

'Silent Women'

A Critique of the Irish and International Legislative Framework
for Sex Trafficked Women:

A Call for Human Rights Orientated Reform

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ABSTRACT

The trafficking of women for the purposes of sexual exploitation is an alarmingly widespread phenomenon. Organised criminal networks have proven adept at identifying vulnerable women for exploitation within the sex industry. Lured away by false promises, these women suffer systematic rape, abuse and violence whilst working as forced prostitutes. It is indisputable that the human rights of these women have been violated. What is curious therefore is that international and national anti-trafficking efforts have failed to focus on the trafficked victim. This paper critically evaluates the Irish and International legal framework relating to the sex trafficking of women. Chapter two will demonstrate how conservative attitudes towards state sovereignty have inhibited the effectiveness of international anti-trafficking law. By failing to provide victims with legal individual complaints procedure, the international community has denied trafficked persons a vital means of redress and empowerment. Chapter three will demonstrate that the state's protection of its own interests has thwarted the effectiveness of the Irish trafficking framework. Research obtained from members of the Gardaí, Amnesty International, the International Organisation for Migration, Ruhama and Women's Aid will illustrate how Ireland's myopic anti-trafficking framework has negatively impacted on trafficking victims. The analysis of Irish and International law is complemented by chapter four's identification of areas for economic, social and cultural reform. It will be concluded that an effective anti trafficking framework is one that targets every tenement of the phenomenon without adversely affecting the interests of the victim.

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Finally, I extend my deepest empathy to the trafficked women our Irish sex industry currently exploits. Robert Kennedy once said,

*“Each time a man stands up for an ideal,
or acts to improve the lot of others,
or strikes out against injustice,
he sends forth a tiny ripple of hope,
and crossing each other from a million
different centres of energy and daring,
those ripples build a current that can
sweep down the mightiest walls of
oppression and injustice.”*

That is what we must aim for.

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Chapter One: *The Sex Trafficking of Women: Causes and Consequences*

1.1 Background

The trafficking of persons is an alarmingly widespread phenomenon. The 2003 Trafficking in Persons Report, issued by the U.S Department of State, estimates that approximately 900,000 people are trafficked worldwide each year.¹ Research has found that 80% of those trafficked are women and girls, whilst 50% are minors.² Trafficking in women manifests itself in modern times to include practices such as “forced domestic labour, factory labour and commercial marriages.”³ Whilst such practices have emerged, the 2005 Council of Europe Organised Crime Report finds the “prostitution sector” to be the dominant basis for trafficking.⁴ The sex trafficking of women proves extremely lucrative for organised criminal networks and lends itself to less risk than other forms of trafficking.

“Compared to drug or arms trafficking, trafficking in women is said to be relatively low-risk and highly profitable, because detection capabilities of the law enforcement agencies and penalties are not as strong as those adopted to tackle other forms of trafficking.”⁵

¹ U.S Department of State, *Trafficking in Persons Report*, Washington: US Dept., 2003, p. 1. This figure may indeed be conservative. The International Organization for Migration estimates that “between one and two million women are trafficked around the world”. Cited by Hauber, L, ‘*The Trafficking of Women for Prostitution: A Growing Problem within the European Union*’ (1998) 21 *B.C Int’ L & Comp. L. Rev.*, p. 183. Note also Dunbar, M, ‘The Past, Present and Future of International Trafficking in Women for Prostitution’ (1999-2000) 8 *Buff. Women’s L.J.*, p. 183.

² U.S Department of State, *Trafficking in Persons Report*, Washington: US Dept., 2004, cited in Department of Justice, Equality and Law Reform, Report of Department of Justice, Equality and Law Reform and an Garda Síochána Working Group on Trafficking in Human Beings, [hereinafter the Department of Justice Trafficking Report], Dublin: The Dept., May 2006, p. 4.

³ Chung, J, ‘Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts’ (1998) 11 *Harv. Hum. Rts. J.*, p. 65. See also United Nations High Commissioner for Human Rights: Report of the Special Rapporteur on Violence against Women, its Causes and its Consequences, U.N ESCOR, Commission on Human Rights, 53rd Sess., Provisional Agenda Item 9(a), at 19, U.N Doc. E/CN.4/1997/47, 1997.

⁴ Council of Europe, *Organised Crime Situation Report*, 2005 [hereinafter “The Organised Crime Report”], p. 7.

⁵ Obokata, Tomoya, *Trafficking in Human Beings as a human rights violation: Obligations and Accountability under International Human Rights Law* (PhD thesis, University of Nottingham, 2004), p. 38. Obokata lists the Japanese *Yakuza* group, the Russian Mafia, the Hong Kong *Triads*, and the Chinese *Snakeheads* large scale criminal operations in the field of trafficking include. See also Organised Crime Report, *ibid*, p. 33.

There is also little doubt that a market exists for the sexual exploitation of such women. The Council of Europe reports that “Europeans spend billions of euros per year for prostitution and other commercial sexual services”.⁶ The classic penchant of domestic sex industries for foreign women creates a demand which fuels the trafficking industry.⁷ Furthermore, a regrettably steady supply of potential victims in poor or developing countries is available to the trafficker.⁸ Women are typically trafficked having responded to job advertisements for work abroad as “babysitters, models, hairdressers, dancers, [or] waitresses”.⁹ The families of trafficked women will often be, albeit to varying degrees, complicit in compelling their female relatives to “earn money for the family” by joining the trafficker.¹⁰ Mail order bride or introduction agencies will often provide traffickers with a contact list of vulnerable women.¹¹ In addition, it is common for women to be recruited by men who they believe to be their husbands or boyfriends.¹² Upon arrival in their destination countries, the trafficking group will typically confiscate the women’s identity and travel documents and will confront such women “with a large debt owed to traffickers which is to be repaid through prostitution.”¹³ Research has found that traffickers inflict unimaginable physical and psychological violence so as to “break” the

⁶ Organised Crime Report, above n. 4, p. 33.

⁷ Demleitner notes that “with a prostitute of another culture many men feel free to engage in practices they would never consider when at home”, Demleitner, N, ‘Forced Prostitution: Naming an International Offense’ (1994-1995) 18 *Fordham Int’ L. J.*, p. 188.

⁸ Organised Crime Report notes that “most victims in Europe are from Council of Europe member States. Countries such as Bulgaria, Moldova, Romania, the Russian Federation and Ukraine are mentioned particularly often as countries of origin.” Organised Crime Report, above n. 4, p. 7.

⁹ Organised Crime Report, above n. 4, p. 33. See Dunbar, above n. 1, p. 104. See also Murray, J, ‘Who will police the Peace-keepers? The failure to establish accountability for the participation of United Nations Civilian Police in the Trafficking of Women in post-conflict Bosnia and Herzegovina’ (2003) 34 *Colum. Human Rights L. Rev.*, p. 493.

¹⁰ Chuang also notes however that in many instances a family will “sell their daughters to traffickers” in the belief that “they will earn money for the family through employment as maids, cooks, or in other jobs requiring few skills”, Chuang, above n. 3, p. 69.

¹¹ Hughes cites the intelligence gathered by the International Organization for Migration, in noting that all marriage agencies which centre on women for the former Soviet Union are operated by organised criminal Networks. Hughes, D, ‘The “Natasha” Trade: Transnational Sex Trafficking’ (January 2001) *National Institute of Justice Journal*, p. 11.

¹² Balo, B, ‘The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation’ (2004) 27 *Harv. Women’s L.J.*, p. 137, Lee, D, ‘Mail Fantasy: Global Sexual Exploitation in the Mail Order Bride Industry and Proposed Legal Solutions’ (1998) 5 *Asian L. J.*, p. 156, Murray, above n. 9, p. 493.

¹³ Organised Crime Report, above n. 4, p. 33, and Murray, above n. 9, p. 493.

women into accepting their new fate as prostitutes.¹⁴ The control exercised by those in charge of brothels, coupled with the linguistic and cultural challenges experienced by trafficked women in foreign countries renders the possibility of escape extremely difficult. Trafficked women, by virtue of their lack of documentation and work as prostitutes “live in constant fear of police arrest, fines, imprisonment and expulsion”.¹⁵ Despite the abuse suffered by trafficked women, they are often extremely reluctant to return to their home countries. Chuang has illustrates the risks faced by former victims of trafficking,

*“for women who manage to escape forced prostitution, the social stigma attached to their former prostitution activities threatens to create a vicious cycle in which women believe they have no alternative but to return to prostitution”.*¹⁶

Trafficked women are therefore trapped. Until they find means to escape, these women are “resold or exchanged” to provide other criminal groups with “fresh meat”.¹⁷

1.2 Trafficking in Europe

The research of Europol and the Council of Europe suggests that European trafficked women originate from “the Russian Federation, Ukraine, Bulgaria, Romania, Lithuania and Moldova.”¹⁸ It is relevant to observe that all of these countries belonged to the former USSR. The cultural, political and economic make-up of such countries leaves their

¹⁴ “Traffickers or pimps typically maintain control over these women through multiple beatings and rapes, isolation, and threats against the women’s families; they may also use drugs to control the women or play on their fears of arrest or deportation”, Murray, above n. 9, p. 494. Balo cites the story of an 18 year old Nepalese woman who was trafficked into India. “She refused to accept her new trade. She was repeatedly beaten. She was not given any food. When she screamed in defiance, knives and chilli powder were held to her genital area.” Balo, above n. 12, p. 137. See also LeRoy, G & Potts, J, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’ (2003) *Geo. Wash. Int’ L. Rev.*, 229. See also Hughes, above n. 11, p. 11, and The Organised Crime Report, above n. 4, p. 33.

¹⁵ Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference [Against Racism, Racial Discrimination, Xenophobia and Related Intolerance], submitted to the Secretary-General by the U.N Special Rapporteur on Violence Against Women on the subject of race, gender, and violence against women Preparatory Committee, 3rd Sess., Provisional Agenda Item 4, 109, U.N Doc. A/CONF.189/PC.3/5, 2001.

¹⁶ Chuang, above n. 3, p. 71.

¹⁷ The Organised Crime Report, above n. 4, p. 33.

¹⁸ The Department of Justice Trafficking Report, above n. 2, p. 5.

women vulnerable to trafficking. The collapse of the former Soviet Union has had an impact on trafficking.¹⁹ The democratisation of former soviet states has led to the opening of borders and reduced travel restrictions.²⁰ However, the absence of strong governance in such burgeoning states has enabled organised criminal networks to flourish. The culture of organised crime and corruption amongst high ranking officials within such countries, coupled with increasingly “porous borders” has given traffickers “significant freedom to operate.”²¹ The poor opportunities available to women in these countries will often compel women to migrate with a trafficker.

1.3 Thesis Outline

There is little doubt that the sex trafficking of women constitutes a grave violation of human rights. The abuse suffered by sex trafficked women violates their rights against torture, cruel or inhuman treatment, discrimination, slavery and forced labour, personal liberty and autonomy, and freedom of movement and expression.²² States are obliged under the principles of human rights law to “respect and protect the rights of individuals to exercise their human rights”.²³ Both the international and national law maker must therefore ensure that the law does not impede the rights of the trafficking victim. Laws designed to eradicate the practice of trafficking and punish the trafficker must therefore be complemented by protective measures for the trafficked person. This paper critically evaluates the Irish and international legal trafficking framework. The author will adopt a human rights based approach throughout this analysis. This approach has been chiefly elucidated within the 2002 Recommended Principles of the United Nations High Commissioner for Human Rights (UNHCHR),²⁴ and the 2004 Expert Group Report on

¹⁹ Hughes, above n. 11, p. 10.

²⁰ Ibid.

²¹ Murray, above n. 9, p. 501, The Organised Crime Report, above n. 4, p. 82.

²² See the Universal Declaration on Human Rights, GA Res 217A, 1948, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 1984, European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, 1953.

²³ European Commission, Directorate-General Justice, Freedom and Security, Report of the Experts Group on Trafficking in Human Beings, Brussels, December 2004, p. 138.

²⁴ United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, E/ 2002/ 68/ Add. 1, May 2002.

Trafficking in Human Beings.²⁵ Accordingly, the author will place the victim's interests and human rights at the centre of her analysis.²⁶

Chapter two of this paper evaluates the effectiveness of the international legal framework for the trafficking of women. Section 2.2 outlines the history of the international law on trafficking. It will be shown that the concept of the trafficker has become more nuanced. Section 2.3 provides a detailed examination of the Palermo Trafficking Protocol. The main advances of the Palermo Trafficking Protocol, namely in its definition, and provisions relating to consent and immigration will be analysed. Section 2.4 of chapter two examines the structural weaknesses which have become evident within International Trafficking law. Weak enforcement mechanisms, limited provisions, and the lack of an individual complaints procedure will be criticised for failing to satisfy the principles of human rights law. Europe provides the basis for the case study of a regional human rights system in section 2.5. Whilst regional law carries great potential in the eradication of sex trafficking, the author will lament the EU's lack of victim orientated instruments.

Chapter three of this Paper analyses whether the Irish legal framework has provided for the effective prosecution of trafficked persons. Section 3.2 provides a background to this discussion, in outlining the current trafficking situation in Ireland. The current Irish provisions relating the trafficking of women are analysed within section 3.3. Section 3.4 reveals the failings of the Irish immigration procedure. It will be shown that the state has shirked its duty to protect victims of human rights violations in its failure to provide a specialised immigration framework for trafficked women. Section 3.5 explores the Irish laws on commercial sex and their impacts on the trafficked woman. It will be shown that the state's 'blind eye' has made prisoners of trafficked women. Finally, section 3.6 outlines the role of the *Gárda Síochána* in the arrest of traffickers and identification of trafficked persons. It will be demonstrated that Ireland's weak trafficking laws have hindered the effectiveness of the operations of the Irish police.

²⁵ The European Commission Experts Group Report, above n. 23, p. 138.

²⁶ *Ibid.*

Within chapter four poverty, the low status of women, and demand within the sex industry are identified as root causes of trafficking which must be addressed. The author will outline what policy can be implemented to reduce the vulnerability of disadvantaged women.

1.4 Methodology

The usual channels of research, that is, legal instruments, reports and secondary materials, were employed by the author in the writing of this paper. However the paucity of information on the Irish sex trafficking situation necessitated primary research. The author made contact with NGOs who she had identified as being closely involved with the trafficking situation. The author interviewed these parties either in person or by phone. Amongst those spoken to were the following:

- Ryan Nelson, Communications Officer, International Organisation for Migration (Irish Section)
- Fiona Crowley, Research and Legal Manager, Amnesty International (Irish Section)
- Theresa Sweeney, Communications Officer, Women's Aid
- Gerardine Rowley, Ruhama Information and Public Relations Officer, Ruhama
- Inspector Pat Lordan, Chief Inspector of the Gárda Síochána Operation Quest

Certain persons who spoke to the author did not wish to be named. A dictaphone was not used during the interviews. The author took detailed notes during the interview, and asked for clarification when it was required. The opinions of those interviewed were invaluable to the development of the Irish case study. Where relevant the author has referenced the findings of these interviews. Nevertheless, it must be emphasised that all of the opinions expressed within this paper are those of the author and she alone bears responsibility for an inaccuracy which may occur.

***Chapter Two: The international legal framework on the sex trafficking of women:
A struggle for consensus***

2.1 Introduction

The sex trafficking of women is indisputably of international concern. Few countries remain untouched by this phenomenon as trafficking involves the crossing of several borders. In Europe, where over 500,000 women are trafficked each year,²⁷ poorer Eastern European states serve as countries of origin for trafficking, whilst wealthier countries such as Ireland, the UK and Germany may serve as transit or countries of destination.²⁸ The dizzying array of treaties, decisions, and policy which have emanated from the international community suggest a strong commitment to the eradication of sex trafficking. However this “wealth of words on paper”²⁹ belies the near-insurmountable difficulties international law has faced in providing a comprehensive, and enforceable, response to sex trafficking. Attitudes towards prostitution and immigration are shaped by the diverse political and cultural climates which exist within different states. Therefore international consensus on these matters has proven difficult to achieve. Furthermore, the sovereign preserve of the state to retain independence over its criminal and immigration policy has conflicted with attempts to create a strong international framework. The creation of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,³⁰ as the “first comprehensive international law to address the issue,”³¹ has been a considerable achievement for the international community. This chapter critically evaluates whether international and regional

²⁷ Europol, Legislation on Trafficking in Human Beings and Illegal Immigrant Smuggling, [hereinafter the 2005 Europol Trafficking Report] Europol Public Information, 2005, p. 5.

