1584/2005 *pentru înființarea, organizarea și funcționarea Agenției Naționale de Prevenire a Traficului de Persoane și Monitorizare a Asistenței Acordate Victimelor Traficului de Persoane*

Government Decision 1083/2006 *privind modificarea și completarea Hotărârii Guvernului nr. 1.584/2005 pentru înființarea, organizarea și funcționarea Agenției Naționale de Prevenire a Traficului de Persoane și Monitorizare a Asistenței Acordate Victimelor Traficului de Persoane*

Emergency Ordinance 20/2009 *pentru modificarea art. 13 alin. (2) și (3) din Ordonanța de urgență a Guvernului nr. 30/2007 privind organizarea și funcționarea Ministerului Administrației și Internelor și pentru reorganizarea unor unități din subordinea Ministerului Administrației și Internelor*

Government Decision 460/2011 *privind organizarea și funcționarea Agenției Naționale împotriva Traficului de Persoane*

Law 187/2012 *pentru punerea în aplicare a Legii nr.286/2009 privind Codul penal*

Government Decree 220/2012 *pentru aprobarea Regulamentului de organizare și funcționare a Agenției Naționale împotriva Traficului de Persoane*

National Strategy 2017-2022 *Strategia națională de prevenire și combatere a traficului de ființe umane pentru anii 2017-2022*

**ix. Sweden**

Government Bill 1997/98:55 *Kvinnofrid*

Government Bill 1997/98:114 *Protokoll*

Government Report 2010:49 *Förbud mot köp av sexuell tjänst En utvärdering 1999-2008*

Law 1998:408 *Lag om förbud mot köp av sexuella tjänster*

Law 2002:436 *Lag om ändring i brottsbalken*

Law 2004:406 *Lag om ändring i brottsbalken*

Law 2005:90 *Lag om ändring i brottsbalken*

Law 2007/08:167 *Handlingsplan mot prostitution och människohandel för sexuella ändamål*

Law 2010:371 *Lag om ändring i brottsbalken*

#### **x. United States**

Restatement (Third) of the Foreign Relations Law of the United States s 404 (1987)

Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386)

Trafficking Victims Protection Reauthorization Act of 2003 (Public Law 108-193)

Trafficking Victims Protection Reauthorization Act of 2005 (Public Law 109-164)

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Public Law 110-457)

Trafficking Victims Protection Reauthorization Act of 2013 (Title XII of the Violence against Women Reauthorization Act of 2013) (Public Law 113-4)

Survivors of Human Trafficking Empowerment Act (Section 115 of the Justice for Victims of Trafficking Act of 2015) (Public Law 114-22)

#### **xi. Other Jurisdictions**

Law 19/1940 *Almenn hegningarlög* (Iceland)

Law 8/2008-2009 *Vedtak til lov om endringer i straffeloven 1902 og straffeprosessloven (kriminalisering av kjøp av seksuell omgang eller handling mv.)* (Norway)

Protection of Communities and Exploited Persons Act (S.C. 2014, c. 25) (Canada)

Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

Criminal Code (Version of 16 July 2016) (France)

### **III. Documents**

#### **i. UN General Assembly**

UNGA Res 48/104 (20 December 1993) UN Doc A/RES/48/104

UNGA Res 55/25 (8 January 2001) UN Doc A/RES/55/25

UNGA Res 59/166 (10 February 2005) UN Doc A/RES/59/166

UNGA Res 61/144 (1 February 2007) UN Doc A/RES/61/144

UNGA Res 63/156 (30 January 2009) UN Doc A/RES/63/156

UNGA Res 65/190 (11 March 2011) UN Doc A/RES/65/190

UNGA Res 67/145 (27 February 2013) UN Doc A/RES/67/145

UNGA Res 23/5 (19 June 2013) UN Doc A/HRC/RES/23/5

UNGA Res 26/8 (17 July 2014) UN Doc A/HRC/RES/26/8

UNGA Res 32/19 (19 July 2016) UN Doc A/HRC/RES/32/19

UNGA Res 34/16 (6 April 2017) UN Doc A/HRC/RES/34/16

UNGA Res 34/21 (7 April 2017) UN Doc A/HRC/RES/34/21

UNGA Res 35/5 (10 July 2017) UN Doc A/HRC/RES/35/5

UNGA 'Report of the Third Committee' (12 December 1997) 52<sup>nd</sup> Session (1997) UN Doc A/52/635

UNGA 'Report of the Committee on the Elimination of Discrimination against Women' (1998) UN Doc A/53/38/Rev.1

UNGA 'Report of the Informal Preparatory Meeting of the Open-Ended Intergovernmental Ad Hoc Committee on the Elaboration of a Comprehensive International Convention against Organised Transnational Crime, Held at Buenos Aires from 31 August to 4 September 1998' (14 December 1998) 1<sup>st</sup> Session (1999) UN Doc A/AC.254/3

UNGA 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) 58<sup>th</sup> Session (2006) UN Doc A/CN.4/L.682

UNGA 'Report to the General Assembly on the fifth session of the Council' (7 August 2007) UN Doc A/HRC/5/21

UNGA 'Convention on the Elimination of All Forms of Discrimination against Women' (27 November 2007) UN Doc A/C.3/62/L.20/Rev.1

Press Release of the Secretary-General 'Add "Partnership" to "Three P" Agenda of United Nations Anti-Trafficking Protocol, Deputy Secretary-General Urges General Assembly Thematic Debate' (2008) DSG/SM/397-GA/10713-HR/4956

UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (12 August 2009) UN Doc A/64/290

UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (9 August 2010) UN Doc A/65/288

UNGA 'Report of the Committee on the Elimination of Discrimination against Women' (2014) GAOR 58<sup>th</sup> Session Supp 38

UNGA 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (6 August 2014) UN Doc A/69/269

**ii. UN Commission on Human Rights/UN Human Rights Council**

UNCHR 'Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women' (29 February 2000) UN Doc E/CN.4/2000/68

UNCHR 'Report of the Special Rapporteur on trafficking in persons, especially women and children' (22 December 2004) UN Doc E/CN.4/2005/71

UNHRC 'Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda' (24 January 2007) UN Doc A/HRC/4/23

UNHRC 'Report on the fifteenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Council, held in Geneva from 23 to 27 June 2008' (2008) UN Doc A/HRC/10/24

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (20 February 2009) UN Doc A/HRC/10/16

UNHRC Res 11/3 (17 June 2009) UN Doc A/HRC/RES/11/3

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (27 March 2014) UN Doc A/HRC/26/37/Add.2

