

**A CRITICAL ANALYSIS OF LEGAL RESPONSES TO
TRAFFICKING: A CASE STUDY OF CHILD DOMESTIC
WORK**

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Liverpool for the degree of Doctor in Philosophy

By

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ABSTRACT

This thesis examines the UK response to child trafficking, taking child domestic work as a case study. The UK's approach has been influenced by, and created alongside, European and International responses. The United Nations Trafficking Protocol has been particularly significant in terms of providing a legal definition of trafficking which has subsequently been used as the basis for the definition contained within the Council Europe Convention. As a result, child trafficking involves the movement of a child either internationally across state borders, or internally within one state, for the purpose of exploitation.

This thesis takes a child-focused approach to human trafficking and examines whether the UK has created a legal response which accounts for all trafficked children regardless of the type of exploitation they experience and whether the enforcement of the law accurately reflects the law. Human trafficking laws have developed primarily with the aim of preventing transnational organised crime and protecting States' borders. However there is also emerging recognition of victims' human rights. A set of assumptions surround human trafficking and these have influenced the current enforcement of the law and created a stereotypical image of the trafficked child. These assumptions are explored and applied to children exploited in domestic work to assess the protection provided to this particular group of trafficked children and more widely, to those trafficked children who do not 'fit' into the stereotypical image.

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PREFACE

This thesis reflects the law as of 1st September 2011.

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I n t r o d u c t i o n

1. INTRODUCTION

Human trafficking involves the movement of individuals, internally within one state or across international borders, for the purpose of exploitation.¹ This thesis explores how the legal framework that has developed to challenge trafficking of human beings reflects the assumptions underlying the conception of the phenomenon and the limits this may place on the effective operation of this legal framework. It takes a specifically child-focused approach and considers the stereotypical image of the trafficked child that has been created as a result of the assumptions. This approach demonstrates the negative impact the creation of this image has on the responses to child trafficking situations which fall outside the parameters of the image presented. One particular form of exploitation, child domestic work, is the focus of this thesis as it assists in illustrating these negative elements.

2. THE MAIN ASSUMPTIONS SURROUNDING CHILD TRAFFICKING AND THEIR CONSEQUENCES

The legal responses to trafficking of human beings have been strongly informed and shaped by a set of assumptions. It is important to identify and discuss each assumption and how it applies to the situation of trafficked children. Each of the assumptions is discussed at different stages throughout the thesis. It is demonstrated that these assumptions have the effect of obscuring some trafficking situations and therefore contributing to the inability of responses to safeguard all trafficked children rather than just a select group.

¹ As defined by Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, (2000 A/55/383 Annex II) supplementing the United Nations Convention against Transnational Organised Crime 2000 (2000, A/55/383 Annex I).

2.1 Sexual Exploitation and Gender

Human trafficking is often assumed to occur for the purpose of sexual exploitation. This assumption has developed due to the historical association between human trafficking and the sexual exploitation of women in prostitution.² Due to this association, women have been viewed, primarily, as victims³ and many countries' trafficking laws have been developed within this context.⁴ This has resulted in a disparate focus being placed on trafficking and prostitution which in turn has meant that less attention has been given to other forms of non-sexual exploitation. Although there is now growing recognition that there is a more diverse range of sectors and issues involved and that trafficking affects not only women, but men and children (both male and female), sexual exploitation remains the frequent focus of research⁵ as does the dominant focus on women.⁶

² For example see the International Agreement for the Suppression of White Slave Traffic 1904, 1 L.N.T.S.83; the International Convention for the Suppression of White Slave Traffic 1910, the International Convention for the Suppression of Traffic in Women and Children 1921, 8 L.N.T.S.278; the International Convention on the Suppression of Traffic in Women for Full Age 1933, 150 L.N.T.S. 431; the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, 96 U.N.T.S..271; and the UN Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 U.N.T.S. 13.

³ See for example F Bettio, and TK Nandi, 'Evidence on women trafficked for sexual exploitation: a rights based analysis' (2010) 29(1) European Journal of Law & Economics 15.

⁴ J Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo (ed), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work and Human Rights* (Paradigm Publishers 2005) 10.

⁵ See for example S Ramage, 'Trafficking for prostitution' (2007) 171 Criminal Lawyer 6-8.

⁶ V Munro, 'A Tale of Two Servitudes Defining and Implementing A Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 Social Legal Studies 91, 102.

An issue related to the focus on sexual exploitation is gender. Issues of gender are assumed to be relevant where the intended exploitation is sexual; however this assumption is not apparent in cases where the exploitation is of a non-sexual nature. There is therefore a lack of recognition of the role gender may play throughout the trafficking process regardless of the type of exploitation involved. As already stated, women are primarily viewed as victims of trafficking with the result that women's roles as perpetrators of trafficking, involved in the recruitment, transfer and exploitation of the child are often overlooked.