²⁸ The Department of Justice Report, above n. 2, p. 5.

²⁹ Farrior, J, ‘The International Law on Trafficking in Women and Children for Prostitution: Making it live up to its potential’ (1997) 10 *Harv. Hum. Rts. J.*, p. 213.

³⁰ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N Doc. A/45/49 Vol. I, 2001

³¹ Mattar, M, ‘General Article: Trafficking in Persons: An Annotated Legal Bibliography’ (2004) 96 *Law Libr. J.*, p. 670.

instruments have proven effective in the prohibition of trafficking and the protection of trafficked victims.³²

Crucially, and in line with the research objective of this dissertation, the international provisions discussed within this chapter are analysed from a human rights perspective. Accordingly, the international anti-trafficking framework will be measured on its incorporation of the human rights principles of standard setting and accountability, participation and empowerment, and its “recognition of human beings as subjects and holders of rights”.³³ Section 2.2 examines the history of the international sex trafficking legislation. It will be found that the perception of the sex trafficked victim has become more nuanced and no longer provides exclusive protection to the ‘white victim’. Section 2.3 of this chapter examines the contemporary international trafficking law under the 2001 Palermo Protocol. The key areas of contention that have emerged within international anti-trafficking discourse, namely coercion, and immigration, will be examined. Section 2.4 will identify state sovereignty, weak enforcement mechanisms and the lack of an individual complaints procedure as the pitfalls of international law. Europe provides the basis for an analysis of regional protective mechanisms in section 2.5. In reviewing core legislation to have emerged from the Council of Europe and the European Union, the author will note that the political considerations of dominant member states have led to the narrowing of protection offered to victims.

³² It should be noted that Article 8 of the International Covenant on Civil and Political Rights (ICCPR) G.A. Res. 2200A(XXI). U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (opened for signature Dec. 16. 1966, entered into force Mar. 23, 1976), prohibits slavery and slavery like practices and thus obliges States to prohibit slavery like practices. Similarly the 1930 Forced Labour Convention (No. 29), 39 U.N.T.S. 55, and the 1957 Abolition of Forced Labour Convention (No. 105), 320 U.N.T.S. 291, of the International Labour Convention have condemned the practice of forced labour. An examination of the ambit of these provisions within the field of international anti-trafficking protection is unfortunately outside the confines of this paper.

³³ The European Commission 2004 Expert Group Report, above n. 23, p. 138.

2.2 *The metamorphosis of the ‘White Slave’*

The concern that women may be trafficked across borders to work against their will in the sex industry is not a new one. As Lee has observed, “there is a century long tradition of international treaties aimed at stopping the trafficking of women for the purposes of prostitution.”³⁴ Following the First Congress of the International Abolitionist Federation in 1877, concern was raised that European women were being forcibly exported to work as prostitutes.³⁵ These ‘white slaves’³⁶ formed the subject of the 1904 *International Agreement for the Suppression of the White Slave Traffic*.³⁷ This agreement sought to “halt the sale of women into prostitution in Europe” by offering protection to victims.³⁸ However the Agreement made no provision for the punishment of procurers.³⁹ The limited substantive scope of the Agreement coupled with its failure to punish procurers, led to the creation of the 1910 *International Convention for the Suppression of the White Slave Traffic*.⁴⁰ Article one of this Convention bound its thirteen signatories to

*“severely punish any person who hired, abducted or enticed for immoral purposes any women under the age of twenty-one or used violence, threats, fraud or any compulsion on a woman over twenty-one to accomplish the same purpose, even if he or she committed the acts constituting the offence in different countries.”*⁴¹

Whilst laudable in its aims to punish the traffickers of women, the 1910 Convention failed to comprehensively address all the “issues of trafficking”.⁴² Women trafficked to work in brothels notably fell outside the ambit of the Convention, as the regulation of

³⁴ Lee, above n. 12, p. 176.

³⁵ Demleitner, above n. 7, p. 165. See also Dunbar, above n. 1, p. 108.

³⁶ Demleitner traces the term ‘white slave’ to English factory workers during the industrial revolution. In a letter to the eminent campaigner Josephine Butler, Victor Hugo asserted that “the slavery of black women is abolished in America; but the slavery of white women continues in Europe”. Demleitner, above n. 7, p. 165.

³⁷ International Agreement for the Suppression of the White Slave Traffic, 35 Stat. 426, 1 L.N.T.S. 83, 1904.

³⁸ Fariior, above n. 27, p. 216.

³⁹ Ibid.

⁴⁰ Demleitner, above n. 7, p. 168. International Convention for the Suppression of the White Slave Traffic, 211 Consol. T.S. 45, 1912 Gr. Brit. T.S. No. 20, 1910

⁴¹ Article One of the International Convention for the Suppression of the White Slave Traffic, 211 Consol. T.S. 45, 1912 Gr. Brit. T.S. No. 20, 1910.

⁴² Demleitner, above n. 7, p. 169.

brothels was deemed to be a matter of “domestic jurisdiction”.⁴³ Most significantly, both the 1904 Agreement and the 1910 Convention focused their attentions on “white slaves”. This created a racial tier system of protection. As Demleitner has attested, by focusing on “their women” or other “white immigrant women”, the reformers failed to deem foreign women worthy of international protection from exploitation.⁴⁴

1927- 1933

As a post First World War establishment, the League of Nations was demonstrably committed to eradicating the trafficking of women and children.⁴⁵ The 1921 *International Convention for the Suppression of Traffic in Women and Children*,⁴⁶ as a product of the League of Nations, enjoyed the ratification support of significantly more states than previous conventions.⁴⁷ This Convention required contracting parties to take a three pronged approach to trafficking. The traffickers of children were to be punished,⁴⁸ “employment agencies and offices” were to be licensed and supervised,⁴⁹ “women and children travelling on emigrant ships” were to be offered protection.⁵⁰ Also notable was the establishment of an Advisory Committee on the Traffic in Women and Children, which accepted periodic reports of signatory states and supervised “the execution of the 1921 Convention”.⁵¹ In contrast to the 1921 Convention, which prohibited the trafficking of children, the 1933 *International Convention for the Suppression of the Traffic in Women of Full Age* provided for the punishment of the traffickers of adult women.⁵² The convention was noteworthy in declaring that “consent did not exempt from penalty

⁴³ Ibid

⁴⁴ Demleitner, above n. 7, p. 166. See also Fariior, above n. 27, p. 216.

⁴⁵ Fariior, above n. 27, p. 216..

⁴⁶ International Convention for the Suppression of Traffic in Women and Children, 9 L.N.T.S. 415, 1921.

⁴⁷ Demleitner, above n. 7, p. 169.

⁴⁸ Article 2 of the International Convention for the Suppression of Traffic in Women and Children, 9 L.N.T.S. 415, 1921.

⁴⁹ Article 6 of the International Convention for the Suppression of Traffic in Women and Children, 9 L.N.T.S. 415, 1921.

⁵⁰ Article 7. of the International Convention for the Suppression of Traffic in Women and Children, 9 L.N.T.S. 415, 1921.

⁵¹ Demleitner, above n. 7, p. 169.

⁵² International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431. Demleitner observes that this Convention also incorporated a 1937 draft Convention of the League of Nations, which as Demleitner notes, “was to be the first international treaty to address the practice of prostitution”. The outbreak of the Second World War prevented this Convention from being opened for Signature. See Demleitner, above n. 7, p. 171-172.

preparatory acts, attempts, and the actual procurement of adult women for immoral purposes in another country.”⁵³

The United Nations

The United Nations, as the post World War II incarnation of the League of Nations, sought to consolidate all previous trafficking treaties, and thus drafted the 1950 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.⁵⁴ This Convention recognised the varied nature of trafficking. Provisions were gender neutral, and the crime of trafficking within the Convention did not necessitate the crossing of international borders.⁵⁵ This Convention further proved valuable in the clear position on prostitution it provided. Prostitution and the “accompanying evil of the traffic in persons for the purpose of prostitution” were held to be “incompatible with the dignity and worth of the human person”.⁵⁶ State parties were obliged to punish any person who “procures, entices or leads away, for purposes of prostitution, another person”.⁵⁷ Clients, as those who “exploit the prostitution of another person” were also to be punished under the Convention,⁵⁸ as well as those who were involved, directly or otherwise, in the management of a brothel.⁵⁹ The consent of the trafficked person could not be used by the trafficker as a defence within criminal proceedings.⁶⁰ While the Convention had a firm anti-prostitution stance, it guarded against the prosecution of trafficked persons or the subjection of prostitutes to “any exceptional requirements for supervision or notification.”⁶¹ This approach was grounded on the rationale that the criminalisation of prostitution would drive the practice underground. It was recognised, as Chaung observes, that “laws designed to punish both

⁵³ Demleitner, above n. 7, p. 171-172.

⁵⁴ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S 271, 1950 [hereinafter ‘The 1950 Convention’].

⁵⁵ Demleitner, above n. 7, p. 172.

⁵⁶ Preamble to the 1950 Convention.

⁵⁷ Article 1(1) of the 1950 Convention.

⁵⁸ Article 1(2) of the 1950 Convention.

⁵⁹ Article 2(1) and 2(2) of the 1950 Convention.

⁶⁰ Ibid.

⁶¹ Article 6 of the 1950 Convention. By requiring States to cease the regulation and supervision of brothels, Article 6 echoes the objectives of the unsigned 1937 Treaty and studies conducted in the 20’s and 30’s. These studies found, as Demleitner notes, that “only when regulation ceases will the entire brothel system wither away”. Demleitner, above n. 7, p. 173.

the client and the prostitute in practice, would be selectively enforced only against the prostitute.”⁶² It is evident therefore that the 1950 Convention took an *abolitionist* approach to the issue of prostitution, thus calling for the ‘third parties of prostitution’ to be prosecuted but not the prostitute herself.⁶³ In striving to achieve this ends, Article 16 of the Convention was laudably holistic. Here, states were obliged to

“take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.”⁶⁴

The potential far-sightedness of the 1950 Convention in providing a detailed approach to the treatment of trafficked prostitutes and their traffickers, proved excessive for many states. The Convention was initially signed by a mere half of all United Nations Member States, whilst only one third of that amount ratified it.⁶⁵ The *Convention for the Elimination of All Forms of Discrimination Against Women* (CEDAW) has enjoyed comparatively greater support.⁶⁶ Opened for signature in December 1979, CEDAW was borne out of concern that the myriad of United Nations human rights instruments had not eliminated widespread discrimination against women.⁶⁷ Whilst CEDAW targeted a broad ambit of discriminatory practices against women, Article 6 of the Convention specifically required state parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”⁶⁸ Under Article 17, a “Committee on the Elimination of Discrimination against Women” was created. Under this review mechanism, national implementation reports were to be reviewed and

⁶² Chung, above n. 3, p. 77.

⁶³ For a detailed outline of the abolitionist perspective on prostitution and its relevance to international legislation, see Wijers, M, *Criminal Victim, Social Evil or Working Girl: legal approaches to prostitution and their impact on sex workers* (online) <http://www.nswp.org/pdf/WIJERS-CRIMINAL.PDF> [10 July 2006].

⁶⁴ Article 16 of the 1950 Convention.

⁶⁵ Murray, above n. 9, p. 7. See also Demleitner, above n. 7, p. 172.

⁶⁶ Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33, 1980 [hereinafter ‘The CEDAW Convention’].

⁶⁷ Article 6 of the CEDAW Convention.

⁶⁸ The CEDAW Convention, preamble.

⁶⁸ Article 6 of the CEDAW Convention.

discussed every four years.⁶⁹ Whilst the wording of Article 6 may have been skeletal, the enactment of CEDAW and its subsequent operations effectively brought “the most attention to the matter” of trafficking.⁷⁰

2.3 *The Palermo Trafficking Protocol*

The signature of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* [hereafter the Palermo Trafficking Protocol], in December 2000 represents a milestone within international efforts to eradicate sex trafficking. In its address of contentious trafficking issues such as the definition of trafficking, consent and immigration, the Protocol constitutes a comprehensive international policy document. The Palermo Trafficking Protocol is not a ‘stand alone’ instrument. The ambit of the *United Nations Convention against Transnational Organized Crime*, to which the Palermo Trafficking Protocol is annexed, is “to prevent and combat Transnational Organized Crime more effectively.”⁷¹ The drafting of this Convention and its annexed Protocols was under the remit of the United Nations Crime Commission. Therefore, the Convention against Transnational Crime and its associated Protocols are “law enforcement, rather than human rights, instruments.”⁷² Given the crime focus of the Palermo Trafficking Protocol, are the human rights of the trafficked person effectively safeguarded by this instrument? The preamble to the Palermo Trafficking Protocol acknowledges the need “to protect the victims of such trafficking..... by protecting their internationally recognised human rights.”⁷³ This perspective is not followed through within the Protocol. Article 6 of the Protocol urges state parties “to consider” providing for the “physical, psychological and social recovery

⁶⁹ Dorata Gierycz “Human Rights of Women at the Fiftieth Anniversary of the United Nations” in Benedek, W et al., *Human Rights of Women: International instruments and African experiences* (Zed Books: London, New York, 2002), p. 43.

⁷⁰ Farrior, above n. 27, p. 228.

⁷¹ Article 1 of the United Nations Convention Against Transnational Organized Crime, 40 I.L.M. 335, 2000.

⁷² Gallagher, A. M, ‘Triply Exploited: Female Victims of Trafficking Networks-Strategies for pursuing Protection and Legal Status in Countries of Destination’ (2004) *Geo. Immigr. L. J.*, p. 102.

⁷³ Preamble of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N Doc. A/45/49 Vol. I, 2001 [hereinafter ‘The Palermo Trafficking Protocol’].

of victims”.⁷⁴ The provision of accommodation, counselling, medical and psychological assistance, and education to trafficking victims is similarly optional for state parties.⁷⁵ This contrasts starkly with the strong wording of the Protocol in relation to crime control. Article 5 obliges all states to “adopt such legislative and other measures as may be necessary to establish as criminal offences” the trafficking of persons.⁷⁶ Under the Palermo Trafficking Protocol therefore, the protection of victims is optional whilst the punishment of traffickers is obligatory. This imbalance between crime control and protective measures has been heavily criticised.⁷⁷ McRedmond has argued that “human trafficking is first and foremost a violation of the human rights of the victim.”⁷⁸ The “dignity and worth of the human being” provided for in the Charter of the United Nations should underscore all United Nations instruments.⁷⁹ The *raison d’être* of United Nations activity is thus not reflected within the Protocol. Where strong provisions are made for the victim, they operate to serve the state’s interests. Article 6 requires states to facilitate victim participation within “criminal proceedings against offenders.” Under the Palermo Protocol therefore, the trafficked person is useful in criminal proceedings, yet does not merit absolute protection. Therefore contrary to the principles of human rights law, the Palermo Trafficking Protocol does not adequately recognise trafficked persons as “subjects and holders of rights”.⁸⁰

2.3.1 The Palermo Definition of Trafficking

From the above discussion it is evident that the Palermo Trafficking Protocol failed to provide minimum standards of services to trafficked women. Despite this huge failing, the Palermo Trafficking Protocol greatly advanced the international law on the sex trafficking of persons. What constitutes the trafficking of persons? The fundamental legal

⁷⁴ Article 6 of the Palermo Trafficking Protocol.

⁷⁵ *Ibid.*

⁷⁶ Article 5 of the Palermo Trafficking Protocol.

⁷⁷ See Fitzpatrick, J, ‘Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualising and Combating Trafficking’ (2002-2003) *Mich. J. Int’ L*, p.1148. See also Gallagher, above n. 77, p. 102.

⁷⁸ McRedmond, Penelope, *Human Trafficking in Europe: The new slave trade* (LLM Research Thesis, University College Dublin, 2004), p. 245.

⁷⁹ Preamble to the U.N. Charter, 59 Stat. 1031, T.S. 993, 1945.