UNHRC 'Report on the twenty-first annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council, including updated information on the special procedures' (2015) UN Doc A/HRC/28/41

UNHRC 'Report of the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council (Geneva, 8 to 12 June 2015), including updated information on the special procedures' (2016) UN Doc A/HRC/31/39

**iii. UN Conference of the Parties**

UNGA Draft rules of procedure for the Conference of the Parties to the United Nations Convention against Transnational Organized Crime UN Doc CTOC/COP/2004/3-A/AC.254/43

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its first session, held in Vienna from 28 June to 8 July 2004' (23 September 2004) UN Doc CTOC/COP/2004/6

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Draft questionnaire on implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (6 July 2004) UN Doc CTOC/COP/2004/L.1/Add.1

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Draft questionnaire on the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (17 October 2005) UN Doc CTOC/COP/2005/L.8

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its second session, held in Vienna from 10 to 21 October 2005' (1 December 2005) UN Doc CTOC/COP/2005/8

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Relaunching the Conference of the Parties' (4 October 2006) UN Doc CTOC/COP/2006/10

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Secretariat on Development of tools to gather information from States on the implementation of the United Nations Convention against Transnational Organized Crime and each of the Protocols thereto' (25 July 2008) UN Doc CTOC/COP/2008/2

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008' (1 December 2008) UN Doc CTOC/COP/2008/19

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009' (21 April 2009) UN Doc CTOC/COP/WG.4/2009/2

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of experts on possible mechanisms to review implementation of the United Nations Convention against Transnational Organized Crime held in Vienna on 30 September 2009' (14 October 2009) UN Doc CTOC/COP/WG.1/2009/3

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October 2010' (2 December 2010) UN Doc CTOC/COP/2010/17

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 10 to 12 October 2011' (15 November 2011) UN Doc CTOC/COP/WG.4/2011/8

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 6 to 8 November 2013' (26 November 2013) UN Doc CTOC/COP/WG.4/2013/5

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its seventh session, held in Vienna from 6 to 10 October 2014' (13 November 2014) UN Doc CTOC/COP/2014/13

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Report of the Chair on the open-ended intergovernmental meeting to explore all options regarding an appropriate and effective review mechanism for the United Nations Convention against Transnational Organized Crime and the Protocols thereto held in Vienna from 28 to 30 September 2015' (14 October 2015) UN Doc CTOC/COP/WG.8/2015/3

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Compilation of contributions received from States on all options regarding an appropriate and effective review mechanism for UNTOC and the protocols thereto' (3 June 2016) UN Doc CTOC/COP/WG.8/2016/CRP.1

UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime 'Mechanism for the review of implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: draft procedures and rules for the functioning of the mechanism' (21 February 2017) UN Doc CTOC/COP/WG.9/2017/2

#### **iv. UN Special Rapporteur**

UNHRC 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (31 May 2010) UN Doc A/HRC/14/32/Add.1

UNHRC 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (17 May 2011) UN Doc A/HRC/17/35/Add.1

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (2014) UN Doc A/HRC/26/37

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (21 March 2014) UN Doc A/HRC/26/37/Add.1

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro' (2 April 2015) UN Doc A/HRC/29/38/Add.2

UNHRC 'Report of the Special Rapporteur on trafficking in persons, especially women and children on her mission to the United States of America' (7 June 2017) UN Doc A/HRC/35/37/Add.2

#### v. UN Human Rights Treaty Bodies

UN Committee for the Elimination of All Forms of Discrimination against Women, 'Report on Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women' (21 June 1995) UN Doc A/CONF.177/7

UN Committee for the Elimination of All Forms of Discrimination against Women, 'Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (10 April 2006) UN Doc CEDAW/SP/2006/2

UN Committee for the Elimination of All Forms of Discrimination against Women, 'Communication No 15/2007, *Zhen Zhen Zheng v The Netherlands*' (14 November 2008) UN Doc CEDAW/C/42/D/15/2007

UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 4' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II)

UN Committee on the Elimination of Discrimination against Women 'General Recommendation No. 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II)

UN Committee on the Elimination of Discrimination against Women 'General Recommendation No. 24' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(VOL.II)

UN Committee on the Elimination of Discrimination against Women 'Rules of Procedure of the Committee on the Elimination of Discrimination against Women' in 'Note by the Secretariat, Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies' (28 May 2008) UN Doc HRI/GEN/3/Rev.3

UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 26 on women migrant workers' (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R

UN Committee for the Elimination of All Forms of Discrimination against Women, 'Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (1 March 2010) UN Doc CEDAW/SP/2010/2

UN Committee for the Elimination of All Forms of Discrimination against Women 'Responses to the list of issues and questions with regard to the consideration of the combined fourth and fifth periodic report: Czech Republic' (26 July 2010) UN Doc CEDAW/C/CZE/Q/5/Add.1

UN Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women on the Czech Republic' (10 November 2010) UN Doc CEDAW/C/CZE/CO/5



UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) UN Doc CEDAW/C/GC/28

UN Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women on Singapore' (16 January 2012) UN Doc CEDAW/C/SGP/CO/4/Rev.1

UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the seventh periodic report of Finland' (2 August 2013) UN Doc CEDAW/C/FIN/Q/7

UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the seventh periodic report of Belgium' (10 March 2014) UN Doc CEDAW/C/BEL/Q/7

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the seventh periodic report of Finland' (10 March 2014) UN Doc CEDAW/C/FIN/CO/7

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the seventh periodic report of Belgium' (14 November 2014) UN Doc CEDAW/C/BEL/CO/7

UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the sixth periodic report of the Czech Republic' (3 August 2015) UN Doc CEDAW/C/CZE/Q/6

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined eighth and ninth periodic reports of Sweden' (10 March 2016) UN Doc CEDAW/C/SWE/CO/8-9

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the sixth periodic report of the Czech Republic' (14 March 2016) UN Doc CEDAW/C/CZE/CO/6

UN Committee on the Elimination of Discrimination against Women 'List of issues and questions in relation to the sixth periodic report of the Netherlands' (16 March 2016) UN Doc CEDAW/C/NLD/Q/6

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the sixth periodic report of the Netherlands' (24 November 2016) UN Doc CEDAW/C/NLD/CO/6

UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) UN Doc CEDAW/C/GC/35

UN Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined seventh and eighth periodic reports of Romania' (24 July 2017) UN Doc CEDAW/C/ROU/CO/7-8

**vi. UN High Commissioner for Refugees**

UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (7 May 2002) UN Doc HCR/GIP/02/01