2.2 Transnational Organised Crime and the Association with Smuggling

There is an assumption that human trafficking invariably involves transnational organised criminal groups. The fact that the UK Human Trafficking Centre is part of the Serious Organised Crime Agency (SOCA) is an indication of the UK's focus on organised crime, however it is acknowledged that this does not automatically mean that this is the only focus of the Centre. The focus on organised crime is also clearly apparent throughout the recently published UK Government's Strategy to tackle human trafficking which presents trafficking as an '*international organised crime, with the exploitation of human beings for profit at its heart*'.⁷

Discussion of human trafficking often evokes an emotive response and frequently reflects assumptions about the purposes and motivations behind trafficking in human beings. The focus on organised crime is apparent in this statement made in January 2008, by the then Home Secretary, Jacqui Smith stating that trafficking is:

⁷ Home Office 'Human Trafficking: The Government's Strategy' July 2011 at 5, para 1. available at <<http://www.homeoffice.gov.uk/publications/crime/human-trafficking-strategy>> [last accessed 15.10.2011].

*'One of the vilest crimes that threaten our society is the trafficking of human beings. This horrendous crime is the product of organised criminality, whose business is to make money from human misery.'*⁸

The main consequence of this focus is that it neglects the more informal arrangements, where private individuals rather than organised criminal groups facilitate trafficking. Private individuals will either intend to exploit the child themselves or deliver them to another person knowing that they are subsequently going to be exploited.

Under international law trafficking in human beings was first defined in Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000).⁹ Due to the fact that it was necessary for the Trafficking Protocol to be read in conjunction with the Convention on Organised Crime, there was a requirement that an element of organised crime was involved in order for an offence to be committed under Article 3 of the Trafficking Protocol. The more informal trafficking situations were therefore not accounted for. However, following the adoption of the Council of Europe Convention on Human Trafficking in 2005, the definition of trafficking contained within that Convention recognised that organised crime was not always a necessary component and more informal trafficking situations may occur. Although these more informal arrangements still constitute trafficking in human beings, they are seldom the focus of trafficking responses in practice, with the focus

⁸ Home Office press release 'Home Secretary Moves to Ratify the Council of Europe Convention against Trafficking in 2008' 14 January 2008 available at <http://www.gov-news.org/gov/uk/news/home_secretary_moves_ratify_council_europe/47508.html> [last accessed 31.7.2011].

⁹ Hereafter Trafficking Protocol.

remaining predominantly on organised crime. For example, to date, police operations in the UK have focused on organised crime with operations such as Pentameter I and II focusing on the sexual exploitation of women in prostitution and operation Ruby in 2008 which concerned agriculture work.¹⁰ This remains the prominent focus despite the fact that UK law itself includes the possibility that organised crime may not be involved.¹¹

The focus on organised crime is linked with immigration offences and smuggling of human beings. Often human trafficking is treated synonymously with human smuggling and dealt with as an immigration offence. This has resulted in an assumption that tighter border controls will help to prevent trafficking in human beings.¹² Approaching human trafficking as a problem which involves immigration offences is potentially problematic. An assumption that tightening borders will help to eradicate the problem could actually have the opposite effect. This could, in fact, drive individuals towards traffickers and making them more vulnerable to trafficking if there are fewer means of entering the UK legally.¹³

The view of human trafficking as a problem associated with smuggling is also problematic in defining the various overlapping legal concepts. This applies not only to the terms human trafficking and smuggling, but also

¹⁰ Pentameter available <http://www.cps.gov.uk/Publications/docs/pentameter_0706.pdf> [last accessed 04.11.2011]; Operation Ruby available <http://www.policeoracle.com/news/Operation-Ruby-Hits-Human-Trafficking-Gang_17797.html> [last accessed 04.11.2011].

¹¹ Section 4 Asylum and Immigration (treatment of claimants, etc) Act 2004 and sections 57-59 Sexual Offences Act 2003.

¹² Home Office White Paper, CM5387, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain' (2002) at 92 available at <www.archive2.official-documents.co.uk/document/.../cm5387.pdf> [last accessed 12.10.2011].

¹³ F Pickup, 'More words but no action?' (1998) 6(1) Gender and Development 44, 47.

slavery and servitude. It is crucial to clarify and separate the various terms as although there is some overlap, each involves different elements. Without clear definitions there is a lack of true understanding of the phenomenon and the risk of ineffective legal responses.