⁸⁰ The European Commission Expert Group Report, above n. 23, p. 138.

principle of *nullem crime, nullem sine lege* requires that for a crime to be committed it must first be provided for within the law. If international law is to facilitate the prosecution of traffickers, it is essential that a well developed crime of trafficking is created. Prior to the enactment of the Palermo Trafficking Protocol, it was widely acknowledged that “the lack of international consensus on the definition of trafficking” had frustrated international anti-trafficking efforts.⁸¹ The Palermo Trafficking Protocol addressed this difficulty, in outlining the “first truly internationally accepted definition of trafficking”.⁸²

Article 3 of the Palermo Trafficking Protocol outlines that,

*“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”*⁸³

The detailed character of Article 3 has proven valuable in many respects. Firstly, the uncertainty within international discourse over the difference between trafficking and smuggling was put to rest.⁸⁴ The joint issuance of the Palermo Trafficking Protocol and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*⁸⁵ [hereinafter the Palermo Smuggling Protocol], provided for the separate crimes of trafficking and

⁸¹ The European Commission Expert Group Report, above n. 23, p. 47. In her 1994 analysis of international anti-trafficking instruments, Demleitner observed that “the international community has not succeeded in its attempts to decrease the prevalence of the practice because it lacks a universal rallying point that would focus attention on the dismal practise.” Demleitner, above n. 7, p. 164.

⁸² McRedmond, above n. 78, p. 245. Mattar, above n. 31, p. 670. Le Roy & Potts, above n. 23, p. 236. The European Commission Expert Group Report, above n. 23, p. 47.

⁸³ Article 3 (a) of the Palermo Trafficking Protocol.

⁸⁴ The Europol observes that the “terms ‘trafficking’ and ‘smuggling’ have been used interchangeably in the past without any clear distinction.” 2005 Europol Trafficking Report, above n. 27, p. 8.

⁸⁵ Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 Vol. I 2001 [Hereinafter ‘the Palermo Smuggling Protocol’].

smuggling. Under Article 3 (a) of the Palermo Smuggling Protocol, smuggling was defined as,

*“The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”*⁸⁶

From a reading of these provisions, it is clear that the crime of smuggling refers to the “facilitated movement of illegal migrants across international borders.”⁸⁷ The crossing of an international border is not required for the purposes of trafficking. In contrast with smuggling, the exploitation suffered by a trafficking victim continues after the journey has been made. These definitions are an invaluable “model for national legislation”.⁸⁸ A distinction between smuggling and trafficking within national law enforcement is important for “gathering information about modes of transportation, travel routes and points of arrival, and information about the clause for leaving the country of origin.”⁸⁹ Therefore the Palermo Trafficking Protocol and its annexed instruments have proven valuable within International Trafficking Law. Issues of consent and migration, which have proven contentious within international anti-trafficking discourse, are also addressed by the Palermo Trafficking Protocol. These concepts are discussed below.

2.3.2 The ‘Consent’ of the Sex Trafficked Woman

Central to the prosecution of serious crimes within criminal law, is the establishment of whether the accused had a guilty mind (*mens rea*) and knowingly carried out a wrongful

⁸⁶ Article 3 (a) of the Palermo Smuggling Protocol.

⁸⁷ Europol 2005 Report, above n. 27, p. 8.

⁸⁸ Europol 2005 Report, above n. 27, p. 9. Whilst Protocol against the Smuggling of Migrants by Land, Sea and Air may have offered clarification to the trafficking debate, this author submits that the Protocol contains paltry protective measures for the smuggled person. The unwillingness of States to recognize the vulnerabilities of smuggled persons is forcefully illustrated within the 2005 Europol Report. “Trafficking is an issue of migration with human rights implications as it involves the protection of individuals, whereas smuggling is an issue of crime and border control as it encompasses the protection of states.” Europol 2005 Report, above n. 27, p. 8. An examination of the experiences of smuggled persons is outside the confines of this paper. This author contends, however, that the attribution of guilt on the smuggled persons flagrantly disregards the vulnerability and desperation of those who cross state borders illegally.

⁸⁹ Irish Refugee Council, *Information Note on Smuggling and Trafficking*, Dublin: IRC, December 2001, p. 8.

activity.⁹⁰ Within Irish rape proceedings for example, the prosecution must prove that an accused knew that the woman did not consent to sexual intercourse or was reckless as to whether or not she consented.⁹¹ A crime is not committed if the accused can prove that the woman consented to the act. Article 3 (a) of the Palermo Trafficking Protocol arguably contains a *mens rea* element. Mere movement of persons for the purpose of exploitation does not suffice under the trafficking definition. The trafficker must have made use of the methods outlined in Article 3 to have enabled the trafficking of the victim. The methods outlined within Article 3 (a) are very broad. In addition to threats, force, coercion, abduction, fraud and deception, “abuse of power or of a position of vulnerability or of the giving or receiving of payments” are also listed as trafficking methods for the purposes of the Protocol.⁹² Given the broadness of these provisions, could a trafficker protest that the trafficked woman consented to the trafficking process? The concept of consent within international sex trafficking discourse has proven to be extremely contentious. Fitzpatrick notes that the question of whether “adult women who migrate knowingly to engage in the sex trade should be seen as trafficking victims...split the non-governmental groups participating in the drafting of the Trafficking Protocol.”⁹³ Many have argued that the victims who consented to work in the sex industry did not consent to the “grave psychological, emotional or physical abuse of violence” they would suffer.⁹⁴ Questions have also been raised on the quality of consent where dire economic circumstances have forced a woman to follow the trafficker.⁹⁵ On the other hand, concerns have been raised about whether the term ‘trafficked’ should be used on those who consented to all aspects of the process. In this regard Europol has warned that

⁹⁰ McAuley, F. and McCutcheon, P, *Criminal Liability: A Grammar* (Round Hall Sweet & Maxwell: Dublin, 2000), pps. 558-570.

⁹¹ Ibid.

⁹² Article 3 (a) of the Palermo Trafficking Protocol.

⁹³ Fitzpatrick, above n. 77, p. 1150.

⁹⁴ Miller, A et al., ‘Report From the Roundtable on the Meaning of “Trafficking in Persons”: A Human Rights Perspective’ (1998-1999) *Women’s Rts L. Rep.*, p. 15.

⁹⁵ Chung, above n. 3, p. 93.

“requiring countries to make the consent of victims completely irrelevant could exclude valid defences and raise constitutional or other problems in many countries.”⁹⁶

The approach the Palermo Trafficking Protocol has taken with respect to consent has been described as a middle stance which “neither considers consent wholly irrelevant nor provides protection for all women in prostitution.”⁹⁷ Article 3 (b) outlines that

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

This provision protects those who consented to trafficking without fully appreciating what it would entail. However the question of consent is still relevant under the Palermo Trafficking Protocol. As the above Article 3 (b) provision outlines, the irrelevance of consent is limited to the trafficking scenarios provided for in Article 3 (a). This means that pimps cannot avail of the defence of consent if they were involved in the trafficking of a woman. It follows therefore that consent may still provide a shield to pimps within a regular pimp and prostitute arrangement. Therefore the prohibition of “sexual exploitation and exploitation of prostitution” within the Palermo Trafficking Protocol is limited to the “the trafficking context.”⁹⁸ The lack of opportunities available to impoverished women will continue to raise the question as to whether any person can consent to prostitution. There are no easy answers to this question, and state policies on prostitution vary greatly. Until universal consensus is reached on prostitution, Article 3 (b) provides a workable solution to the problem of consent within international anti-trafficking law.

⁹⁶ “Nonconsent and the use of force or coercion by traffickers have emerged in recent international human rights documents as essential, yet controversial, elements of human rights violations in the context of trafficking.” Balo, above n. 12, p. 148.

⁹⁷ Balo, above n. 12, p. 162.

⁹⁸ By focusing on force and not including provisions on general prostitution the “Protocol seeks to avoid the debate of whether prostitution is necessarily a form of violence or can be freely chosen work” Balos p. 162.

2.3.3 *The Crossing of International Borders*

As chapter one demonstrated, the trafficking of women can take a myriad of forms. The demand within the sex industry for foreign women typically results in the trafficking of women from other countries. Nevertheless, it has been recognised that trafficking may occur within state borders, for example from a rural area to an urban area.⁹⁹ The definition of trafficking under the 1950 Convention did not require that the trafficking of persons be international in character.¹⁰⁰ However the focus of the Convention against Transnational Organized Crime and its annexed Protocols made international movement relevant again.¹⁰¹ For the purposes of the Palermo Trafficking Protocol, movement of persons is defined as “the transportation, transfer, harbouring or receipt of persons”.¹⁰² Therefore the Palermo definition of trafficking does not, at first glance, require the crossing of borders. However, Article 4 of the Protocol limits the effect of “the prevention, investigation and prosecution” outlined within the Protocol to trafficking offences which are “transnational in nature”.¹⁰³ A combined reading of Articles 3 and 4 therefore suggests that the crossing of borders is irrelevant to the *definition* of trafficking, yet essential to the *crime* of trafficking. McRedmond has argued that the wide ambit of the Protocols trafficking definition should have been “followed through in the substance”

⁹⁹ Roundtable on Trafficking, above n. 94, p. 14. Obokata has observed the “transporting of Thai nationals as well as hill tribe people from rural areas to large cities such as Bangkok for prostitution and sexual exploitation.” Obokata, above n. 5, p. 31.

¹⁰⁰ Article 1 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others outlines that

“The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person.

¹⁰¹ Obokata, above n. 5, p. 32.

¹⁰² Article 3 of the Palermo Trafficking Protocol

¹⁰³ Article 4 Palermo Protocol. Note that Article 3 (2) of the Convention against Transnational Organized Crime holds a crime to be transnational if

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.”.

of the Protocol.¹⁰⁴ In effect, the inconsistencies which exist between Articles 3 and 4 have curtailed the effective scope of the Protocol. The Palermo Trafficking Protocol offers little protection to women in Thailand, for example, where the internal sex trafficking of women is rife. In failing to do so, the Palermo Trafficking Protocol is confined to the crime of trafficking, leaving fewer traffickers punishable by law. In this instance it is evident that the crime and immigration focus of the international community has compromised the levels of protection offered to victims.

2.4 Challenges for International Law: State Sovereignty

International law represents the coming together of individual sovereign states in an effort to accomplish aims for the common good.¹⁰⁵ Each of the above international legal instruments was drafted in an effort to eliminate the sex trafficking of women. The expression of a common will to eradicate the phenomenon of trafficking alone represents an achievement within the international community. Nevertheless, a conflict exists within the international community between the desire to eradicate heinous practices on the one hand, and reluctance of the states to relinquish their sovereign autonomy. The cool reception with which the 1950 Convention was received by the International Community illustrates this conflict. As section 2.2 of this chapter illustrates, the 1950 Convention provided a strong abolitionist position on prostitution, punishing clients and traffickers whilst protecting the prostitute. This author contends that this three pronged sex industry framework could have provided an effective, victim-orientated, anti-trafficking policy.¹⁰⁶ The paltry support which this policy received from the international community demonstrates the reluctance of states to adhere to an international position on

¹⁰⁴ McRedmond, above n. 78, p. 77.

¹⁰⁵ This aim finds expression within the preamble to the U.N. Charter. See Steiner, H. J. and Alston, P, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press: Oxford, 2000), p. 4.

¹⁰⁶ The regulation of prostitution currently operating within Sweden mirrors the approach of the 1950 Convention. Prostitutes are seen as victims whose rights have been violated by both their pimp and their clients. This policy is said to have diminished the attractiveness of the Swiss market to traffickers. Marie O'Halloran, 'Call for decriminalisation of prostitutes, but not prostitution', *The Irish Times*, 6 December 2004.

prostitution.¹⁰⁷ It is submitted that in this instance the commitment of the international community to eradicate the sex trafficking of women was defeated by the desire of states to maintain unfettered control over their domestic legal systems.

Admittedly, international anti-trafficking instruments must accommodate the interests of domestic states. However, it is evident that the excessive accommodation of state interests has compromised the protection offered to trafficked persons. Article 12 of the 1950 Convention held that

*“The present Convention does not affect the principle that the offences to which it refers shall in each State be defined, prosecuted and punished in conformity with its domestic law.”*¹⁰⁸

Accordingly, states are not required to modify their criminal law to provide for the prosecution of traffickers under the 1950 Convention. Whilst this ‘clause of appeasement’ presumably intended to attract more parties to the Convention, this author contends that it irreparably damaged the integrity of the Convention. Where states laws on trafficking prove inadequate, there is therefore a risk that traffickers will not be effectively prosecuted.¹⁰⁹ A similar clause of appeasement within Article 19 of the 1950 Convention saw the erosion of the protection offered to trafficking victims during their repatriation process. Where a person is to be repatriated to their country of origin, Article 19 requires states to firstly reach an agreement “with the state of destination as to identity and nationality as well as to the place and date of arrival at frontiers.”¹¹⁰ The State bears financial obligations to ensure that the cost of repatriation is covered where the trafficking victim cannot bear it themselves.¹¹¹ Repatriated trafficking victims are therefore provided minimum standards of protection by the 1950 Convention. The State can however evade such requirements where “expulsion is ordered in conformity with

¹⁰⁷ Chaung , above n. 3, p. 75.

¹⁰⁸ Article 12 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

¹⁰⁹ See chapter three on this matter.

¹¹⁰ Article 19.2 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

¹¹¹ Ibid.

law”.¹¹² This provision enables states to expel trafficking victims without ensuring a safe repatriation process.¹¹³ The safety of trafficked victims in their return home is therefore compromised.

Fifty years on, the Palermo Protocol has suffered from the excessive accommodation of state interests. Article 7 of the Protocol asks states to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”¹¹⁴ This paltry provision provides no minimum standards of protection to trafficked women who need to remain in the state. Neither does it oblige the State to implement a temporary leave of residence framework for trafficked women. Human Rights organisations have frequently emphasised the need to provide temporary residence to a trafficked woman while she receives counselling and other vital services.¹¹⁵ Anne Gallagher of the United Nations Office of the High Commissioner for Human Rights has noted that

*“While human rights concerns may have provided some impetus (or cover) for collective action, it is the **sovereignty/ security issues** surrounding trafficking and migrant smuggling which are the true driving force behind such efforts”*¹¹⁶

[Author’s emphasis added]

In this instance, the perception of leave to remain as a sovereign issue, rather than a fundamental human right, has weakened the protection offered to trafficked persons by international law. There is no easy resolution to the conflict between the international legal framework and sovereign interest. Nevertheless, the obligation of the State to protect human rights, which has arisen from instruments such as the Universal Declaration of Human Rights, should preclude states from denying protection to the

¹¹² Ibid

¹¹³ Farrow, above n. 27, p. 219.

¹¹⁴ Article 7 of the Palermo Trafficking Protocol.

¹¹⁵ See Hauber, above n. 1, p. 195. See Presentation by Fiona Crowley, Research & Legal Manager, Amnesty International (Irish Section) to the Oireachtas Joint Committee on Justice, Equality, Defence and Women’s Rights on its *review of trafficking in human beings for the purposes of sexual exploitation*, 23 May 2006, p. 6. See also Kathleen Fahy, Director of Ruhama, *Presentation to the Oireachtas Justice Committee on 23rd of May 2006* (online) available at: www.ruhama.ie [05 August 2006].

¹¹⁶ Anne Gallagher of the United Nations Office of the High Commissioner for Human Rights quoted in Fitzpatrick, above n. 77, p. 1149.

victims of human rights violations. Until such commitments are acknowledged, “pressure from NGOs”, State citizens and the international community will provide the only means of ensuring a sincere collaboration of the State with international efforts.¹¹⁷

2.4.1 Challenges for International Law: Weak Enforcement Mechanisms

In her review of the afore-mentioned anti-trafficking instrumentation, Dunbar has lamented their lack of “legal force”. This author shares this observation. The early promise of instruments such as the 1950 Convention, in calling for the protection of trafficked women and punishment of traffickers, was never realized due to weak enforcement mechanisms. Article 21 of the 1950 Convention requires state parties to “communicate to the Secretary-General of the United Nations such laws and regulations as have already been promulgated in their States” as well as “all measures taken by them concerning the application of the Convention”.¹¹⁸ This information is dissipated by the Secretary General to all U.N members and other states invited to ratify the Convention. Beyond such published reporting by the states, the 1950 Convention contains no provisions to ensure that signatory states protect victims and punish traffickers in line with the Convention. The absence of an “ongoing evaluation of its implementation or effectiveness”,¹¹⁹ hindered the realisation of the Convention’s objectives. Article 32 of the Convention Against Transnational Organized Crime outlines that the implementation of the Convention and its annexed protocols is to be reviewed “periodically.”¹²⁰

This author is unconvinced that the reviews and reportage mechanisms within the U.N ensure state compliance with international instruments. The obligation of states to submit annual reports for publication by the Secretary General has conceivably aimed to ‘shame’ recalcitrant states into bringing their legislation in line with international obligations. The

¹¹⁷ Dunbar, above n. 1, p. 120.