**vii. Diplomatic Conferences**

‘Summary Records of the Plenary Meetings: 6<sup>th</sup> Meeting’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (20 November 1998) UN Doc A/CONF.183/C.1/SR.6

**viii. Other UN Agencies**

ECOSOC ‘Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others’ (17 March 1983) UN Doc E/1983/7

ECOSOC ‘Report of the Working Group on Slavery on its Second Session’ (19 August 1976) UN Doc E/CN.4/SUB.2/AC.4/373

ECOSOC ‘Suppression of the traffic in persons and of the exploitation of the prostitution of others’ Res 1982/20 (4 May 1982)

ECOSOC ‘Contemporary Forms of Slavery: Updated Review of the Implementation of and follow-up to the Conventions on Slavery: Working Paper Prepared by Mr. David Weissbrodt and Anti-Slavery International’ (26 May 2000) UN Doc E/CN.4/Sub.2/2000/3

ECOSOC ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (20 May 2002) UN Doc E/2002/68/Add.1

**ix. Council of Europe**

Committee of Ministers Recommendation 91(11) on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults

Opinion of 24 September 2004 of the Expert Group on Trafficking in Human Beings of the European Commission: On measures in the Council of Europe Convention on Action Against Trafficking in Human Beings to establish a Monitoring Mechanism

PACE Opinion 253 (2005) on draft Council of Europe convention on action against trafficking in human beings

PACE Recommendation 1695 (2005) on Draft Council of Europe Convention on action against trafficking in human beings

Committee on Equal Opportunities for Women and Men Report 10397 (2005) on Draft Council of Europe Convention on action against trafficking in human beings

Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings CM(2005)32 Addendum 2 final

Committee of the Parties Council of Europe Convention on Action against Trafficking in Human Beings 'Rules of procedure of the Committee of the Parties' THB-CP(2008)2

GRETA 'Internal rules of procedure of the Group of Experts on Action against Trafficking in Human Beings' THB-GRETA(2009)1

GRETA 'Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties: First evaluation round' GRETA(2010)1 rev4

GRETA 'First General Report on GRETA's activities covering the period from February 2009 to July 2011' GRETA(2011)11

Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings Recommendation CP(2012)7 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania: First evaluation round' (31 May 2012) GRETA(2012)2

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

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium: First evaluation round' (25 September 2013) GRETA(2013)14

GRETA 'Third General Report on GRETA's activities covering the period from 1 August 2012 to 31 July 2013' GRETA(2013)17

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands: First evaluation round' (18 June 2014) GRETA(2014)10

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden: First evaluation round' (27 May 2014) GRETA(2014)11

GRETA 'Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties: Second evaluation round' GRETA(2014)13.

GRETA 'Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties' THB-GRETA(2014)52

GRETA 'Fourth General Report on GRETA's activities covering the period from 1 August 2013 to 30 September 2014' GRETA(2015)1

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Finland: First evaluation round' (4 June 2015) GRETA(2015)9

GRETA 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania: Second evaluation round' (8 July 2016) GRETA(2016)20

#### **x. European Union**

The Hague Ministerial Declaration on European Guidelines for Effective Measure to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation (The Hague, 24-26 April 1997)

Commission Communication Better Monitoring of the Application of Community Law COM(2002)725 final

Commission Communication Third Strategic Review of Better Regulation in the European Union COM(2009)15 final

Council Conclusions Establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings (4 June 2009) 2946<sup>th</sup> meeting of the Justice and Home Affairs Council

Commission Communication Measuring Crime in the EU: Statistics Action Plan 2011-2015 COM(2011)713 final

Commission Communication The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 COM(2012)286 final

Commission Staff Working Document mid-term report on the implementation of the EU strategy towards the eradication of trafficking in human beings (COM(2014)635 final) SWD(2014)318 final

Commission Staff Working Document accompanying the Commission Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims SWD(2016)159 final

Commission Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims COM(2016)267 final

Commission Report assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23(1) COM(2016)722 final

Commission Report assessing the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings,

on the prevention of trafficking in human beings, in accordance with Article 23(2) of the Directive 2011/36/EU COM(2016)719 final

European Commission Statement STATEMENT/16/2329 (24 June 2016)

European Parliament Answer given by Mr Avramopoulos on behalf of the Commission E-002889-17 (5 July 2017)

#### xi. OSCE

Permanent Council ‘OSCE Action Plan to Combat Trafficking in Human Beings’ (24 July 2003) PC.DEC/557

### IV. Secondary Sources

‘Ad-hoc Query on Websites and Prevention Campaigns of THB’ (*European Commission*, 3 July 2014) <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/ad-hoc-queries/trafficking/566\\_emn\\_ahq\\_websites\\_prevention\\_campaigns\\_thb\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/trafficking/566_emn_ahq_websites_prevention_campaigns_thb_en.pdf)> accessed 11 June 2016.

‘ERRC Submission to UN CEDAW on the Czech Republic (September 2010)’ (*European Roma Rights Centre*, 22 September 2010) <<http://www.errc.org/cms/upload/file/cedaw-trafficking-in-human-beings-czech-republic.pdf>> accessed 2 June 2016.

‘EU Civil Society e-Platform’ <[http://ec.europa.eu/anti-trafficking/media-outreach-els/eu-civil-society-e-platform\\_en](http://ec.europa.eu/anti-trafficking/media-outreach-els/eu-civil-society-e-platform_en)> accessed 4 February 2017.

‘Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on July 4, 2016’ (*Ministry of Foreign Affairs, the People’s Republic of China*, 4 July 2016) <[http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1377405.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1377405.shtml)> accessed 11 November 2016.

‘Human Trafficking Has No Place in Modern World, General Assembly President Says’ (*UN News Centre*, 14 July 2014) <<http://www.un.org/apps/news/story.asp?NewsID=48271#.VrZiW1iLShc>> accessed 8 March 2017.

‘Manual of Operations of the Special Procedures of the Human Rights Council’ (*OHCHR*, August 2008) <[http://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf)> accessed 29 January 2017.

‘Trafficking in Persons National Security Presidential Directive/NSPD-22’ (*US Army Combat Trafficking in Persons Program*, 16 December 2002) <[www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf](http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf)> accessed 10 March 2017.

## A

Abbott KW and Snidal D, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization* 421.

Ahmed A and Seshu M, "'We Have the Right Not To Be 'Rescued'...": When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers' (2012) 1 *Anti-Trafficking Review* 149.

Allain J, 'The Definition of Slavery in International Law' (2009) 52 *Howard Law Journal* 239.

— 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) *Human Rights Law Review* 546.

— — *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013).

— 'No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol' (2014) 7 *Albany Government Law Review* 111.