2.3 An Increased Rate in the Occurrence of Human Trafficking

Human trafficking is reported to be a crime which is 'growing at an alarming rate'.¹⁴ This perceived increase is in some part created through the use of statistical information and research that has been undertaken on human trafficking. Using this limited data has resulted in an assumption that trafficking is an increasing problem. The consequences of this assumption are potentially far-reaching with policy responses being influenced by such claims.

The perceived increase in the phenomenon is based on what some consider 'guesstimates'.¹⁵ Generalisations are being made based on statistical evidence that only provides a glimpse of the problem within particular geographical areas or sectors in an attempt to provide a global estimate of the extent of the problem.¹⁶ There is an inherent difficulty in collecting reliable data which can provide a true picture of the extent of the problem of trafficking due to the hidden nature of the phenomenon. This is problematic, and distorts the picture of the true extent of the global problem. A different approach to assessing the extent of the problem needs to be considered.

¹⁴ S Stoecker, 'The Rise in Human Trafficking and the Role of Organized Crime' (2000) 8(1) *Demokratizatsiya: The Journal of Post-Soviet Democratization* 129, 129.

¹⁵ H Askola, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13(2) *European Law Journal* 204, 205.

¹⁶ *Ibid.*

2.4 A Homogenous Group of Children

A trafficked child is assumed to form part of a homogenous group of all trafficked children, sharing the same vulnerabilities, needs and characteristics, whose best interests would be served by returning them to their family. However, this ignores the fact that children's needs vary depending on the type of exploitation, the conditions experienced and the individual child. It is also often assumed that trafficked children arrive in the UK unaccompanied and claim asylum with the focus surrounding their unaccompanied status.¹⁷ This assumption fails to acknowledge that not all trafficked children arrive unaccompanied or claim asylum.¹⁸ Some children will arrive in the UK accompanied by an adult claiming to be the child's relative, often using false documents and therefore these children are not claiming asylum.¹⁹ Although there is some acknowledgement that children may be accompanied upon entry into the UK, the dominant focus placed on unaccompanied children means the trafficking responses potentially overlook other groups of trafficked children. This focus may be due to the fact that more is known about unaccompanied children arriving in the UK as they come to the notice of the Border and Immigration Agency at the point of entry.

2.5 The Family are Assumed to be the Best Place to Return a Child to

When a child is identified as a trafficking victim, the child's family is usually assumed to be the best place to return the child. The overarching

¹⁷ P Conroy, 'Trafficking in Unaccompanied Minors in the European Union Member States' International Organization of Migration Research Report (2003), available at <www.iom.int/jahia/webdav/site/.../shared/.../Ireland_trafficking.pdf> [last accessed 12.10.2011].

¹⁸ ECPAT UK 'Child Trafficking in Birmingham, Coventry and Solihull: A report on the evidence and agency responses to child trafficking' (2007) 4 available <<http://www.ecpat.org.uk/content/ecpat-uk-reports>> [last accessed 18.04.2012].

¹⁹ See Local Safeguarding Children Board: Cheshire, available <http://www.cheshirewestlscb.org.uk/?page_id=261> [last accessed 20.04.2012].

emphasis on rehabilitation and reintegration of child victims back to their families and communities is viewed as '*an unproblematic strategy for it is assumed to provide adequate protection and safety for victims of trafficking*'.²⁰ The assumption that families are best placed to reintegrate a child when it is discovered that they have been trafficked is flawed. This assumption fails to acknowledge the potential role the child's family may play in the trafficking process by providing their consent to the child's removal from their home and thereby taking an active role in the trafficking of the child.

This is particularly relevant where traffickers abuse the tradition of private fostering. In some cases parents will think they are acting in their child's best interests having been promised that the child will experience a better life than they can provide.²¹ In other cases parents may be entirely aware that their child will be in domestic work in a private household and may have received some incentive to provide their consent to what is presented to the outside world as a private fostering arrangement. Therefore, under some circumstances it would not necessarily be in the child's best interests to return them to their family where they may be at risk of re-trafficking. UK law does provide for the situation in the child's country of origin to be assessed before a child is returned to their family and any decision is made in the best interests of the child.²² This helps to protect children from potentially being re-trafficked where their own family was involved in

²⁰ Sanghera (n4) 5.

²¹ L Shelley, 'Human trafficking as a form of transnational crime' in M Lee (ed) *Human Trafficking* (Willian Publishing 2007) 128.

²² UK Department for Education Consultation, 'Working together to safeguard children: Safeguarding children who may have been trafficked' (2011) 28, available <<http://www.education.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1497&menu=3>> [last accessed 28.04.2012].

their original trafficking. However this is providing that the true picture of parents' involvement is discovered.