¹¹⁸ Article 21 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹¹⁹ Hughes, above n. 11, p. 14.

¹²⁰ Article 32 (3) (d) of the Convention Against Transnational Organized Crime.

effectiveness of this method has been frequently challenged. The United Nations reportage mechanism results in a mushrooming workload for “committees....that just collect and read reports concerning trafficking.”¹²¹ The inadequacy of reportage as a mechanism for the enforcement of a Convention has also been noted with relation to the CEDAW Committee.¹²² In observing the composition of committees such as CEDAW, which are characterised by the collaboration of experts from different signatory states, Gierycz has critiqued the vulnerability of such forums to political influences. Gierycz contends that

“The state parties and the experts often tend to concentrate more on seeking compromises and cooperation with each other in order to be re-elected and to receive more favourable consideration of their own national reports.....They hardly demand coherent and comprehensive information and answers to difficult questions which may antagonize the governments of reporting countries.”¹²³

Whilst such damning contentions are not shared equally by this author, Gierycz illustrates effectively the compromised effectiveness of reportage mechanisms in overseeing state co-operation. In failing to compel states, through the creation of penalties or otherwise, to put in place necessary reforms, international anti-trafficking Conventions have been described as a mere “wealth of words on paper”.¹²⁴ The fundamental purpose of international law, that is to co-ordinate the efforts of domestic states in matters of grave importance, is thus undermined by weak enforcement mechanisms. Under the human rights based analysis, anti-trafficking provisions such as the 1950 Convention falter in their failure to enforce the ‘Principle of Accountability’. Under this principle, “governments, intergovernmental bodies and other relevant actors” have a positive

¹²¹ Toepfer, S & Wells, B, ‘The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women’ (1994) 2 MICH. J. GENDER & L. 83, 92.

¹²² “The inability of the Committee to establish measurable and consistent criteria to evaluate the implementation of the Convention by reporting governments; to take a stock of progress in the situation of women in the countries; to set deadlines and develop indicators for improvement; to make the reporting governments accountable for the information provided in their reports and for the promises and future-orientated policies outlined therein; and to monitor which promises were implemented in the subsequent reporting periods, seriously weakened implementation of the Convention.” Benedek et al., above n. 69, p. 42.

¹²³ Dorata Gierycz “Human Rights of Women at the Fiftieth Anniversary of the United Nations” in Benedek et al., above n. 69, p. 43.

¹²⁴ Farrior, above n. 27, p. 213.

obligation to “to prevent and combat trafficking and to protect, assist and provide redress to the victims”.¹²⁵ In creating a weak enforcement framework, the drafters of the Palermo Trafficking Protocol have failed to provide firm guarantees to trafficking victims.

2.4.2 *Challenges for International Law: The Need for an Individual Complaints Procedure*

As the European Commission’s Expert Group on Trafficking have emphasised, the “rights of individuals to exercise their human rights” is “a recognised principle of international human rights law”.¹²⁶ Accordingly, if international anti-trafficking instruments are intended to uphold the norms of human rights law, it is crucial the victims of trafficking are not disenfranchised from the operation of their provisions. In failing to guarantee the trafficking victim a platform to assert their rights, the Palermo Trafficking Protocol and prior international legislative efforts have fallen short of this requirement. Whilst disputing member states have recourse to the International Court of Justice under the 1950 Convention, individuals cannot directly make a claim to the court against the State. Conceivably, the only means through which a trafficking victim can assert their rights at international level is if a signatory state initiates proceedings on their behalf.¹²⁷ Until recently CEDAW equally failed to facilitate the participation of trafficking victims within the enforcement of its provisions. However, the enactment of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* in 1999 has provided trafficking victims with a “voice and a venue to be heard.”¹²⁸ Under Article 2 of this Protocol, “communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any of the rights set forth in the Convention by that state party.”¹²⁹ This provision is bolstered by Article 7 of the Protocol which enables the CEDAW Committee to communicate their “views on the communication” back to the

¹²⁵ The European Commission Expert Group Report, above n. 23, p. 139.

¹²⁶ European Commission Expert Group Report, above n. 23, p. 139.

¹²⁷ Hauber, above n. 1, p. 192.

¹²⁸ Dunbar, above n. 1, p. 120. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature Dec. 10, 1999, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Annex, U.N. Doc. A/RES/54/4 (1999) [hereinafter ‘Optional CEDAW Protocol’].

¹²⁹ Article 2 of the Optional CEDAW Protocol.

parties involved.¹³⁰ The provision of such a platform does more than empower a trafficking victim. In her role as the United Nations High Commissioner for Human Rights, Mary Robinson observed that individual submissions force “governments to take a fresh look at the means of redress....available to women at the domestic level.”¹³¹

The review mechanism of the Convention against Transnational Organized Crime and its annexed protocols encourages “the mobilization of voluntary contributions”.¹³² However these skeletal provisions fail to create a formal framework through which the submissions of trafficking victims and related NGOs are invited and considered. In any event, this author contends that access to review mechanisms such that of CEDAW does not provide international trafficking victims with an adequate individual complaints procedure. The establishment of a formal and legal tribunal or court, modelled on the European Court of Human Rights, would provide the trafficking victim with an international platform to assert their rights over negligent states. The European Commission Expert Group Report has called for the establishment of such a mechanism. “Such a mechanism would ensure the accountability of states for their actions and the fulfilment of international obligations under human rights law.”¹³³ Central to the crime of trafficking is the erosion of the trafficked person’s dignity. The inclusion of trafficked persons within the international trafficking framework is therefore essential to the empowerment of trafficking victims.

2.5 Regional Protection Systems: Europe as a case study

As the above discussion has demonstrated, the United Nations has faced great difficulty in attempting to create concise and enforceable anti-trafficking law. McRedmond has attributed this difficulty to the world wide scale of United Nations operations.

¹³⁰ Article 7 of the Optional CEDAW Protocol.

¹³¹ Former United Nations High Commissioner for Human Rights, quoted by Steiner & Alston, above n. 105, p. 777.

¹³² Article 32 3(a) of the Convention against Transnational Organized Crime.

¹³³ European Commission Expert Group Report, above n. 23, p. 75.

*“The United Nations is an organisation composed of one hundred and ninety one diverse nations with different cultures and problems. In formulating a convention, the United Nations has to achieve a consensus among these nations.”*¹³⁴

Less encumbered by these difficulties, regional systems carry great potential to provide a strong regional anti-trafficking framework. “Within a region”, as Claude notes, “common solutions” can be geared around regional specific problems and “commitments by states to each other can be confined to manageable proportions.”¹³⁵ Within Europe the fall of the Soviet Empire created a power vacuum, leading to a surge in organised crime. The eradication of trafficking in Europe therefore demands a specialised economic, political and legal framework. The Council of Europe and the European Union are well established institutions within Europe and permeate between them the legal systems of over forty countries. Legal instruments have emanated from both institutions, which have directly and indirectly addressed the issue of trafficking.

The Council of Europe

The Council of Europe was established to promote human rights and to safeguard the rule of law within Europe.¹³⁶ The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the ECHR), as the human rights law instrument of the Council of Europe, created for the first time an international protection system ensuring the effective implementation of human rights.¹³⁷ Under Article 34 of the ECHR, an individual can seek redress at the European Court of Human Rights (ECtHR) for domestic human rights violations.¹³⁸ As the 2004 Expert Group report has established, individual complaints procedures prove an invaluable means of providing victim-orientated law enforcement.¹³⁹ Much comment has been made about whether the

¹³⁴ McRedmond, above n. 78, p. 244.

¹³⁵ Inis Claude quoted by Steiner & Alston, above n. 105, p. 780.

¹³⁶ Statute of the Council of Europe 1949 CETS No.: 001, Article 3.

¹³⁷ Steiner & Alston, above n. 105, p. 786.

¹³⁸ Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, 1953 [hereafter ‘The ECHR’].

¹³⁹ European Commission Expert Group Report, above n. 23, p. 131.

European Court of Human Rights might offer recourse to victims of trafficking.¹⁴⁰ Article 34 limits the individual complaints procedure to actions against a state.¹⁴¹ However Hauber has identified that a victim of trafficking could bring a claim against a state for the actions of a trafficker if it was demonstrated that the “state’s failure to implement legislation necessary to protect” the victim had led to the trafficking.¹⁴² Despite this possibility, the human rights violation of trafficking is not expressly provided for in the ECHR. This frustrates the capacity of a trafficking victim to make a successful application to the Court. Article 4 of the ECHR, holds that no-one shall be “held in slavery or servitude” or forced to perform compulsory labour. A trafficked person could therefore argue a violation of this right before the Strasbourg Court. However, it has been noted that “the concept of slavery is generally interpreted as to refer to slavery in its classic sense.”¹⁴³ Until jurisprudence is developed within the Court on the slavery of trafficked women, an individual claim under this provision may prove difficult. Likewise, whilst Article 4 of the ECHR prohibits torture and inhumane and degrading treatment, the Court has yet to establish the recourse of trafficked women to enforcement under this provision.

The *2005 Council of Europe Convention on Action against Trafficking in Human Beings* has been heralded as “a major step forward in the fight against trafficking in Europe.”¹⁴⁴ The definition of trafficking outlined within the Convention mirrors that of the Palermo Trafficking Protocol. However the Convention presents a more victim orientated anti-trafficking framework. Article 12 obliges the parties to the Convention to provide for the “physical, psychological and social recovery” as well as more specific health, accommodation, and education measures.¹⁴⁵ Article 36 (1) of the Convention outlines

¹⁴⁰ Hauber, above n. 1, p. 187; 2005 Europol Trafficking Report, p. 190; Demleitner, above n. 7, p. 178; European Commission Expert Group Report, above n. 23, p. 131.

¹⁴¹ Article 34 of the ECHR.

¹⁴² Hauber, above n.1, p. 187.

¹⁴³ The European Commission Expert Group Report, above n. 23, p. 138.

¹⁴⁴ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, 2005

¹⁴⁵ Article 12 (1) of the Council of Europe Convention on Action against Trafficking in Human Beings provides that

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
a: standards of living capable of ensuring their subsistence, through such measures as:

that a “The Group of experts on action against trafficking in human beings.....shall monitor the implementation of this Convention by the Parties.”¹⁴⁶ Given the often limited effectiveness of monitoring bodies, this author contends that an additional enforcement mechanism should be provided by the Convention. The provisions of the Convention could be annexed to the ECHR by a Protocol, which would thus enable the European Court of Human Rights to hear cases which specifically dealt with trafficking.

The European Union

The origins of the European Union lay in post World War II efforts to create a common market within Europe which would facilitate economic prosperity.¹⁴⁷ As McRedmond has noted, the European Union is supranational to its Member States.¹⁴⁸ Under this principle it is recognised that Member States have “voluntarily chosen to transfer their sovereignty” with regard to matters of European Union Community law.¹⁴⁹ The nature of the European Union both positively and negatively affects its capacity to provide a trafficking framework. Firstly, the authority which the European Union wields over its Member States provides a greater guarantee that trafficking provisions will be enforced. Conversely however, the economic orientation of European Union activities can influence the ambit of its trafficking instruments. The *Charter of the Fundamental Rights of the European Union* recognises that the trafficking of persons is a human rights violation.¹⁵⁰ However it is evident from the principle instruments of the European Union

appropriate and secure accommodation, psychological and material assistance;
b: access to emergency medical treatment;
c: translation and interpretation services, when appropriate;
d: counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
e: assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
f: access to education for children.

¹⁴⁶ Article 36 (1) of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

¹⁴⁷ Craig, P. and De Burcha, G, *EU LAW: Text, Cases, and Materials* (Oxford University Press: Oxford, 2002), p. 8.

¹⁴⁸ McRedmond, above n. 78, p. 171.

¹⁴⁹ Craig and de Burcha, above n. 147, p. 274.

¹⁵⁰ EUROPEAN UNION, Charter of Fundamental Rights, 2000/C 364/ 01.

trafficking framework that trafficking is perceived as a matter relating to crime and immigration control. The 2002 *EU Council Framework Decision on combating trafficking in human beings* seeks in its preamble to

*“To approximate the laws and regulations of the Member States in the area of police and judicial cooperation in criminal matters relating to the fight against trafficking in human beings.”*¹⁵¹

Many aspects of this directive are noteworthy. The definition of the crime of trafficking within this framework decision does not require trafficking to be international in character.¹⁵² The consent of the trafficked person is deemed irrelevant to the crime of trafficking where coercion, deceit, pressure or payment is used. Furthermore, the crime of trafficking is harshly dealt with and carries a minimum custodial sentence of 8 years.¹⁵³ Whilst these provisions are useful to a European understanding of the phenomenon of trafficking, the European instrument fails to provide a framework for the provision of support and services to trafficked women. This inadequacy demonstrates reluctance within the European Union to provide minimum standards of protection to trafficked women. Whilst the criminal law focus of the framework decision may prove useful in the eradication of sex trafficking, the needs of victims must not be ignored.

In 2004 the European Union issued a Council Directive “on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.”¹⁵⁴ In providing limited grounds for the temporary residence of trafficked persons, the directive demonstrates a one-sided perspective on the trafficking of persons. Article 1 of this directive provides for the provision of temporary residence

¹⁵¹Objective No. 1, COUNCIL FRAMEWORK DECISION on combating trafficking in human beings, L 203, 2002/629/JHA.

¹⁵² Ibid.

¹⁵³ Id.

¹⁵⁴ 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 EU Council Directive on Residence].

visas to trafficking persons who agree to participate within criminal proceedings.¹⁵⁵ Article 6 of this directive provides for a reflection period to be granted to trafficked persons “allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.”¹⁵⁶ During this reflection period, Member States must provide basic services to the victim, including where necessary psychological assistance.¹⁵⁷ Those who are granted temporary leave to remain are given every opportunity, through education and training, to regain a “normal life”. In effect, this directive dangles a carrot at victims of human rights violations temporary leave to remain is only granted to those who will participate in trial proceedings.¹⁵⁸ The deeply malevolent character of organised criminal networks gives most trafficked persons good reason not to participate in criminal proceedings. As chapter one outlined, traffickers exercise a psychological control over their victims, frequently making threats against their families. Therefore the operation of this directive has the bizarre consequence of denying protection to those who may need it the most.¹⁵⁹ The author submits that this directive reflects the deeply conservative position of Member States towards immigration. Nevertheless, it is unacceptable that the EU trafficking framework should reduce trafficking victims to state pawns in crime control.

2.6 Conclusion

An international legal instrument symbolises a will within the international community to bring about reform. For that measure alone, the development of international trafficking instruments is a necessary first step in the elimination of the sex trafficking of women. However the effective protection of trafficking victims and prosecution of traffickers requires more than political will. Clear provisions have to be outlined within international law to ensure a workable international trafficking framework. The detailed definition of

¹⁵⁵ Article 1, 2004 EU Council Directive on Residence.

¹⁵⁶ Article 6 of the 2004 EU Council Directive on Residence.

¹⁵⁷ Article 7 of the 2004 EU Council Directive on Residence.

¹⁵⁸ Article 8 of the 2004 EU Council Directive on Residence.

¹⁵⁹ Murray, above n. 9, p. 494.

trafficking within the Palermo Trafficking Protocol has addressed many uncertainties and is laudable in this regard. There are however more hurdles for international law. As this chapter has illustrated, the conflicting interests of state sovereignty and international law has weakened the protection offered to victims. Similarly, the tepid enforcement provisions provided in anti-trafficking instruments have done little to ensure vital domestic reforms. The lobbying efforts of NGOs, active citizens, and international organisations will provide the only weapon against such legislative half-heartedness. In this regard regional systems of protection may be advantaged by the commonality of their community objectives. As the international trafficking framework will continue to grow and diversify, the subjects of these efforts must not be forgotten. Sex trafficking violates the most sacred rights of its victims. The provision of an individual complaints procedure sends a powerful message to such victims that their grievances will be heard. Within Europe, the ECtHR carries great potential to provide a victim orientated enforcement mechanism. At an international scale however, instruments such as the Palermo Trafficking Protocol should provide for the inclusion of an individual complaints mechanism within their framework. The eradication of the sex trafficking of women demands a multi-pronged approach. The next chapter of this paper demonstrate the very real impact of inadequate domestic law on the trafficked person. Strong domestic trafficking law is essential to the protection of trafficking victims. It is hoped that the increased recognition of the human rights of trafficked women will be reflected in future international policy. A clear international anti-trafficking framework, with detailed provisions, strong enforcement mechanisms and a victim redress system, would provide a beacon for the policy building of domestic states.