Alston P, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?' (2011) 52(2) *Harvard International Law Journal* 561.

Alvarez JE, *International Organizations as Law-makers* (OUP 2006).

Andersen S, *The Enforcement of EU Law: The Role of the European Commission* (OUP 2012).

Anderson B, 'Where's the Harm in That? Immigration Enforcement, Trafficking and the Protection of Migrants' Rights' (2012) 56(9) *American Behavioral Scientist* 1241.

Aronowitz A, Theuermann G and Tyurykanova E, *Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime* (OSCE 2010).

Askola H, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007).

Avellino R, 'Trafficking in Persons: A Contemporary Threat to Human Dignity' (2011) 1 *ELSA Malta Law Review* 46.

## B

Bailey SL, 'A Microsimulation Model to Assess the Impact of Prevention Efforts to Combat Sex Trafficking out of Five Eastern European States' (2015) 1(2) *Journal of Human Trafficking* 167.

Bales K and Robbins PT, "'No One Shall Be Held in Slavery or Servitude": A Critical Analysis of International Slavery Agreements and Concepts of Slavery' (2001) 2(2) *Human Rights Review* 18.

Bassiouni MC, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59(4) *Law and Contemporary Problems* 63.

Bellamy R, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) *European Journal of International Law* 1019.

Benelux Working Group on Trafficking in Human Beings (eds), *Informatiebrochure Omtrent de Benelux-samenwerking ter Bejegening van Slachtoffers van Mensenhandel* (Benelux Union 2015).

Benvenisti E, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law* 295.

Berman J and Friesendorf C, 'EU Foreign Policy and the Fight against Human Trafficking: Coercive Governance as Crime Control' (2008) 13 *European Foreign Affairs Review* 189.

Berman PS, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

Bernat FP and Zhilina T, 'Trafficking in Humans: The TIP Report' (2011) 5(5) *Sociology Compass* 452.

Bhuta N, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016).

Biaudet E, *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2010* (Ombudsman for Minorities 2010).

— — *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2011* (Ombudsman for Minorities 2011).

— — *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2012* (Ombudsman for Minorities 2012).

— — *The Finnish National Rapporteur on Trafficking in Human Beings: Report 2013* (Ombudsman for Minorities 2013).

— — *National Rapporteur on Trafficking in Human Beings: Report 2014* (Ombudsman for Minorities 2014).

Boister N, *An Introduction to Transnational Criminal Law* (OUP 2012).

Bressan S, 'Criminal Law against Human Trafficking within the EU: A Comparison of an Approximated Legislation?' (2012) 20(2) *European Journal of Crime, Criminal Law and Criminal Justice* 137.

Breuil BCO and others, 'Human Trafficking Revisited: Legal, Enforcement and Ethnographic Narratives on Sex Trafficking to Western Europe' (2011) 14(1) *Trends in Organized Crime* 30.

Brunelle-Quraishi O, 'Assessing the Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis' (2012) 2(1) *Notre Dame Journal of International and Comparative Law* 101.

Brunovskis A and Skilbrei M-L, 'Two Birds with One Stone? Implications of Conditional Assistance in Victim Protection and Prosecution of Traffickers' (2016) 6 *Anti-Trafficking Review* 13.

Buchanan AE, *The Heart of Human Rights* (OUP 2013).

## C

Chalmers D, Davies G and Monti G, *European Union Law: Text and Materials* (CUP 2014).

Charnysh V, Lloyd P and Simmons BA, 'Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons' (2015) 21(2) *European Journal of International Relations* 323.

Cho S-Y and Vadlamannati KC, 'Compliance with the Anti-trafficking Protocol' (2011) 28 *European Journal of Political Economy* 249.

— — Dreher A and Neumayer E, 'Does Legalized Prostitution Increase Human Trafficking?' (2013) 41 *World Development* 67.

— — Dreher A and Neumayer E, 'The Determinants of Anti-Trafficking Policies: Evidence from a New Index' (2014) 116(2) *Scandinavian Journal of Economics* 429.

Chuang J, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) 27(2) *Michigan Journal of International Law* 437.

— — 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy' (2010) 158(6) *University of Pennsylvania Law Review* 1655.

— — 'Article 6' in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012).

— — 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) *American Journal of International Law* 609.

## D

Davies J and Davies B, 'How to Use a Trafficked Women: The Alliance between Political and Criminal Trafficking Organisations' (2008) 1 *Recherches Sociologiques et Anthropologiques* 114.

Davies M, 'Legal Pluralism' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).



De Smet F, *Annual Report 2015 on Trafficking and Smuggling of Human Beings: Tightening the Links* (Myria 2016).

— — *Annual Report 2016 on Trafficking and Smuggling of Human Beings: Beggars in the Hands of Traffickers* (Myria 2017).

De Vries I and Dettmeijer-Vermeulen CE, 'Extremely Wanted: Human Trafficking Statistics—What to Do with the Hodgepodge of Numbers?' (2015) 8 UN Forum on Crime and Society 15.

DeMeritt JHR, *International Organizations and Government Killing: Does Naming and Shaming Save Lives?* (2012) 38(5) *International Interactions* 597.

Department of Security Policy and Crime Prevention, *National Strategy of the Fight against Trafficking in Human Beings (for the period of 2005-2007)* (Ministry of the Interior 2005).

— — *2008 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2009).

— — *2014 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2015).

— — *2016 Status Report on Trafficking in Human Beings in the Czech Republic* (Ministry of the Interior 2016).

— — *Report on Internal Security and Public Order in the Czech Republic in 2015 (as compared to 2014)* (Ministry of the Interior 2016).

DeStefano AM, *The War on Human Trafficking: US Policy Assessed* (Rutgers University Press 2007).

Dettmeijer-Vermeulen CE, *Trafficking in Human Beings: Fifth Report of the Dutch National Rapporteur* (BNRM 2007).

— — *Trafficking in Human Beings: Ten Years of Independent Monitoring* (BNRM 2010).

— — *Trafficking in Human Beings. Case Law on Trafficking in Human Beings 2009-2012. An Analysis* (BNRM 2012).

— — *Trafficking in Human Beings: Visible and Invisible. A Quantitative Report 2007-2011* (BNRM 2012).

— — 'Trafficking in Human Beings: Ten Years of Independent Monitoring by the Dutch Rapporteur on Trafficking in Human Beings' (2012) 18(3) *European Journal on Criminal Policy and Research* 283.

— — *Trafficking in Human Beings: Visible and Invisible II. Summary of the Quantitative Report 2008-2012* (BNRM 2014).