Chapter Three: The Irish Legal Framework on the Sex Trafficking of Women: A Porous Shield

3.1 Introduction

As chapter two has demonstrated, sovereign interests have been employed within the international community to curtail protective measures offered to trafficking victims. The provision of migration orientated protection, such as leave to remain, has been met with particularly strong resistance. The reduced need for consensus building within national legislative efforts, as well as expertise on local trafficking patterns, enables domestic anti-trafficking legislation to provide an effective and specialised framework against the trafficking of women. However, “a criminal justice response characterised by immigration and crime control” has come to typify national responses to trafficking.¹⁶⁰ The Irish State unequivocally adopts an immigration and crime orientated approach. The 2006 “Report of the Department of Justice, Equality and Law Reform and An Garda Síochána Working Group on Trafficking in Human Beings”, underlined that “strong and robust border controls are key to the prevention of human trafficking.”¹⁶¹ European Commission’s Expert Group Report labels this approach as a “repressive strategy” which seeks to suppress “those phenomena that are considered to be particularly connected to trafficking in human beings, such as organised crime and (illegal) migration”.¹⁶² In many respects, a strengthening of crime and immigration law represents a logical response to the phenomenon of trafficking. The crime and migration policies of European states have been noted to reflect a worldwide “general feeling of insecurity” which has prevailed following 9/11 and subsequent terrorist attacks.¹⁶³ If highly sophisticated criminal networks are to be detected and prosecuted by the Irish State, it is necessary to develop a strong legal framework and a regulation of migration.

¹⁶⁰ Obokata, above n. 5, p. 5.

¹⁶¹ The Department of Justice Trafficking Report, above n. 2, p. 21.

¹⁶² The European Commission Expert Group Report, above n. 23, p. 62.

¹⁶³ 2005 Organised Criminal Report, above n. 4, p. 5.

This chapter seeks to demonstrate that the crime and migration orientation of the Irish trafficking policy has unequivocally failed to provide adequate protection to sex trafficked women.

Section 3.2 will outline the current trafficking situation in Ireland. The author will avail of the reports of the media and organisations such as Ruhama in attempting to build a picture of the nature of sex trafficking in Ireland. The conflicting perspectives of the Irish State and NGOs on the extent of the problem will be noted. In its focus on the prosecutions which have been made against traffickers, the Irish State will be criticised for its myopic representation of the extent of trafficking in Ireland.

Section 3.3 critically evaluates the Irish legal framework relevant to the sex trafficking of women. The Illegal Immigrants (Trafficking) Act 2000 will be harshly criticised for its failure to incorporate a definition of trafficking in line with the United Nations Trafficking Protocol. In failing to accommodate the definitions of Trafficking which have emerged from the Palermo Trafficking Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings, the Irish State is not satisfying the international norms of sex trafficking legislation. A case study of a trafficked woman in Meath will provide a harrowing illustration of how Ireland's narrow trafficking definition has negatively impacted upon trafficking victims.

Section 3.4 analyses the immigration procedures adopted by the State once a trafficked person has been identified. The lack of a specialised framework for trafficked women will be criticised. The Humanitarian Leave to Remain procedure, and the Voluntary Return Program will be evaluated. The author will argue that the current repatriation framework for sex trafficked women in Ireland risks contravening the principle of *non-refoulement*. The capacity of the trafficked women to apply for asylum within Ireland will also be questioned.

Section 3.5 explores the operation of the sex industry in Ireland. The operation of Irish prostitution law will be found to have created a hidden sex industry, where trafficked women are effectively imprisoned. The author will call for law reform in this area.

Section 3.6 outlines the role of the *Gárda Síochána* in the arrest of traffickers and identification of trafficked persons. The initiation of operations such as Operation Quest will be praised as a vital measure in elimination of trafficking in Ireland. It will be demonstrated however, that Ireland's inadequate legal definition of trafficking has hampered the capacity of the *Gardaí* to arrest potential traffickers. The author will conclude by noting the invaluable role that NGOs have played in providing a victim orientated response to trafficking. The grave human rights violations which trafficking victims suffer merit the implementation of an official state protective framework. Until such a framework is established, the work of Irish NGOs proves vital in rebalancing Ireland's trafficking policy

3.2 *Sex Trafficking in Ireland*

“When Rose, from Northern Moldova, got the chance to move to Western Europe, she was sure she was going to have a better life.

She was introduced by her grandfather to a man in his 30s named Jay, who seemed trustworthy to a young girl who had never travelled far beyond her immediate area. Jay sorted out her passport and made her travel arrangements and they arrived in Ireland in 2004....

She was brought to an apartment in a rural area of Ireland, which Jay rented..... One day he brought a man back to the apartment and told her she was to have sex with him. She did not want to do this and protested...

Then day after that, there were more and more men, as many as 10 on some days. The men that came to the apartment were Irish and foreign. When Rose objected to having sex with these men, Jay beat her....

One day he left the apartment and didn't come back. Rose was left homeless and penniless in a foreign country.”¹⁶⁴

¹⁶⁴ Excerpts from Kitty Holland, 'Trafficking in misery', *The Irish Times*, 6 May 2006.

Over the last few years stories, such as Rose's have become more and more frequent within the Irish Media.¹⁶⁵ Whilst circumstances may vary, accounts of "abuse sexually, emotionally [and] psychologically" perpetrated against these women are common to all reports.¹⁶⁶ Victims of sex trafficking in Ireland are said to originate from the former Soviet Countries of Romania, Albania, Ukraine, Croatia, Moldova, Lithuania, Russia, Czech Republic, as well as Venezuela, Brazil, Nigeria and South Africa.¹⁶⁷ In May of this year, an Irish current affairs television program provided strong evidence that the sex trafficking of women into Ireland is a growing phenomenon. The notion that the Irish State could be home to such systematic and severe exploitative practices against women provoked intense debate both within the Irish media and within the Irish Parliament.¹⁶⁸ The Irish NGO Ruhama, which works with trafficked prostitutes, released a report stating their knowledge of "over 200 women trafficked into Ireland over recent years."¹⁶⁹ It has been further suggested that these numbers are "only the tip of the iceberg."¹⁷⁰ At the launch of their 2004 Report, the NGO Women's Aid outlined their concern that a small but increasing number of calls made to their helpline were from suspected victims of sex trafficking.¹⁷¹ However, the mounting evidence of the sex trafficking of women into this country has been met with a curious response by the Irish government. Whilst acknowledging that "human trafficking is a clandestine activity", the Department of Justice concluded in its 2006 Trafficking Report that "there is no evidence to suggest that trafficking of persons into Ireland for the purposes of sexual exploitation is widespread."¹⁷² The discrepancy between the reports of Irish NGOs and the Irish State proves significant to an analysis of Ireland's sex trafficking framework. Fiona Crowley of the Irish branch of Amnesty International has raised concerns that "the Irish State may be

¹⁶⁵ Jim Cusack, 'Woman flown here to be sold as prostitute', *The Sunday Independent*, 29th January 2006; Paul Cullen, 'Women 'trafficked to work as prostitutes'', *The Irish Times*, 6 October 2005.

¹⁶⁶ Presentation of Kathleen Fahey, the Director of Ruhama, above n. 115, p. 3.

¹⁶⁷ Ibid.

¹⁶⁸ See Marie O'Halloran, 'O'Donoghue reassures on trafficking Bill', *The Irish Times*, 12 May 2006.

¹⁶⁹ See the presentation of Kathleen Fahey, the Director of Ruhama, above n. 115.

¹⁷⁰ Ibid.

¹⁷¹ Information provided by Theresa Sweeney, Communications Officer for Women's Aid, in a telephone interview with the author on Monday the 24th of July 2006.

¹⁷² The Department of Justice Trafficking Report, above n. 2, p. 21.

minimizing the scale of trafficking of women and children into Ireland.”¹⁷³ As previously outlined, over 500,000 women are trafficked within Europe each year.¹⁷⁴ Eastern European countries serve as the principle supply countries for sex trafficked women in Europe.¹⁷⁵ Given that the vast majority of women working within the sex industry in Ireland originate from Eastern European countries,¹⁷⁶ is there not a likelihood that some women are being trafficked into Ireland? It is evident that the Irish State’s modest recognition of sex trafficking results from their reliance on arrest and prosecution data. In a Dáil Eireann debate on the 29th of January 2004, the Minister for Justice Michael McDowell stated that

*“Since the enactment of the Illegal Immigrants (Trafficking) Act 2000 there have been nine cases of trafficking investigated by the Garda National Immigration Bureau where sexual exploitation was disclosed as a motive.”*¹⁷⁷

Indeed the Irish Refugee Council has noted that the operation of current Irish trafficking law has not “resulted in a successful prosecution for the crime of trafficking, though individuals have been arrested and charged.”¹⁷⁸ Given the modesty of these figures, it is unsurprising that the Irish State has deemed trafficking to be a limited phenomenon in Ireland. An exclusive reliance on such data fails to account for the hidden nature of trafficking, nor the difficulties faced by fearful sex trafficked women in bringing the matter to the attention of the authorities. It is furthermore very difficult to prove in a court of law that the crime of trafficking has occurred.¹⁷⁹ The Irish State’s conservative acknowledgement of the Irish sex trafficking situation has had a clearly negative impact on the level of protection offered to trafficked women. The Irish government has firstly

¹⁷³ Fiona Crowley, Amnesty International Presentation, above n. 115, p. 2.

¹⁷⁴ 2005 Europol Trafficking Report, above n. 27, p. 5.

¹⁷⁵ The Department of Justice Trafficking Report, above n. 2, p. 5.

¹⁷⁶ Interview with Inspector Pat Lordan, Chief Inspector with Operation Quest, Wednesday 23rd of August 2006.

¹⁷⁷ Dail Eireann Debate-Volume 578- 29 January, 2004, Written Answers- People Trafficking (online) www.historical-debates.oireactas.ie [10 June 2006].

¹⁷⁸ Irish Refugee Council, *Draft information Note on Human Trafficking*, Dublin: IRC, May 2006, p. 1.

¹⁷⁹ EU AGIS Conference, Forum to Improve Best Practice in the Prevention, Detection, & Investigation of Trafficking in Human Beings and to Examine Best Practice in Fighting & Preventing Corruption of Public Figures in the Administration of Immigration Regulation, Improvement of Best Practice in the Prevention, Detection & Investigation of Trafficking of Human Beings, November 2005 [hereinafter “AGIS Best Practice Report’], p. 8.

demonstrated extreme tardiness in bringing the necessary reforms to the Irish sex trafficking law. This “foot-dragging” of the Irish government on this issue reflects that the sex trafficking problem is not high on the agenda for the Irish State.¹⁸⁰ In the mean time, as section 3.3 reveals, Ireland’s porous legal framework allows many sex trafficking victims to remain undetected. Furthermore, the Irish State has failed to create a specialised program through which trafficked women are provided services, granted leave to remain, or are repatriated. Trafficked women are simply challenged through the general immigration law framework which, as section 3.4 of this chapter will demonstrate, is not tailored to accommodate the particular needs of trafficked women. Until the Irish government draws from the “valuable anecdotal evidence” of NGOs that work directly with trafficking victims, it is likely that the response of the Irish government to this matter will remain piecemeal.¹⁸¹

3.3: The Irish Law on the Sex Trafficking of Women

A cursory review of the Irish legislative framework reveals that the law on sex trafficking is truly in a state of flux. The UN Palermo Trafficking Protocol which supplemented the Convention against Transnational Organized Crime has been signed but not yet ratified by the Irish State. As Amnesty International Ireland has noted, this comprehensive international anti-trafficking instrument cannot be ratified by the Irish State “until we have legislation on our statute books specifically criminalising trafficking.”¹⁸² The Council of Europe Convention on Action against Trafficking in Human Beings has similarly not enjoyed the ratification of the Irish State.¹⁸³ The EU Framework Decision on combating trafficking in human beings obliged all European Union Member States to transpose its requirements by the 1st of August 2004. Ireland has similarly failed to meet this international commitment.¹⁸⁴ The 2006 Department of Justice Report has stated that “legislation is currently being prepared to provide, primarily, for compliance” with

¹⁸⁰ Fiona Crowley Amnesty Ireland Presentation, above n. 115, p. 3.

¹⁸¹ *Id.*, p. 2.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*, see also Laura Bradley, ‘Street angels giving hope to sex slaves shunned by law’, *The Sunday Independent*, May 14 2006.

Ireland's International obligations.¹⁸⁵ A Criminal Justice (Trafficking in Persons and Sexual Exploitation of Children) Bill is expected to be published by the end of the year which will create an “offence of trafficking in persons for the purpose of their sexual or labour exploitation.”¹⁸⁶ Furthermore, as section 3.4 of this chapter will discuss the Immigration and Residence Bill which is currently being drafted which will provide protective measures to the trafficked person. The tardiness of the Irish government to honour its duty to transpose into Irish law the provisions of the above international instruments merits criticism in itself. Nevertheless, the Department of Justice has insisted that current Irish legal provisions adequately provide for the prosecution of traffickers.¹⁸⁷ The *Child Trafficking and Pornography Act 1998* and the *Illegal Immigrants (Trafficking) Act 2000* are the current authoritative sources on the law of trafficking in Ireland. The Child Trafficking and Pornography Act 1998 prohibits the “entry into, transit through, or exit from the State of a child for the purposes of his or her sexual exploitation.”¹⁸⁸ This crime does not necessitate the illegality of migration and carries life imprisonment.¹⁸⁹ Whilst the above provision provides a skeletal definition of trafficking, the law provides for the prosecution of traffickers at each stage of their journey. The law on the trafficking of adults in Ireland is less satisfactory. A trafficker is defined under Article 2 (1) of the *Illegal Immigrants (Trafficking) Act 2000* as

*“A person who organises or knowingly facilitates the entry into the State of a person whom he or she knows or has reasonable cause to believe to be an illegal immigrant or a person who intends to seek asylum shall be guilty of an offence and shall be liable”.*¹⁹⁰

This offence carries the lesser penalty of ten years or a fine. The definition of trafficking outlined within the *Illegal Immigrants (Trafficking) Act 2000* poses a number of difficulties at both a conceptual and practical level. Conceptually, the aforementioned definition signifies the Irish State’s fundamental misunderstanding of what trafficking *is*.

¹⁸⁵ The Department of Justice Trafficking Report, above n. 2, p. 10.

¹⁸⁶ The Department of Justice Trafficking Report, above n. 2, p. 10.

¹⁸⁷ Marie O’Halloran, ‘O’Donoghue reassures on trafficking Bill’, *The Irish Times*, 12 May 2006.

¹⁸⁸ Article 3 (1) (a) of the *Child Trafficking and Pornography Act 1998*.

¹⁸⁹ EU AGIS Best Practice Conference, above n. 178, p. 6.

¹⁹⁰ Article 2 (1) of the *Illegal Immigrants (Trafficking) Act 2000*.

Trafficking, as the Palermo Trafficking Protocol confirmed, “is characterised by coercion, and the subsequent exploitation of those smuggled.”¹⁹¹ These core components of the crime of trafficking are not present within the Irish definition. In fact when viewed vis-à-vis the Palermo Smuggling Protocol, it is evident that the Irish crime of trafficking refers to the smuggling of persons. This is apparent from the requirements that a trafficker facilitates the entry into the state of an “illegal immigrant”. The failure of the Irish State to draw from international discourse in the drafting of its trafficking provisions is embarrassing to say the least. The Illegal Immigrants (Trafficking) Act entered into Irish law in 2000, two years after drafting negotiations for the Palermo Protocols had commenced.¹⁹² As chapter two outlined, the clear demarcation of the separate crimes of smuggling and trafficking is essential to the gathering of intelligence operations of law enforcement, and to the overall objective of detecting and prohibiting the practices. Furthermore, this confused definition of trafficking has compromised the protection that the Irish State offers against the trafficking of persons. A detailed legal provision on the components of trafficking would enable both the Garda Síochána and the Irish judiciary to effectively identify and prosecute against acts of trafficking.

3.3.1 The ‘Invisible’ Sex Trafficked Women

As previously outlined, a trafficker for the purposes of Irish law is one who enables the entrance into the Irish State of an illegal immigrant. Accordingly a woman who has legally immigrated into Ireland cannot be identified as a trafficked person under Irish law. The accession in May 2004 of twelve new countries to the European Union, and the subsequent removal of work and travel restrictions, effectively enables women from Eastern European states to travel to and work in Ireland. The unfortunate side-effect of this development has been that women from European Union Member States cannot be perceived as trafficking victims under Irish law. This author believes this legal anomaly to be *the gravest injustice within the Irish Trafficking Framework*. The identification of trafficked persons is a crucial first step in the prosecution of traffickers and in the

¹⁹¹ 2005 Europol Trafficking Report, above n. 27, p. 9.

¹⁹² See the preamble to the United Nations Convention Against Transnational Organized Crime.

protection of trafficked persons.¹⁹³ The Irish law on trafficking does not account for the myriad of ways that trafficking can occur. Traffickers will often organise the passports and work visas of trafficked women to ensure their successful transit into destination countries.¹⁹⁴ The organised trafficking of women from Eastern European countries into Ireland falls outside the scope of the Irish law. Under Irish law, an organised criminal network, however organised, will not be prosecuted for trafficking women for EU Member States under the provisions of the Illegal Immigrants (Trafficking) Act 2000. Romania and Lithuania have been listed amongst the European countries from which women are most likely to be trafficked.¹⁹⁵ Ruhama, for example, have reported that a great deal of the trafficking victims they have encountered originate from Romania, Lithuania, and the Czech Republic.¹⁹⁶ Irish Trafficking Law therefore effectively denies protection to the women who are most in need of it. Given the failure of Irish law to recognise Eastern European trafficked women, is it any wonder that the statistics of the Irish State on sex trafficking are so modest? The ‘invisibility’ of trafficked European women within Ireland logically provides a ‘pull factor’ for traffickers. In this instance it is evident that the weakness of Irish trafficking law has greatly eroded the ability of the state to eradicate trafficking.

3.3.2 Sexual Exploitation of Trafficked Women and Irish Criminal Law

The Palermo Trafficking Protocol affirmed that the intention to exploit a trafficked person constitutes an essential component of the crime of trafficking. Exploitation under the Palermo Protocol includes “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁹⁷ The forms which exploitation can take for the purposes of trafficking are thus clearly outlined within the international

¹⁹³ The European Commission Expert Group Report, above n. 23, p. 62.

¹⁹⁴ 2005 Organised Crime Report, above n. 4, p. 33.

¹⁹⁵ The Department of Justice, above n. 2, p. 5.

¹⁹⁶ Presentation of Kathleen Fahey, the Director of Ruhama, above n. 115, p. 3.

¹⁹⁷ Article 3 (a) of the Palermo Trafficking Protocol outlines that “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.”

law on trafficking. The Illegal Immigrants (Trafficking) Act 2000 contains no provision that the trafficker must intend to exploit the trafficked victim. Neither does it provide a clear outline on what actions would constitute exploitation under the crime of trafficking. In the absence of such provisions, does Irish Criminal law provide a shield to trafficked women from the acts perpetrated by their traffickers? The 2006 Department of Justice Trafficking Report emphasises that “in trafficking cases, it is possible for the prosecuting authorities here to bring charges for a range of offences covered by our criminal law, including sexual offences, false imprisonment, possession of false documents, etc.”¹⁹⁸ The Minister for Justice has staunchly disagreed with the contention that “a legislative vacuum existed in this country which gives traffickers carte blanche to pursue their evil trade here.”¹⁹⁹ As Fiona Crowley of the Amnesty International Ireland has noted however, there is no information available regarding prosecutions which have been made against traffickers under these offences.²⁰⁰ In researching the sex trafficking of women into Ireland, this author spoke to members of Amnesty International, Women’s Aid, the International Organisation for Migration, Ruhama and the Gárda Síochána. On the strength of this research, it is submitted that current Irish Criminal law does not adequately accommodate the unique character of trafficking related offences. A case emerged within the Irish media in January of this year which illustrates this point. A distressed young woman presented herself at OldCastle Gárda Station, in Co. Meath and told officers that she had been “forced to have sex with hundreds of men over a 6-month period.”²⁰¹ It is reported that “the young woman came to Ireland with the promise of proper work, but was met at Dublin Airport by two Eastern European men who took her passport and identity papers on the journey to Co. Meath.”²⁰² The woman was later “held in a house” where she was forced to work as a prostitute.²⁰³ The Gárda Síochána arrested her alleged trafficker and carried out an

¹⁹⁸ Department of Justice Trafficking Report, above n. 2, p. 6.

¹⁹⁹ Minister for Justice Michael McDowell, quoted in Marie O’Halloran, ‘O’Donoghue reassures on trafficking Bill’, *The Irish Times*, 12 May 2006.

²⁰⁰ Fiona Crowley Amnesty Ireland Presentation, above n. 115, p. 3.

²⁰¹ Irish Refugee Council, *Draft information Note on Human Trafficking*, Dublin: IRC, May 2006, p. 5. See also Jim Cusack, ‘Woman flown here to be sold as prostitute’, *The Sunday Independent*, 29th January 2006; MEP Coveney says *Sex-Trade trafficking should not be under-estimated*, February 01 2006 (online) www.simoncoveney.ie/archives/2006/02/mep_coveney_say.html [10 June 2006].

²⁰² Ibid.

²⁰³ Jim Cusack, ‘Woman flown here to be sold as prostitute’, *The Sunday Independent*, 29th January 2006.

investigation. A prosecution could conceivably have been made against this man under s. 28 of the Non-Fatal Offences Against the Persons Act 1997, which prohibits the detention of another or the restriction of their personal liberty. However, from a conversation with a member of the *Gárda Síochána*, this author has learned that no prosecution was made against this man by the Director of Public Prosecutions.²⁰⁴ The DPP allegedly held that as the door to the room where the woman was operating was not locked, and the house was not guarded, she could have left the house at any time. Hence the suspected trafficker was not charged for his actions against this trafficked woman. To the author's knowledge there are no official records on this decision and thus it is difficult to comment on the DPP's decision authoritatively. Nevertheless, this author believes that the DPP's interpretation of Irish Criminal law did not take into account the psychological coercion which can be exercised against a trafficked woman.²⁰⁵ Irish NGOs in the trafficking field contend that evasions of justice similar to the above case are regrettably common. It was observed by one NGO officer in the field that

*“Most cases don't even get past the DPP. We have seen what we believed to be really clear cut cases going nowhere.”*²⁰⁶

The incorporation into Irish law of the provisions of the Palermo Protocol would provide for an independent offence of trafficking, irrespective of other provisions within Irish law. The Irish criminal offences of rape, sexual assault and false imprisonment have not been drafted with the specific nature of trafficking related offences in mind. The Criminal Justice (Trafficking in Persons and Sexual Exploitation of Children) Bill which is currently being drafted by the government is expected to outline a detailed definition of trafficking in line with the Palermo Protocol.²⁰⁷ The crime of trafficking within this Act should carry a heavy custodial sentence. Given the lucrative nature of trafficking the

²⁰⁴ Garda Officer, in conversation with the author, Wednesday the 23rd of August 2006.

²⁰⁵ Murray has observed that traffickers or pimps will often make threats against a woman's family or “play on their fears of arrest or deportation” in exercising control over the trafficked person. Murray, above n. 9, p. 494.

²⁰⁶ This NGO officer did not wish to be named.

²⁰⁷ The Department of Justice Trafficking Report, above n. 2, p. 10.

heaviest of fines would prove futile in the punishment of traffickers. In the meanwhile, this author contends that the capacity of the Irish criminal law to facilitate the prosecution of sex traffickers is limited.

3.4 *The Trafficked Woman as an Illegal Immigrant*

The Irish State takes a firm stance against those who are found to be illegal immigrants. In a discussion paper on a new Immigration and Residence Bill, the Department of Justice emphasised that

*“The State’s power to remove persons who are non-nationals is a fundamental element of state sovereignty and is in the interest of the common good.”*²⁰⁸

The immigration policy of the Irish State becomes a very real concern to trafficked women who have been found to be illegal immigrants within the country. A respect for the human rights of trafficking victims demands that the anti-trafficking framework of the state does not “create or exacerbate existing situations that cause or contribute to trafficking” nor “adversely affect” their human rights.²⁰⁹ It has been well documented that the return home of a trafficked person can often lead to their further re-victimisation. In many countries the deportation process is inhumane and demeaning.²¹⁰ Unless adequate measures are taken by both state parties to the repatriation process, many trafficked women risk being re-trafficked to another country by a criminal network.²¹¹ The Irish State is obliged under the International principle of *non-refoulement* to ensure that persons are not removed from the country who risk persecution in their own

²⁰⁸ Minister for Justice, Equality and Law Reform, *Immigration and Residence Bill Discussion Paper*, Dublin: Dept., April 2005 p. 111.

²⁰⁹ The European Commission Expert Group Report, above n. 23, p. 139.

²¹⁰ See Chaung, above n. 3, p. 71. Drawing reference from the ASIA WATCH AND THE WOMEN’S RIGHTS PROJECT, *A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand* 45-46 (1993), Chaung cites the hypothetical (yet documented) scenario where a trafficked Burmese woman may “coerced into having sex with a Thai official in exchange for her safe return”.

²¹¹ The European Commission Expert Group Report, above n. 23, p. 114.

country.²¹² International human rights law obligations therefore oblige the Irish State to guard against the re-victimisation of the trafficked women.

There are three procedures through which a trafficked woman may be channeled by the Irish immigration system, namely Humanitarian Leave to Remain, the Voluntary Return Program, and the Irish Asylum system. It is worth noting that these systems operate within general Irish immigration policy and have not been tailored to accommodate the specialised needs of the trafficking victim.

3.4.1 Humanitarian Leave to Remain

Those who do not have leave to remain in the Irish State, or who have failed the asylum process, are subject to deportation under section 3 of the Immigration Act 1999. The Irish State has outlined deportation as being the “enforced departure” of a “non-national.” Under section 3, those who are to be deported are allowed to make a claim for humanitarian leave to remain. The consideration of this application takes note of the

*“personal, family and domestic circumstances of the person, employment record and prospects, duration in and connection with the State, humanitarian considerations, national security and the common good.”*²¹³

There is no official or public procedure for this process and the decision remains entirely “at the discretion of the Minister for Justice, Equality and Law Reform.”²¹⁴ Amnesty International Ireland has criticised this system for being “flawed”, and “lacking transparency and independence.”²¹⁵ In practice, Humanitarian Leave to Remain is granted

²¹² The Convention relating to the Status of Refugees 1951 [hereinafter ‘The 1951 Convention’]. This principle has been transposed into Irish law under the Refugees Act 1996. Article 5 states that “A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.”

²¹³ Immigration and Residence Bill Discussion Paper, above n. 207, p. 112.

²¹⁴ Irish Refugee Council, *Draft information Note on Human Trafficking*, Dublin: IRC, May 2006, p. 2.

²¹⁵ Fiona Crowley Amnesty Ireland Presentation, above n. 115, p. 4.

to very few trafficked women.²¹⁶ Where trafficked women have been denied this measure, the private nature of the process renders public scrutiny on the fairness of each decision impossible. Whilst this measure has been made available to some trafficked women,²¹⁷ the majority of sex trafficked women who have been identified as irregular migrants are repatriated to their respective countries.²¹⁸ The Irish Humanitarian Leave To Remain system therefore does not adequately provide vulnerable trafficked women with an opportunity to remain in Ireland.

3.4.2 The Voluntary Return Program

The NGO Ruhama has noted that none of the trafficked women they encountered were removed by the Irish State by the Deportation procedure.²¹⁹ The Irish State is in this regard, sympathetic to the trafficked woman. Under the Irish immigration system, women who are to be repatriated are referred to the Irish Section of the International Organization for Migration (IOM), which manages a voluntary return program for migrants in Ireland. The Voluntary Return Program seeks to ensure that the repatriation of immigrants is a dignified and secure process and arranges “appropriate transit and post-arrival assistance” to the trafficked person.²²⁰ Ryan Nelson outlined to the author that the IOM coordinates its activities with the Irish NGO Ruhama, and thus try to ensure that trafficking victims receive counselling before they are repatriated.²²¹ Arrangement is also made for trafficked persons who do not have accommodation to be housed whilst they await repatriation. Such persons are typically housed within the asylum accommodation network or in houses arranged by Ruhama. This author contends that the efforts of the IOM to provide a victim orientated repatriation procedure are to be praised. However, the ‘turnaround time’ of the Voluntary Return Program, from the referral of the

²¹⁶ Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006.

²¹⁷ Presentation of Kathleen Fahey, the Director of Ruhama, above n. 115, p. 4.

²¹⁸ Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006.

²¹⁹ Presentation of Kathleen Fahey, the Director of Ruhama, above n. 115, p. 4. Note that the current Irish Deportation procedure is set out under section 5 of the Immigration Act 2003.

²²⁰ The Department of Justice Trafficking Report, above n. 2, p. 9.

²²¹ Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006.

person to the IOM to their repatriation normally takes four to six weeks.²²² Whilst efforts are made to facilitate trafficked persons who wish to delay their repatriation, the IOM cannot delay significantly the repatriation of a trafficked person. It is submitted that four to six weeks does not provide an adequate amount of time for a trafficked person to recuperate and receive the extensive counselling they require. The ‘fault’ on this matter, rests not with the IOM but with the Department of Justice. As a non-state actor, the IOM is limited to the amount of time within which it can reasonably delay the repatriation of a trafficked person. When researching the effectiveness of the Voluntary Return Program, the author inquired as to whether the Irish State carried out an investigation into whether it was safe for the trafficked person to return to their own country. Research seemed to indicate that such investigations were not standard within the repatriation process. Given the potential vulnerability of repatriated trafficked women, the failure of the Irish State to undertake such preliminary investigations gravely compromises the security and human rights of the trafficked person. As the introduction to this section outlined, the Irish State has a duty to prevent the re-victimisation of a trafficked person under international human rights law. The 2004 Expert Group Report of the European Commission strongly urges all states to “carry out an individual risk assessment prior to the return or deportation of a trafficked person”.²²³ Until the Irish State includes such a procedure within the repatriation process, it will have failed in its duty to protect the trafficked woman.

3.4.3 The Irish Asylum Process

Arising out of its obligations under the 1951 Convention Relating to the Status of Refugees, the Irish State has a duty to provide asylum to refugees. The Irish Asylum system is governed under the 1996 Refugee Act. Refugees, as the successful applicants of the asylum process, are guaranteed a myriad of rights relating to work, travel, education, social welfare, medical care, and access to the Courts.²²⁴ Free legal aid is provided to

²²² Ibid.

²²³ The European Commission Expert Group Report, above n. 23, p. 117.

²²⁴ See Article 3 (2) (a) of the 1996 Refugee Act.

asylum seekers by the Refugee Legal Services to ensure that they can argue their claim as effectively as possible.²²⁵ Where applications for asylum are denied, the asylum seeker can apply for an appeal to the Refugee Appeals Tribunal.²²⁶ When compared with the Humanitarian Leave to Remain procedure, it is clear that the Irish Asylum system offers a more structured and fair decision making process for granting residence to an immigrant. Despite the lack of alternatives available to trafficked women who wish to remain in Ireland, the Irish Refugee Council has noted that “few victims of trafficking in Ireland have been able to access the asylum system.”²²⁷ This finding is supplemented by the anecdotal evidence of Irish NGOs.²²⁸ Several factors account for the inaccessibility of the Irish Asylum procedure. In order for a trafficked woman to succeed in her asylum claim, she must establish that she is a refugee. A refugee is, under Irish and International law, any person who

*“Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”.*²²⁹

Trafficked women do not fit the classic definition of a refugee. The persecution of a trafficked woman is committed by non-state actors, i.e. criminal networks and traffickers. Furthermore, trafficking victims are persecuted (through the act of trafficking) primarily because they are women, which is not a basis for prosecution provided for in the above definition. The United Nations High Commissioner for Refugees has issued guidance that sex trafficking could provide “a basis for a refugee claim where the State has been unable

²²⁵ Irish Refugee Council, A Report on the Fairness and Sustainability of Asylum Determinations at First Instance, Dublin, IRC, July 2000.

²²⁶ Ibid.

²²⁷ Irish Refugee Council, *Draft information Note on Human Trafficking*, Dublin: IRC, May 2006, p. 2.

²²⁸ In conversation with the author, Ryan Nelson of the IOM, knew off-hand of only one trafficked woman who had successfully applied for asylum in Ireland. He knew of only ten more trafficking victims who had applied for asylum. Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006. The opinion that the asylum system is inaccessible to trafficked women was shared by a Legal Officer with the Refugee Legal Services, Galway. Legal Officer of the Refugee Legal Services Galway in conversation with the author, 28th August 2006.