Doezema J, 'Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiations' (2005) 14(1) *Social and Legal Studies* 61.

Dormaels A, Moens B and Praet N, 'The Belgium Counter-Trafficking Policy' in Christien van den Anker (ed), *The Political Economy of New Slavery* (Palgrave Macmillan Ltd 2004).

Dottridge M, 'Introduction' in Bandana Pattanaik (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW 2007).

Dragomirescu DA, Necula C and Simion R, 'Romania: Emerging Market for Trafficking? Clients and Trafficked Women in Romania' in Andrea Di Nicola and others (eds), *Prostitution and Human Trafficking: Focus on Clients* (Springer 2009).

Dutton YM, 'Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms' (2012) 34(1) *University of Pennsylvania Journal of International Law* 1.

Dunoff JL and Pollack MA (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

## E

Efrat A, *Governing Guns, Preventing Plunder: International Cooperation against Illicit Trade* (OUP 2012).

Ekberg G S and Wahlberg K, 'The Swedish Approach: A European Union Country Fights Sex Trafficking' (2011) 2(2) *Solutions* <<http://www.thesolutionsjournal.com/node/895>> accessed 28 April 2015.

Eriksson M, 'The Prevention of Human Trafficking: Regulating Domestic Criminal Legislation through the European Convention on Human Rights' (2013) 82 *Nordic Journal of International Law* 339.

## F

Falkner G and Treib O, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46(2) *Journal of Common Market Studies* 293.

Feasley A, 'Time for a Tune-up: Retooling the 2012 TIP Report in Order to Better Meet International Legal Research Standards' (2013) 25 *Florida Journal of International Law* 5.

Fojtová S, 'Legalising Sex Work in the Czech Republic: Agency and Migration in a Transnational Feminist Context' in M-S D Alexandru, M Nicolaescu and H Smith (eds), *Between History and Personal Narrative: East European Women's Stories of Migration in the New Millennium* (LIT Verlag 2014).

Foot KA, Toft A and Cesare N, 'Developments in Anti-Trafficking Efforts: 2008–2011' (2015) 1(2) *Journal of Human Trafficking* 136.

Friedrich AG, Meyer AN and Perlman DG, 'The Trafficking in Persons Report: Strengthening a Diplomatic Tool' (2006) UCLA School of Public Affairs Project, 10-11

<[https://issuu.com/uclapubaffairs/docs/the\\_trafficking\\_in\\_persons\\_report](https://issuu.com/uclapubaffairs/docs/the_trafficking_in_persons_report)> accessed 24 February 2017.

Friman HR, 'Numbers and Certification: Assessing Foreign Compliance in Combating Narcotics and Human Trafficking' in Peter Andreas and Kelly M Greenhill (eds), *Sex, Drugs and Body Counts: the Politics of Numbers in Global Crime and Conflict* (Cornell University Press 2010).

## G

GAATW and others, 'Statement on a monitoring mechanism for the United Nations Convention against Transnational Organized Crime and each of the protocols thereto with specific attention to the Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Human Trafficking Protocol)' (GAATW, 13 October 2008) <[http://www.gaatw.org/statements/Statement\\_on\\_a\\_Monitoring\\_Mechanism-COPS08.pdf](http://www.gaatw.org/statements/Statement_on_a_Monitoring_Mechanism-COPS08.pdf)> accessed 24 February 2017.

Gall G, *Sex Worker Unionization: Global Developments, Challenges and Possibilities* (Palgrave Macmillan 2016).

Gallagher AT, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 163.

——— *The International Law of Human Trafficking* (CUP 2010).

——— 'Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports' (2011) 12 *Human Rights Review* 381.

——— and Chuang J, 'The Use of Indicators to Measure Government Responses to Human Trafficking' in Kevin Davis and others (eds), *Governance by Indicators: Global Power through Quantification and Ranking* (OUP 2012).

——— and Surtees R, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who Decides-and How?' (2012) 1 *Anti-Trafficking Review* 10.

——— 'Two Cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 14.

——— and Ezeilo JN, 'The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review' (2015) 37(4) *Human Rights Quarterly* 913.

——— 'Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending Impunity and Securing Justice' (2016) 6 *Anti-Trafficking Review* 1.

Goodman R and Pegram T, 'Introduction: National Human Rights Institutions, State Conformity, and Social Change' in Goodman R and Pegram T (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012).

Goździak EM, 'Empirical Vacuum: In Search of Research on Human Trafficking' in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime* (OUP 2014).

—— and Bump MN, 'Data and Research on Human Trafficking: Bibliography of Research-Based Literature' (Institute for the Study of International Migration, October 2008) <[https://repository.library.georgetown.edu/bitstream/handle/10822/551495/Data\\_research\\_trafficking.pdf?sequence=1](https://repository.library.georgetown.edu/bitstream/handle/10822/551495/Data_research_trafficking.pdf?sequence=1)> accessed 8 February 2016.

Greer S and Wildhaber L, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2012) 12(4) *Human Rights Law Review* 655.

Guinn DE, 'Defining the Problem of Trafficking: The Interplay of US Law, Donor, and NGO Engagement and the Local Context in Latin America' in Leonard Territo and George Kirkham (eds), *International Sex Trafficking of Women & Children: Understanding the Global Epidemic* (Looseleaf Law Publications Inc 2010).

Guzman AT, 'Against Consent' (2012) 52(4) *Virginia Journal of International Law* 747.

## H

Hacker D, 'Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law' (2015) 28 *Harvard Human Rights Journal* 11.

Hafner-Burton EM, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem' (2008) 62(4) *International Organization* 689.

—— 'International Regimes for Human Rights' (2012) 15 *Annual Review of Political Science* 265.

—— Brad L LeVeck and David G Victor, 'How Activists Perceive the Utility of International Law' (2015) 78(1) *Journal of Politics* 167.

—— Mansfield ED and Pevehouse JCW, 'Human Rights Institutions, Sovereignty Costs and Democratization' (2015) 45(1) *British Journal of Political Science* 1.

Hakimi M, 'Unfriendly Unilateralism' (2014) 55(1) *Harvard International Law Journal* 105.

Halley J and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29(2) *Harvard Journal of Law & Gender* 335.

Halliday TC, 'Recursivity of Global Normmaking: A Sociolegal Agenda' (2009) 5 *Annual Review of Law and Social Science* 263.

Hathaway O, 'Do Human Rights Treaties Make a Difference?' (2002) 111(8) *Yale Law Journal* 1935.

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

— — ‘Human Trafficking and Migration’ in Alice Bullard (ed), *Human Rights in Crisis* (Ashgate 2008).