²²⁹ Article 1 (A) (2) of the 1951 Convention.

or unwilling to provide protection against such harm or threats of harm.”²³⁰ Nevertheless, as Gallagher has noted, there remains a reluctance within many states “to entertain non-traditional asylum applications such as gender-based claims involving non-state actors.”²³¹ It is not difficult to envisage that a trafficked woman could be met with the same response within Irish refugee status determination procedures. A culture of disbelief prevails within the Irish Asylum system.²³² A study undertaken by the Irish Refugee Council in 2000 found that ‘lack of credibility’ constitutes the dominant grounds for refused asylum applications.²³³ Within the Discussion Paper for the Immigration and Residence Bill issued by the Department of Justice, it was observed that

*“National asylum systems are frequently used as a means of circumventing normal immigration controls and of securing entry to or stay in a state.....Ireland’s experience is no different.”*²³⁴

Furthermore, country of origin reports are frequently used to verify the validity of an asylum applicants claim. Given the clandestine nature of trafficking activities, this author questions the effectiveness of such reports in providing a comprehensive picture of a country’s organised criminal practices. Asylum authorities may not, for example, comprehend the vulnerability of women to trafficking in otherwise politically stable countries.²³⁵ In particular, it is possible that a country of origin report may overlook the heightened vulnerability of women within certain regions and ethnic and socio-economic groups to sex trafficking. These difficulties demonstrate that the Irish Asylum System provides limited protection to women who are fearful of returning to their home countries. Ryan Nelson of the IMO has argued the need for an alternative residency application programme with an expertise in the particular needs and circumstances of

²³⁰ United Nations High Commissioner for Refugees: Guidelines on International Protection; Gender Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002.

²³¹ Gallagher, above n. 72, p. 107.

²³² Legal Officer of the Refugee Legal Services Galway in conversation with the author, 28th August 2006.

²³³ This was illustrated by a study undertaken by the Irish Refugee Council. See Irish Refugee Council, *A Summary Report on the Fairness and Sustainability of Asylum Determinations at First Instance*, Dublin: IRC, July 2000.

²³⁴ The Department of Justice Trafficking Report, above n. 2, p. 113.

²³⁵ Legal Officer of the Refugee Legal Services Galway in conversation with the author, 28th August 2006.

trafficked women.²³⁶ Until such a framework is created, it is evident that the Irish immigration procedure for trafficked women is inadequate.

3.4.4 Temporary Residence for Trafficked Women

The Irish State has contended that

“The current immigration system in Ireland allows the authorities to deal with the victims of trafficking in a sympathetic and pragmatic way.”²³⁷

This author does not share this confidence. Trafficked women are placed through the same immigration channels as other illegal immigrants. The perception of trafficked women as “illegal immigrants” suggests a criminal culpability which they do not deserve. By offering trafficked women the same limited recourses as other immigrants, the Irish State has failed to acknowledge their status as victims of human rights violation. This is unacceptable and deeply unsympathetic. Furthermore, the skeletal security checks undertaken within the repatriation process subject the repatriation woman to the risk of further abuse. At the very least, the Irish State should ensure trafficked women are provided with temporary leave to remain in the State. Despite the limited scope of the 2004 EU Council Directive on Temporary Residence, the Irish State has not opted into this directive, nor has firm plans to do so.²³⁸ It is further evident that the temporary residence provided to trafficked women under the incumbent Immigration and Residence Bill will be conditional on their participation in criminal proceedings.²³⁹ As chapter two of this paper has previously outlined, the State further exploits the trafficked person by limiting leave to remain proceedings to ‘co-operative’ victims. It is evident therefore that the “sympathetic and pragmatic” immigration framework for trafficked women is, in fact, insufficient and indifferent to the needs of the trafficked person.

²³⁶ Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006.

²³⁷ The Department of Justice Trafficking Report, above n. 2, p. 9.

²³⁸ Minister for Justice Michael McDowell has said that he is “keeping an open mind on future participation in the directive.” Quoted by Laura Bradley, ‘Street angels giving hope to sex slaves shunned by law’, *The Sunday Independent*, May 14 2006.

²³⁹ Immigration and Residence Bill Discussion Paper, above n. 207, p. 109.

3.5 *The State Regulation of the Sex Industry in Ireland: The Blind Eye?*

The Irish Celtic Tiger has breathed life into the Irish economy for almost two decades. An unsavoury benefactor of Ireland's economic good fortune has been the Irish sex industry. This industry, comprised of brothels, lap-dancing clubs, and sex chatlines, is known to be a "multi-multi-million-euro-business".²⁴⁰ There is now at the very least one brothel in every city and large town in Ireland.²⁴¹ The growing phenomenon of the sex trafficking of women into Ireland has, without doubt, resulted from this boom. Trafficked women are found within both the legal and illegal sectors of the Irish sex industry. From their experience of dealing with trafficking victims, Ruhama has learned that the lap-dancing industry provides a gateway for the forced prostitution of trafficked persons.²⁴² The trafficked women that remain in the lap-dancing industry experience "violence and economic exploitation."²⁴³ The state's legal framework for prostitution and other elements of the sex industry therefore has a direct impact on the trafficked person. In the 2006 Trafficking Report issued by the Department of Justice it was outlined that

"Prostitution itself is not an offence under Irish law. What the law seeks to do in this area is to protect society from the more intrusive aspects of prostitution."

This ambivalent "out of sight, out of mind" governmental policy permeates Irish prostitution law. Under Article 7 of the *Criminal Law (Sexual Offences) Act 1993* any person who "in a street or public place solicits or importunes another person or other persons for the purposes of prostitution" shall be guilty of an offence. Article 1 of the Act

²⁴⁰ Inspector Pat Lordan, chief of the Garda Operation Quest, quoted by Kitty Holland, 'Trafficking in misery', *The Irish Times*, 6 May 2006.

²⁴¹ Inspector Pat Lordan, Chief Inspector of Garda Operation Quest, in an interview with the author on Wednesday 23rd of August 2006.

²⁴² Gerardine Rowley, Ruhama Information and Public Relations Officer, quoted by News, 'Garda vice squad is needed- women's group', *The Irish Times*, (undated) 2004.

²⁴³ Garda Officer cited by Paul Cullen, 'Lap-dancing not harmless but 'gateway drug' to sex industry', *The Irish Times*, 6 December 2004.

provides an exhaustive list of what constitutes a street²⁴⁴ or a public place²⁴⁵ for the purposes of the Act. Section 8 of the same Act makes it an offence to loiter “in a street or public place in order to solicit or importune another person or other persons for the purposes of prostitution.” Those who materially benefit from,²⁴⁶ organise,²⁴⁷ or facilitate the prostitution of another,²⁴⁸ are also prosecuted under Irish law. There are no direct provisions within the Irish law on the regulation of sex related activities within the Irish lap-dancing industry, although there is authority to revoke the license of lap-dancing clubs under Ireland’s licensing laws.²⁴⁹ In succeeding in its end goal of eliminating the “more intrusive aspects” of prostitution, Irish prostitution law has provided impetus for the creation of a hidden sex industry. The intelligence gathered from the Operation Quest of the Gárda Síochána found that a client will typically ring an escort agency phone number.²⁵⁰ He is then put through to a call centre which may oversee four brothels.²⁵¹ The client would then be given the phone number of the girl and will go directly to her apartment.²⁵² These clients are not vetted before they go to the apartment thus leaving the trafficked women extremely vulnerable to abuse. In ensuring that women are not picked up by authorities under section 7 of the Criminal Law (Sexual Offences) Act, trafficked women become virtual prisoners, with no opportunity to escape or contact the

²⁴⁴ Under Article 1 of the Criminal Law (Sexual Offences) Act 1993, ““Street” includes any road, bridge, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways, entrances and gardens abutting on a street and any ground or car-park adjoining and open to a street, shall be treated as forming part of a street.”

²⁴⁵ “public place” means any place to which the public have access whether as of right or by permission and whether subject to or free of charge” Article 1 of the Criminal Law (Sexual Offences) Act 1993

²⁴⁶ Under 10 of the Criminal Law (Sexual Offences) Act 1993. —(1) A person who knowingly lives in whole or in part on the earnings of the prostitution of another person and aids and abets that prostitution shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both

²⁴⁷ Article 9 of the Criminal Law (Sexual Offences) Act 1993 provides for the prosecution of any person who

(a) controls or directs the activities of a prostitute in respect of prostitution,

(b) organises prostitution by controlling or directing the activities of more than one prostitute for that purpose, or

(c) compels or coerces a person to be a prostitute.

²⁴⁸ Article 11 of the Criminal Law (Sexual Offences) Act.

²⁴⁹ Officer of the Gárda Síochána in conversation with the author, on Wednesday 23rd of August 2006.

²⁵⁰ Inspector Pat Lordan, Chief Inspector of Garda Operation Quest, in an interview with the author on Wednesday 23rd of August 2006.

²⁵¹ Ibid.

²⁵² Ibid.

authorities.²⁵³ It is clear that the Irish law on prostitution has failed to protect trafficked prostitutes or curb the sex trafficking industry. If sex trafficking is to be combated effectively, the law in this area will have to be reconsidered. The 2006 Trafficking Report, issued by Department of Justice 2006 Report, emphasised the commitment of the *Gárda Síochána*'s in its surveillance of the sex industry.²⁵⁴ The report did not provide for a review of Irish Commercial Sex law nor harsher penalties for the pimps of trafficked women. Given the centrality of the sex industry to the trafficking of women, this oversight by the State is unacceptable. The regulation of the sex industry is an extremely contentious issue to which there are no easy answers.²⁵⁵ What is clear, however, is that the current law on prostitution in Ireland has led to the further exploitation of women. As Theresa Sweeney of Women's Aid has argued, effective policy reform in this area will have to address wider issues such as the immunity of those who procure the services of prostitutes from criminal prosecution.²⁵⁶ In the absence of such review, the 'blind eye' of state commercial sex law will continue to facilitate the trafficking of women.

3.6 *The Gárda Síochána: A Tiger rendered Toothless by Irish Trafficking Law?*

Given that Ireland has perceived trafficking to be a criminal and immigration law matter, the ongoing amelioration of Irish law enforcement in this area is unsurprising. A review of the *Gárda Síochána*'s framework indicates that Irish law enforcement operations have become increasingly specialised. The *Gárda National Immigration Bureau (GNIB)* was established in 2000 which would have chief responsibility in matters relating to immigration.²⁵⁷ The Department of Justice has outlined that intelligence units within the GNIB have "advanced training in the examination of documents" enabling an

²⁵³ News, 'Garda vice squad is needed - women's group', *The Irish Times*, (undated) 2004.

²⁵⁴ The Department of Justice Trafficking Report, above n. 2, p. 22.

²⁵⁵ The different theories that have emerged in relation to prostitution are outlined within Wijers, M, *Criminal Victim, Social Evil or Working Girl: legal approaches to prostitution and their impact on sex workers* (online) <http://www.nswp.org/pdf/WIJERS-CRIMINAL.PDF> [10 July 2006].

²⁵⁶ The centrality of demand to the issue of sex trafficking will be discussed within chapter four of this paper.

²⁵⁷ EU AGIS Best Practice Conference, above n. 178, p. 7.

identification of “persons engaged in immigration related offences.”²⁵⁸ Three Garda Síochána operations have additionally been set up “to specifically target offences relating to trafficking” in Ireland. *Operation Hotel* targets “the trafficking of females from Eastern Europe to work in the sex industry.” *Operation Quest* carries out surveillance operations on lap-dancing clubs to ascertain whether their female staff were trafficked into the country.²⁵⁹ Finally, *Operation Poppy* determines within its operations whether Eastern European women have been trafficked into Ireland.²⁶⁰ The structured character of the Garda trafficking framework suggests a commitment amongst Irish law enforcement to eliminate the sex trafficking of women into Ireland. In line with the recommendations of the 2002 EU Council Framework Decision, the Irish police force has also established strong sharing of cooperation and intelligence with other European law enforcement units.²⁶¹ Despite the sophisticated character of the Garda Síochána’s trafficking framework, certain factors have weakened the effectiveness of Irish law enforcement. Under Irish law the crime of trafficking, outlined under the Illegal Immigrants (Trafficking) Act 2000, relates to the smuggling of illegal immigrants into Ireland. Whilst the inadequacies of this trafficking definition are clearly identifiable, the Illegal Immigrants (Trafficking) Act 2000 remains the authoritative text for the Irish police force in their detection and prosecution of trafficking offences. The Irish legal definition of trafficking clearly impacts Garda operations. Garda Operation Quest, for example, recently carried out raids on lap-dancing clubs, following intensive surveillance operations, to determine whether women had been trafficked into the sector.²⁶² The author of this report was told that “of the 90 girls who were questioned by the Gardaí, not one was trafficked.”²⁶³ These girls were predominantly Latvian, Lithuanian and Polish and could therefore legally work in Ireland.²⁶⁴ The girls who have been questioned by the Garda Síochána within such operations have stated that they are in Ireland “of their own

²⁵⁸ The Department of Justice Trafficking Report, above n. 2, p. 15.

²⁵⁹ Ibid; EU AGIS Best Practice Conference, above n. 178, p. 7; Paul Cullen, ‘Lap-dancing not harmless but ‘gateway drug’ to sex industry’, *The Irish Times*, 6 December 2004.

²⁶⁰ Ibid.

²⁶¹ 2002 EU Council framework Decision on combating trafficking in human beings, Objective No. 1.

²⁶² Inspector Pat Lordan, Chief Inspector of Garda Operation Quest, in an interview with the author on Wednesday 23rd of August 2006.

²⁶³ Ibid.

²⁶⁴ Ibid.

free will.”²⁶⁵ This author fears that the preoccupation of Irish law enforcement with the question of whether women are illegal immigrants may overshadow other necessary aspects of identification proceedings. Given the psychological control that traffickers exercise over women, it is unlikely that trafficked women would identify themselves during a brief questioning process. It is furthermore not evident, from government reports on the activities of Operation Quest and other operations, that detailed investigations are carried out into the background and circumstances of each suspected trafficking victim. This was recently acknowledged by Europol’s Chief Officer on Trafficking in Human Beings.²⁶⁶ It is submitted, therefore, that the limited findings of trafficking which have resulted from Gárda operations reflect their limited ambit, rather than the extent of trafficking in Ireland. The blame, for these shortcomings, rests squarely on the Department of Justice. The law and policy which emanates from the State provides the backbone to all Gárda operations, and are in effect the “tools” of their trade. It is submitted that the capacity of members of the Gárda Síochána to identify trafficking victims has been thwarted by the absence of a detailed trafficking legal framework in Ireland.

Members of the Irish police force who were interviewed for the purposes of this paper demonstrated an impressive sensitivity to the plight of trafficked women, and a commitment to the eradication of the phenomenon. Members of Amnesty International, the IOM, Ruhama and Women’s Aid were satisfied by the Gardaí’s referral of trafficked women to NGOs such as Ruhama.²⁶⁷ This author is hopeful that the imminent Criminal Justice (Trafficking in Persons and Sexual Exploitation of Children) Bill will provide the Gárda Síochána with a more workable framework for the identification of trafficked

²⁶⁵ EU AGIS Best Practice Conference, above n. 178, p. 12.

²⁶⁶ Steve Harvey of the Europol Human Trafficking Unit told the *Irish Times*, “while the police tend to have a good quality intelligence on what’s happening in, for instance, Ireland, they aren’t too interested in how the women were recruited, how they got here, whereas the NGOs will talk to women about those issues and that is the kind of intelligence we need to tackle the issues on the Europe-wide basis.” Kitty Holland, ‘Europol expert on people trafficking to meet with Garda’, *The Irish Times*, 15 May 2006.

²⁶⁷ Gerardine Rowley, Ruhama Information and Public Relations Officer, in an interview with the author on the 28th of August 2006; Ryan Nelson of the Irish branch of the International Organization for Migration, in an interview with the author, 14 July 2006; Theresa Sweeney, Communications Officer with Women’s Aid, in an interview with the author 24th of July 2006.

women. This author however recommends that investigation procedures should be geared towards creating an environment of trust with suspected trafficked persons. At present Ruhama and the IOM have provided training to certain members of the *Gárda Síochána* on the issues relating to trafficking. This author contends that more could be done to ensure that good quality evidence is obtained during *Gárda Síochána* operations. The charged atmosphere of a police raid and subsequent investigations are not conducive to the effective questioning of a vulnerable trafficked person. This author recommends the establishment of a scheme whereby sex workers would be registered with the *Gárda Síochána* and obliged to meet periodically with specially trained, female, *Gárda* liaison officers. Such an informal liaison procedure would create an environment of trust which would better enable trafficked women to report their circumstances. Such a measure would secure better evidence, thus enabling the more successful prosecution of traffickers. Furthermore, this measure could provide a vital lifeline to trapped trafficked women. Until such procedures are implemented this author believes that the current framework for the identification of trafficked women will continue to be inadequate.