Hendrix MC, ‘Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China’ (2010) 43 *Cornell International Law Journal* 173.

Hodson L, ‘Women’s Rights and the Periphery: CEDAW’s Optional Protocol’ (2014) 25(2) *European Journal of International Law* 561.

Holman M, ‘The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively’ (2009) 44(1) *Texas International Law Journal* 99.

Holmberg S and others, *Prostitution och människohandel för sexuella ändamål: Slutredovisning av regeringens handlingsplan* (Rapport 2011:18, Brottsförebyggande rådet 2011).

Holmström C and Skilbrei M-L, *Prostitution in the Nordic Countries: Conference Report, Stockholm, October 16-17, 2008* (Nordic Council of Ministers 2009).

Hughes E and Talerico C (eds), *Implementation of the Eurojust Action Plan against THB 2012-2016: Final Evaluation Report* (Eurojust 2017).

## J

Jakobsson N and Kotsadam A, ‘The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation’ (2013) 35(1) *European Journal of Law and Economics* 87.

Jyrkinen M, *The Organisation of Policy Meets the Commercialisation of Sex: Global Linkages, Policies and Technologies* (Edita Prima 2005).

Kaeding M, ‘Determinants of Transposition Delay in the European Union’ (2006) 26(3) *Journal of Public Policy* 229.

## K

Camp-Keith L, ‘Human Rights Instruments’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

Kelemen K and Johansson MC, ‘Still Neglecting the Demand that Fuels Human Trafficking: A Study Comparing the Criminal Laws and Practice of Five European States on Human Trafficking, Purchasing Sex from Trafficked Adults and from Minors’ (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice* 247.

Kingsbury B, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20(1) *European Journal of International Law* 23.

Kirby M, ‘UN Special Procedures: Reflections on the Office of UN Special Representative for Human Rights in Cambodia’ (2010) 11(2) *Melbourne Journal of International Law* 491.

Kirchofer CP, 'Organised Begging in Vienna, Austria: Right-Wing Propaganda, Benevolent Necessity, Illicit Business, Human Smuggling, or Human Trafficking?' (*Webster University*, 18 February 2010) <[http://webs.schule.at/website/Texte\\_online/Organized\\_Begging.pdf](http://webs.schule.at/website/Texte_online/Organized_Begging.pdf)> accessed 7 June 2016.

König T and Luetgert B, 'Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives' (2009) 39(1) *British Journal of Political Science* 163.

— — and Mäder L, 'Compliance in the European Union: A Strategic Analysis of the Interaction between Member States and the Commission in the Implementation Process of Directives' (PEIO conference, Mannheim, January 2012).

Koh HH, 'On American Exceptionalism' (2003) 55(5) *Stanford Law Review* 1479.

Koremenos B, 'Institutionalism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

Korvinus AG, *Trafficking in Human Beings: First Report of the Dutch National Rapporteur* (BNRM 2002).

— — *Trafficking in Human Beings: Third Report of the Dutch National Rapporteur* (BNRM 2005).

— — *Trafficking in Human Beings Supplementary Figures: Fourth Report of the Dutch National Rapporteur* (BNRM 2005).

Kotiswaran P, 'Protocol at the Crossroads: Rethinking Anti-trafficking Law from an Indian Labour Law Perspective' (2015) 4 *Anti-Trafficking Review* 33.

Krain M, 'J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?' (2012) 56(3) *International Studies Quarterly* 574.

Krieg S, *Multilevel Regulation against Trafficking in Human Beings: A Critical Application Analysis of International, European and German Approaches* (Nomos 2014).

Kushen R (ed), *Breaking the Silence: Trafficking in Romani Communities* (European Roma Rights Centre 2011).

## L

Latomaa S, 'Human Trafficking in Finland' (2014) 9 *Intercultural Human Rights Law Review* 229.

Leevan S, 'Comparative Treatment of Human Trafficking in the United States and Israel: Financial Tools to Encourage Survivor Rehabilitation and Prevent Trafficking' (2008) 6 *Cardozo Public Law, Policy and Ethics Journal* 773.

Lenzerini F, 'International Legal Instruments on Human Trafficking and A Victim-Oriented Approach: Which Gaps Are to be Filled?' (2009) 4 *Intercultural Human Rights Law Review* 205.

Limoncelli SA, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women* (Stanford University Press 2010).

Lloyd P and Simmons BA, 'Framing for a New Transnational Legal Order: The Case of Human Trafficking' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015).

## M

Macedo S and others (eds), *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs 2001).

MacKinnon CA, 'Trafficking, Prostitution, and Inequality' (2011) 46(2) *Harvard Civil Rights-Civil Liberties Law Review* 271.

Mahmoud T O and Trebesch C, 'The Economics of Human Trafficking and Labour Migration: Micro-Evidence from Eastern Europe' (2010) 38(2) *Journal of Comparative Economics* 173.

Mapp S and others, 'Local Law Enforcement Officers' Knowledge of Human Trafficking: Ability to Define, Identify, and Assist' (2016) 2(4) *Journal of Human Trafficking* 329.

Marttila A-M, 'Desiring the "Other": Prostitution Clients on a Transnational Red-Light District in the Border Area of Finland, Estonia and Russia' (2008) 12(1) *Gender Technology and Development* 31.

Mattar MY, 'Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings' (2008) 41 *Vanderbilt Journal of Transnational Law* 1.

Mattson G, *The Cultural Politics of European Prostitution Reform: Governing Loose Women* (Palgrave Macmillan 2016).

Meernik J and others, 'The Impact of Human Rights Organizations on Naming and Shaming Campaigns' (2012) 56(2) *Journal of Conflict Resolution* 233.

Mehran F and De Cock M (eds), *ILO Global Estimate of Forced Labour: Results and Methodology* (ILO 2012).

Melito T, 'Report to the Chairman, Committee on the Judiciary and the Chairman, Committee on International Relations, House of Representatives' (2006) U.S. Government Accountability Office GAO-06-8252006, 24-25 <<http://www.gao.gov/new.items/d06825.pdf>> accessed 24 February 2017.

Merzon S, 'Note: Extraterritorial Reach of the Trafficking Victims Protection Act' (2007) 38 *George Washington International Law Review* 887.

Meshkovska B and others, 'Trafficking of Women for Sexual Exploitation in Europe: Prosecution, Trials and their Impact' (2016) 6 *Anti-Trafficking Review* 71.

Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

— — Sicilianos L-A, 'Reservations to Treaties: An Introduction' (2013) 24(4) *European Journal of International Law* 1055.