3.7 Conclusion: The Future of the Irish Trafficking Framework

Although certain reforms are afoot, “strict border controls” will remain the central tenement of the Irish trafficking policy.²⁶⁸ The 2004 Expert Group Report urged states to adopt “a holistic, multi-levelled and integrated approach” which would prevent crime and immigration centred policies from increasing the vulnerability of the victim.²⁶⁹ In its failure to balance state interests with those of the victim, the Irish legal framework has failed in this regard. The focus on the illegality of immigration allows many trafficked women, and their traffickers, to slip through the net. The state perception of trafficked persons as illegal immigrants channels human rights victims into an unyielding immigration system. Crucially, the State has failed to provide a centralised victims support network necessary to safeguard the provision of counselling, accommodation, medical care and training to former trafficking victims. In providing such vital services to

²⁶⁸ The Department of Justice Trafficking Report, above n. 2, p. 21.

²⁶⁹ The European Commission Expert Group Report, above n. 23, p. 9.

victims, NGOs such as Ruhama have shouldered the burden for the State's inadequate trafficking policy. Hopefully, the Criminal Justice (Trafficking in Persons and Sexual Exploitation of Children) Bill, and the Immigration and Residence Bill will ameliorate the Irish law on trafficking. Such measures must be complemented by minimum standards of protection for trafficked persons. Without this balance, the law of Ireland will continue to deny trafficked persons their entitlements as victims of human rights violations.

Chapter Four: The Human Right-based Approach: Issues for Policy Reform

4.1 Introduction

When the law of trafficking is analysed under a human rights paradigm, core structural weaknesses are revealed. Chapter two of this paper has demonstrated that the human rights norms of state accountability and victim empowerment are not being reflected in international trafficking law. Weak enforcement provisions, and the absence of judicial individual complaints procedure, identify reluctance within the international community to guarantee reparation to the victim. Equally, where this paradigm is applied to domestic law, it is evident that Ireland has breached its duty “to respect and protect the rights of individuals to exercise their human rights.”²⁷⁰ The emergence of a ‘human rights based approach to trafficking’ within international discourse has therefore provided an invaluable framework to both the national and international legislator.²⁷¹ However the phenomenon of trafficking will not be resolved by law alone. In its “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, the United Nations High Commissioner for Human Rights identified that the sex trafficking of persons is both a cause and a consequence of human rights.²⁷² If we are to eradicate the practice of sex trafficking, each of the factors that contribute to the vulnerability of a trafficking victim must be addressed. This chapter seeks to complement the analysis of the law within previous chapters by identifying the crucial issues that must be addressed by economic, social and political policy.

²⁷⁰ This duty is outlined in section three of the European Commission Expert Group Report, above n. 23, p. 138.

²⁷¹ See United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, May 2002, and European Commission, Directorate-General Justice, Freedom and Security, Report of the Experts Group on Trafficking in Human Beings, Brussels, December 2004.

²⁷² See Principle 1 of the United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, May 2002.

4.2 Poverty

It is well established that the poverty experienced in many countries of the origin of the trafficking victims feeds the trafficking phenomenon.²⁷³ As Farrior explains, traffickers “prey on families who need income for basic survival.”²⁷⁴ Therefore, organised criminal networks capitalise on economic desperation. However, poverty alone does not lead to the trafficking of women.²⁷⁵ Farrior has argued that the centrality of poverty to trafficking has been overemphasised.²⁷⁶ The high levels of government and police corruption which characterise poor countries will either directly or indirectly facilitate organised criminal gangs in their recruitment of victims.²⁷⁷ The normalisation of trafficking in many regions will also contribute to its proliferation. The observations of an officer of an Asian anti-trafficking NGO forcefully illustrate this point.

“When you go to a village in northern Thailand, you have to ask why is it that in one village, all the girls go automatically into the brothels, while in another village the people would rather die than see their daughters and sons sold off?”²⁷⁸

It is submitted that the regional development funding emanating from the European Union or the United Nations could prove useful in reducing the vulnerability of impoverished communities. Without equal efforts to raise the status of women in such societies, the exploitation is likely to continue.

²⁷³ See Farrior, above n. 27, p. 214; The Brussels Declaration on Preventing and Combating Trafficking in Human Beings, Brussels European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century, Brussels, September 2002; The European Commission Expert Group Report, above n. 23, p. 62; Fiona Crowley Amnesty Ireland Presentation, above n. 115.

²⁷⁴ Farrior, above n. 27, p. 214.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Roundtable on Trafficking, above n. 94, p. 18.

²⁷⁸ International Coordinator of End Child Prostitution in Asian Tourism (ECPAT), quoted by Farrior, above n. 27, p. 214.

4.3 *The Low Status of Women*

“Trafficking is not a “neutral” phenomenon, but is closely related to and generated by discriminatory practices and unequal power relations.”²⁷⁹

As chapter one of this paper identified, the families of trafficked women are often complicit in the trafficking. The invitations made by traffickers are perceived at face value, despite the indisputable security risks involved. The sentiment that daughters have a duty to “earn money for their family”²⁸⁰ can pressurise women to leave their countries and find work. Trafficked victims are viewed by their traffickers as “property that can be bought and sold on the market.”²⁸¹ It is evident that female victims of trafficking are objectified by both their traffickers, and to an extent, their families. The normalisation of the sex trafficking of women is symptomatic of the low status of women within many societies. The “unequal status of women and girl-children” and “harmful stereotypes of women as property, commodities, servants and sexual objects” has been said to characterise many trafficking-permissive countries.²⁸² Women’s rights instruments such as CEDAW face a great battle in attempting to dilute the deeply entrenched patriarchal norms which exist in most traditional societies. The limited economic opportunity for women world-wide feeds the perception that daughters are a burden. As Gierycz has noted, “most women in the world work in underpaid, poorly regulated conditions, in occupations with low prestige and salaries.” Women earn on average “only 50 to 80 per cent of men’s wages.”²⁸³ The lack of opportunities available to women therefore creates an “unequal bargaining power” thus enabling the traffickers to procure the women more easily.²⁸⁴

²⁷⁹ The European Commission Expert Group Report, above n. 23, p. 143.

²⁸⁰ Chuang, above, n. 3, p. 69.

²⁸¹ Demleitner, above n. 7, p. 186.

²⁸² Roundtable on Trafficking, above n. 94, p. 186.

²⁸³ Dorota Gierycz, “Human Rights of Women at the Fiftieth Anniversary of the United Nations”, in Benedek, W et al., *Human Rights of Women: International instruments and African experiences* (Zed Books: London, New York, 2002), p. 36.

²⁸⁴ Chuang, above, n. 3, p. 68.

Despite the link between poverty and trafficking, the economic advancement of a country may further disenfranchise women. As Balo has observed, the increased industrialisation of the Thai economy has created jobs for men.²⁸⁵ The subsequent decline of agriculture has forced women to migrate to urban areas in search of work where they are vulnerable to exploitation.²⁸⁶ It is evident from the above discussion that economic, cultural and social rights of women are intrinsically linked to the issue of trafficking. Whilst relevant international instruments in this area might provide a basis for lobbying efforts, this author contends that the economic marginalisation of women will only be addressed through training initiatives.²⁸⁷ The 2002 U.N ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ called for “development cooperation policies and programmes” overseen by the mutual efforts of “intergovernmental and non-governmental organizations”.²⁸⁸ This framework would provide for “livelihood options, such as basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.”²⁸⁹ By facilitating an economic integration of women into society, this author believes such programs prevent young women from following the trafficker ‘as their only option’. The acceptance of violence and discrimination against women in society will prove infinitely more difficult to address. No country, however well developed economically, or advanced politically, is immune from violence against women. In Ireland, for example, an average of nineteen thousand calls is made annually to Women’s Aid, a support group for domestic violence victims.²⁹⁰ Until the exploitation of women becomes socially unacceptable, disadvantaged women will remain vulnerable to trafficking.

²⁸⁵ Balo, above n. 12, p. 158.

²⁸⁶ Ibid.

²⁸⁷ See the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33, 1980, International Covenant on Economic, Social and Cultural Rights, 6 I.L.M. 360, 1966.

²⁸⁸ United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, E/ 2002/ 68/ Add. 1, May 2002, Guideline 7.

²⁸⁹ United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, E/ 2002/ 68/ Add. 1, May 2002, Guideline 7.

²⁹⁰ Women’s Aid., *National Freephone Helpline Statistics 2004*, Dublin: Women’s Aid, 2005.

4.4 Demand

In order for any item to be sold, a market must exist. This most basic of economic principles also holds true for the sex trafficking industry. Research has found that “the market for commercial sexual activities is considered a major force driving trafficking.”²⁹¹ The UNHCR emphasises the need for “strong legislative, policy and other measures to address” the demand for “exploitative commercial sexual services.”²⁹² Despite such universal acknowledgement of demand as a relevant issue, a clear policy on the matter has not emerged in the international community for fifty years. As chapter two has outlined, the 1950 Convention for the Suppression of the Traffic in Persons outlined a clear position on the issue of demand. The preamble to the Convention held that prostitution and sex trafficking were “incompatible with the dignity and worth of the human person”.²⁹³ Accordingly the Convention sought to provide protective measures to the prostitute whilst prosecuting her clients and pimps. Few states however signed and ratified this Convention. The current zeal within the European and international community regarding trafficking policy has yet to create a clear policy on how the sex industry should be regulated. Given the grave human rights violations suffered by trafficked women, we must harshly question the evasiveness of the international community on this issue. Demleitner has pointed to the extremely lucrative nature of the sex industry as a factor to state evasiveness. Accordingly it is observed that many Thai officials have

*“Come to accept the institutionalization of violence in the form of forced prostitution because they view the practice as the key to regional development and an important source of foreign currency.”*²⁹⁴

²⁹¹ The Department of Justice Trafficking Report, above n. 2, p. 4 drawing reference from Council of Europe reports.

²⁹² United Nations High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Trafficking; Report of the United Nations High Commissioner for Human Rights to the Economic and Security Council, E/ 2002/ 68/ Add. 1, May 2002, Guideline 7.

²⁹³ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S 271, 1950, Preamble.

²⁹⁴ Demleitner, above n. 7, p. 190.

Such a prioritisation of economic interests the human rights flagrantly disregards the internationally recognised standards of human rights. Nevertheless the cultural acceptance of exploitative practices towards women and children proves difficult to resolve. The unequal distribution of men and women that remains within the executive branches of national and international public sector arguably shapes its policy on the male experience. Murray noted the “boys will be boys” attitude exercised by U.N officials when investigating allegations that U.N peacekeepers had frequented the brothels of forced prostitutes.²⁹⁵ The paltry knuckle wrapping that these men received suggested that their activities were condoned by officials. The perception of male clients as harmless consumers has enabled a normalisation of the sex industry.²⁹⁶ Until there is a state-led condemnation of trafficking practices within impoverished countries where trafficking is rife, the cultural acceptance of the exploitation of women and children will prevail. It is submitted that strong and well-targeted national awareness campaigns must be initiated by the international community to highlight the vulnerability of women in such countries and to initiate national discourse. The creation of a charter, by the Irish NGO Ruhama, illustrates the effectiveness of such national awareness campaigns. This charter arose from concern of “the growing normalization” of the Irish sex industry, and asks its signatories to “use their corporate responsibility to prevent the commercial sexual exploitation of women”.²⁹⁷ At an international level, it is evident that the international community is unlikely to reach an agreement on the correct means of regulating the sex industry.²⁹⁸ Until such a framework emerges, this author contends that the purchasing of sexual services should be actively discouraged.

4.5 Conclusion

Given the complexity of the factors that contribute to sex trafficking, it is clear that the practice will not easily be prevented. As Steiner and Alston note, there are

²⁹⁵ Murray, above n. 9, p. 10.

²⁹⁶ Gerardine Rowley, Ruhama Information and Public Relations Officer, at the *Launch of the Ruhama Charter*, (online) www.ruhama.ie [25 August 2006].

²⁹⁷ Ibid.

²⁹⁸ Anderson, Bridget., & O’Connell Davidson, Julia., *Trafficking- A demand led Problem? A Multi-Country pilot study*, Stockholm: Save the Children, 2002.

“Complexly interwoven socio-economic, legal, political and cultural strands to the problem of women’s subordination and to the content of women’s rights.”²⁹⁹

The prevention of the trafficking of women will not occur until each strand is addressed. It is hoped that the economic development of countries such as Thailand will bring with it reforms in matters of social politics. The trafficking of women occurs where no other economic opportunities are presented to women. Education, economic development and a shift in cultural perceptions of women will be required for women to be perceived as equal actors within the economy. Such reforms do not occur overnight. In the meantime, international efforts to raise awareness on discriminatory practices against women will prove vital in the battle to prevent the sex trafficking of women.

²⁹⁹ Steiner & Alston, above n. 105, p.159.

Chapter Five: Conclusion

5.1 Overview

The formulation of an effective legal trafficking framework is an unenviable task. The covert and highly organised nature of organised criminal networks will challenge even the strongest of criminal justice initiatives. The strictest of border control initiatives will be circumvented by the trafficker. Every crevasse that exists within the state's trafficking framework will be capitalised upon, enabling the exploitation of defenceless women. Within her analysis of the national and international trafficking law initiatives, the author has identified two vital and inter-related sentiments which must exist throughout all legislative efforts. The author will conclude this paper with a reflection on these concepts.

5.2 A Political Will

The creation of strong legal provisions providing for the prosecution of traffickers and the protection of trafficking victims will only occur if there exists within the community, a political will and commitment to address the trafficking phenomenon. Recognition of both the grave nature of sex trafficking and the need for concerted efforts could rejuvenate this flagging sector of domestic and international law. Chapter two has illustrated how the 'half-heartedness' of states to commit to domestic reform have marred international anti-trafficking efforts. The far-reaching policy on prostitution provided by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others had the potential to tackle the root causes, such as demand, which feed the sex trafficking industry. The refusal of states to relinquish their state sovereign legal autonomy in this instance prevented valuable reform. The 'half-heartedness' of states has additionally led to the failure of international trafficking law to create enforcement mechanisms which ensure state compliance. Even as late as 2000, the limited enforcement procedure of the Palermo Trafficking Protocol has demonstrated a

reluctance to relinquish their autonomy over areas of immigration. Where domestic reform has been provided for within the Palermo Trafficking Protocol the wording has been too weak to ensure compliance.³⁰⁰ The Irish State, in failing to recognise the problem of trafficking, has evidenced this tepid response. The myopic assessment the Irish State has made on the trafficking situation in Ireland has made law reform in this area a low priority. Hence 6 years on from the signing of the Palermo Trafficking Protocol, the Irish legal framework has yet to contain detailed provisions about sex trafficking. Until states, as collectives or independents, become committed to the elimination of trafficking, the law will continue to provide piecemeal provisions to the victims.

5.3 Recognising the Status of Trafficked Women as Victims of Human Rights Violations

The labelling of trafficked women as immigrants, rather than as victims of human rights violations, constitutes the greatest failing of current anti-trafficking frameworks. As this paper has frequently argued, recognition of the human rights of trafficked women is crucial to the creation of a humane and victim-orientated anti-trafficking framework. The Irish State has failed unequivocally in this regard. The trafficked woman is an ‘illegal immigrant’ within the Irish immigration system, and merits no additional services or security measures. State initiatives which ostensibly seek to protect the trafficked person are, upon further reading, designed to facilitate the state border control. The incumbent Immigration and Residence Bill is expected to provide for the temporary leave to remain of trafficked women who co-operate with state inquiries. By denying leave to remain to those trafficked women who ‘don’t co-operate’, trafficked women are required to barter for the most basic protection. They are reduced from being victims of human rights violations to being pawns of a crime and immigration-orientated state. By failing to acknowledge the trafficked woman as a victim of human rights violations, the Irish State shirks its duties under the principles of international law.

³⁰⁰ Article 7 of the Palermo Trafficking Protocol.

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