Munro VE, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' (2006) 46 *British Journal of Criminology* 318.

Mutua M, *Human Rights Standards: Hegemony, Law, and Politics* (State University of New York Press 2016).

## N

Nanda VP and Bassiouni MC, 'Slavery and the Slave Trade: Steps Towards Eradication' (1972) 12 *Santa Clara Lawyer* 424.

Naples-Mitchell J, 'Perspectives of UN Special Rapporteurs on their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15(2) *International Journal of Human Rights* 232.

## O

Oberleitner G, *Global Human Rights Institutions* (Polity Press 2007).

Obokata T, 'EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal' (2003) 40(4) *Common Market Law Review* 917.

— — 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System' (2005) 54(2) *International and Comparative Law Quarterly* 445.

— — and Payne B, 'Implementing Action against Trafficking of Human Beings under the TFEU: A Preliminary Analysis' (2012) 3(3-4) *New Journal of European Criminal Law* 298.

Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: June 2006* (US Department of State 2006).

— — *Trafficking in Persons Report: 10<sup>th</sup> Edition* (US Department of State 2010).

— — *Trafficking in Persons Report: June 2011* (US Department of State 2011).

— — *Trafficking in Persons Report: June 2016* (US Department of State 2016).

— — *Trafficking in Persons Report: June 2017* (US Department of State 2017).



OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (UN 2010).

Outshoorn J, 'Introduction: Prostitution, Women's Movements and Democratic Politics' in Joyce Outshoorn (ed), *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (CUP 2004).

— — and others, 'Remaking Bodily Citizenship in Multicultural Europe: The Struggle for Autonomy and Self-Determination' in B Halsaa, S Roseneil and S Sümer (eds), *Remaking Citizenship in Multicultural Europe: Women's Movements, Gender and Diversity* (Palgrave Macmillan 2012).

— — and others, 'Women's Movements and Bodily Autonomy: Making the Case for Bodily Citizenship' in Joyce Outshoorn (ed), *European Women's Movements and Body Politics: The Struggle for Autonomy* (Palgrave Macmillan 2015).

## P

Paterson N and Vermeulen G, *The Montrasec Demo: A Bench-mark for Member State and EU Automated Data Collection and Reporting on Trafficking in Human Beings and Sexual Exploitation of Children* (Maklu 2010).

Pauwelyn J, Wessel RA and Wouters J (eds), *Informal International Lawmaking* (CUP 2012).

Petrescu AG, *Report on Trafficking in Persons in Romania 2006* (National Agency against Trafficking in Persons 2007).

— — *Trafficking in Persons for Begging: Romania Study* (National Agency against Trafficking in Persons 2013).

— — *Rapport Privind Evoluția Traficului de Persoane în Anul 2013* (National Agency against Trafficking in Persons 2014).

Phoenix J, 'Frameworks of Understanding' in Jo Phoenix (ed), *Regulating Sex for Sale: Prostitution, Policy Reform and the UK* (Policy Press 2009).

Piccone T, 'Human Rights Special Procedures: Determinants of Influence' (2014) 108 *Proceedings of the Annual Meeting* (American Society of International Law) 288.

Pimiã K, *Annual Report 2015 of the Non-Discrimination Ombudsman* (Non-Discrimination Ombudsman 2015).

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

Planitzer J, 'GRETA's First Years of Work: Review of the Monitoring of Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings' (2012) 1 *Anti-Trafficking Review* 31.

Poncelet A and Martiniello M, 'Migration of Romanian Women to Belgium: Strategies and Dynamics of the Migration Process' in Christiane Timmerman and others (eds), *New Dynamics in Female Migration and Integration* (Routledge 2015).

Popaac O-R and Bucur N-F, 'Gender Discrimination and Education Practitioners. Reality, Perception, Possible Solutions' (2014) 127 *Procedia - Social and Behavioral Sciences* 459.

## R

Raymond JG, *Not a Choice, Not a Job: Exposing the Myths about Prostitution and the Global Sex Trade* (Potomac Books 2013).

Rehof LA, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women* (Martinus Nijhoff Publishers 1993).

Rogoz M and others, 'Responses to Demand in the Context of Trafficking in Human Beings: Regulatory Measures from Twelve National Contexts' (2016) DemandAT Working Paper 6, 9  
<[http://www.demandat.eu/sites/default/files/DemandAT\\_WP6\\_Rogoz\\_April2016\\_FINAL.pdf](http://www.demandat.eu/sites/default/files/DemandAT_WP6_Rogoz_April2016_FINAL.pdf)> accessed 23 September 2017.

Roth V, *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff 2012).

Rubinfeld J, 'Commentary: Unilateralism and Constitutionalism' (2004) 79(6) *New York University Law Review* 1971.

Rutland M, 'Criminal Liability of Legal Entities: Crimes, Sanctions, International Context' (*Rutland Ježek*, 27 March 2012) <<http://www.rutlandjezek.com/gb/menu/12/news/clanek-112-criminal-liability-of-legal-entities-crimes-sanctions-international-context/>> accessed 12 March 2017.

## S

Scarpa S, *Trafficking in Human Beings: Modern Slavery* (OUP 2008).

Schönhöfer J, 'Political Determinants of Efforts to Protect Victims of Human Trafficking' (2016) *Crime, Law and Social Change* 1.

Shelley L, 'The Relationship of Drug and Human Trafficking: A Global Perspective' (2012) 18(3) *European Journal on Criminal Policy and Research* 241.

Sidoti C, 'National Human Rights Institutions and the International Human Rights System' in Goodman R and Pegram T (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (CUP 2012).

Simmons BA, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).

Skilbrei M-L and Holmström C, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies* (Routledge 2016).

Smith M, 'Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties under Article 228 EC (now Article 260 TFEU)' (2010) 16(4) *European Public Law* 547.

Spetalnick M and Wroughton L, 'U.S. Downgrades Myanmar, Raises Thailand in Human Trafficking Report' (*Reuters*, 1 July 2016) <<http://www.reuters.com/article/us-humantrafficking-usa-idUSKCN0ZG1U3>> accessed 11 November 2016.

Steiner HJ, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008).

Stoyanova V, '*L.E. v. Greece: Human Trafficking and States' Positive Obligations*' (*Strasbourg Observers*, 2 February 2016) <<https://strasbourgobservers.com/2016/02/02/l-e-v-greece-human-trafficking-and-states-positive-obligations/>> accessed 31 May 2016.

Strauss L, 'Note: Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act' (2010) 19 *Cornell Journal of Law and Public Policy* 495.

Subedi SP, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33(1) *Human Rights Quarterly* 201.

—— 'Life as a UN Special Rapporteur' (Public Lecture, Leeds, May 2015).

Surtees R and De Kerchove F, 'Who Funds Re/integration? Ensuring Sustainable Services for Trafficking Victims' (2014) 3 *Anti-Trafficking Review* 64.

Švec J, 'National Monitoring and Report Mechanisms to Address THB: The Role of National Rapporteurs' (OSCE conference, Vienna, 21 May 2007) <<http://www.osce.org/cthb/25266?download=true>> accessed 8 November 2014.

Szep J and Spetalnick M, 'Special Report: State Department Watered down Human Trafficking Report' (*Reuters*, 3 August 2015) <<http://www.reuters.com/article/us-usa-humantrafficking-disputes-special-idUSKCN0Q821Y20150803>> accessed 11 November 2016.

## T

Tallberg J, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56(3) *International Organization* 609.

—— 'Explaining the Institutional Foundations of European Union Negotiations' (2010) 17(5) *Journal of European Public Policy* 633.

Territo L and Kirkham G (eds), *International Sex Trafficking of Women & Children: Understanding the Global Epidemic* (Looseleaf Law Publications Inc 2010).

Tiefenbrun SW, 'Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad' (2005) 11(3) William and Mary Journal of Women and the Law 317.

— — 'The Domestic and International Impact of the US Victims of Trafficking Protection Act of 2000: Does the Law Deter Crime?' (2005) 2 Loyola University Chicago Law Journal 193.

Todres J, 'Law, Otherness, and Human Trafficking' (2009) 49 Santa Clara Law Review 605.

Toshkov D, 'Taking Stock: A Review of Quantitative Studies of Transposition and Implementation of EU Law' (NIG Annual Work Conference, Maastricht, November 2010).

— — 'Compliance with EU Law in Central and Eastern Europe: The Disaster that Didn't Happen (Yet)' (2012) 2(364) L'Europe en Formation 91.

— — 'Compliance and Enforcement of EU Law: Who Wins, Who Loses, and Who Settles' (Ninth Annual Conference on the Political Economy of International Organizations, Salt Lake City, January 2016).

Tyldum G and Brunovskis A, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking' (2005) 43(1-2) International Migration 17.

## U

UNODC, *Travaux Préparatoires: Of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2006).

— — *Model Law against Trafficking in Persons* (UN 2009).

— — *Issue Paper: Abuse of a Position of Vulnerability and Other 'Means' within the Definition of Trafficking in Persons* (UN 2013).

— — *Issue Paper: The Role of 'Consent' in the Trafficking in Persons Protocol* (UN 2014).

— — *Global Report on Trafficking in Persons* (UN 2014).

— — *Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol* (UN 2015).

— — *Global Report on Trafficking in Persons* (UN 2016).

## V

Van der Wilt H, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts' (2014) 13(2) Chinese Journal of International Law 297.

Van Dijk J and Mierlo F K-V, 'Quantitative Indices for Anti-Human Trafficking Policies: Based on Reports of the U.S. State Department and the Council of Europe' (2014) 61(2) Crime, Law and Social Change 229.

Van Hoecke M, 'Methodology of Comparative Legal Research' (2015) *Law and Method* 1.

Verhoeven M, 'Sex Work Realities Versus Government Policies: Meanings of Anti-Trafficking Initiatives for Sex Workers in the Netherlands' (2016) *Sexuality Research and Social Policy* 4 <<http://link.springer.com/article/10.1007/s13178-016-0264-7>> 1 January 2017.

Vlassis D, 'The UN Convention Against Transnational Organized Crime' in Mats Berdal and Monica Serrano (eds), *Transnational Organized Crime and International Security: Business as Usual?* (Lynne Rienner 2002).

Von Stein J, 'The Engines of Compliance' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013).

## W

Wahlberg K, *Trafficking in Human Beings for Sexual and Other Purposes: Situation Report 13* (Swedish National Police Board 2012).

——— *Människohandel för sexuella och andra ändamål: Lägesrapport 16* (Swedish National Police Board 2015).

Walk Free Foundation, *The Global Slavery Index 2014* (Hope for Children Organization Australia Ltd 2014).

Weitzer R, 'The Mythology of Prostitution: Advocacy Research and Public Policy' (2010) 7(1) *Sexuality Research and Social Policy* 15.

——— *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York University Press 2012).

Wijers M, *Compensation of Victims of Trafficking under International and Dutch Law* (La Strada International 2014)

——— 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 56.

## Z

Zimmerman C, Hossain M and Watts C, 'Human Trafficking and Health: A Conceptual Model to Inform Policy, Intervention and Research' (2011) 73 *Social Science and Medicine* 327.

## Appendix

### I. ECHR Case Law on Trafficking in Persons under Article 4

#### i. Inadmissible Applications

*FA v the United Kingdom* App no 20658/11 (ECHR, 10 September 2013)

*VF v France* App no 7196/10 (ECHR, 29 November 2011)

*Idemugia v France* App no 4125/11 (ECHR, 27 March 2012)

*SE v Spain* App no 4982/12 (ECHR, 29 September 2015)

*LO v France* App no 4455/14 (ECHR, 18 June 2015)

#### ii. Applications Struck Out

*Kawago v the United Kingdom* App no 56921/09 (ECHR, 3 September 2013)

*YK v the United Kingdom* App no 21413/11 (ECHR, 4 March 2014)

*LR v the United Kingdom* App no 49113/09 (ECHR, 14 June 2011)

*DH v Finland* App no 30815/09 (ECHR, 28 June 2011)

*OGO v the United Kingdom* App no 13950/12 (ECHR, 18 February 2014)

#### iii. Article 4 Violation

*Siliadin v France* App no 73316/01 (ECHR, 26 July 2005)

*Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010)

*CN and V v France* App no 67724/09 (ECHR, 11 October 2012)

*CN v the United Kingdom* App no 4239/08 (ECHR, 13 November 2012)

*LE v Greece* App no 71545/12 (ECHR, 21 January 2016)

#### iv. No Article 4 Violation

*Kaya v Germany* App no 31753/02 (ECHR, 28 June 2007)

*Tas v Belgium* App no 44614/06 (ECHR, 12 May 2009)

*M and Others v Italy and Bulgaria* App no 40020/03 (ECHR, 31 July 2012)

#### v. Pending Applications

*JVL and Others v Austria* App no 58216/12 (ECHR, 4 September 2012)

*Chowdury and Others v Greece* App no 21884/15 (ECHR, 27 April 2015)

*SM v Croatia* App no 60561/14 (ECHR, 27 August 2014)