2.6 Responding to Children in the Same Way as Women is Assumed to be Mutually Beneficial

Where children are trafficked they are often dealt with in the same way as women with the same response being seen as mutually beneficial to both groups.²³ Approaching child trafficking in the same way as trafficking of women does not necessarily address the particular needs of child victims and the legal and policy measures are not fully responsive to all trafficked children. Children in domestic work are partially overlooked within the responses. The problems faced by trafficked children are often conflated with those faced by women and discussed in the same context and is clearly based primarily on an adult template. The particular vulnerabilities of children such as their *'...dependence on older family members and society...naiveté and many other reasons...'*²⁴ can make them more susceptible to trafficking and therefore the child trafficking response requires a different response to that taken in relation to the trafficking of adults. As Fortin stated: *'Children's 'protective rights' arise from their innate dependence and vulnerability and an obvious need for nurture, love and care, both physical and psychological.'*²⁵

2.7 The Stereotypical Image of the Trafficked Child

The overall effect of this set of assumptions has been to create a stereotypical image of the trafficked child. This child is one who is

²³ Sanghera (n4) 6.

²⁴ M Vinkovic, 'The "unbroken marriage" – trafficking and child labour in Europe' (2010) 13(2) Journal of Money Laundering Control 87, 94.

²⁵ J Fortin, *Children's Rights and the Developing Law* (3rd ed, CUP 2009) 17.

trafficked internationally by an organised criminal group, entering the UK as an unaccompanied child who claims asylum and who is subsequently sexually exploited in prostitution. This child is treated as part of a homogenous group with identical needs as every other trafficked child whose best interests are served by returning them to their family.

3. CHALLENGING THE STEREOTYPE: A CASE STUDY OF CHILD DOMESTIC WORK

This thesis uses child domestic work in order to challenge the stereotypical image of the trafficked child and explore the impact the assumptions have on the current responses to the problem. The child who is the focus of this case study is a female child in domestic work. This focus on female children is due to the disproportionate number of girls who are exploited in domestic work.²⁶ Focusing on girls also allows the gendered nature of child trafficking to be discussed in terms of discrimination against the child due to her gender, as well as exploring women's roles within the context of child trafficking.

A particularly unusual aspect of relocating children internationally for the purposes of domestic work is the use of private fostering arrangements which have been agreed with the child's parents in the country of origin. These arrangements are a specific focus of this thesis. Traffickers abuse and manipulate the tradition of private fostering, often persuading parents that their child will have a better life and benefit from opportunities that would otherwise be unavailable to them.²⁷ Child trafficking involving the child's own parents, private fostering arrangements and the exploitation

²⁶ J Blagborough , 'Child Labour: A Modern Form of Slavery', (2008) 22 Children & Society, 179, 180.

²⁷ K Manzo, 'Exploiting West Africa's children: trafficking, slavery and uneven development' (2003) 37 (4) Area 393, 397.

of the child in domestic work presents challenges for the responses to child trafficking.

The focus of this thesis is a child in domestic work that has been trafficked across international borders, arriving in the UK accompanied by an adult claiming to be a relative of the child. This child has been trafficked through a more informal arrangement with no involvement of organised crime. The child's own family has consented to the child leaving their home and they present this as a private fostering arrangement made between the family and the individual who is taking the child. These children in domestic work do not conform to the image presented of the stereotypical trafficked child. These various elements help to expose the limitations of the existing trafficking framework²⁸ to protect children and their rights when they do not conform to the stereotypical image of a trafficked child.

There is a distinction drawn throughout the thesis between 'child domestic workers', 'child domestic labour' and 'domestic work'. For the purpose of this thesis, reference to 'child domestic workers' refers to children who are above the international minimum legal age to enter employment²⁹ and who view themselves as having voluntarily entered domestic work as a form of employment. In contrast, 'child domestic labour' is used to describe the situation where there is exploitation of a child's labour and it is not an employment relationship. Any reference to 'domestic work' will refer generally to the actual work such as cooking, cleaning, washing, ironing,

²⁸ Throughout the thesis reference to 'trafficking framework' is referring to the policy responses, enforcement of the law, debates and discussions surrounding trafficking, rather than the legal provisions themselves. Where reference is being made to the legal provisions, it will be referred to as the 'trafficking legal framework'.

²⁹ As defined by the International Labour Organisation Minimum Age Convention 1973 (C138).

childcare and other work associated with a domestic household, rather than defining the status of the children involved.

4. CONTRIBUTION OF THIS THESIS TO THE CURRENT BODY OF RESEARCH

The thesis challenges the dominant conceptualisations and highlights the limitations of the current responses by taking a particular aspect of child trafficking (domestic work) as a case study. This enables the heterogeneity of child trafficking responses to be exposed and permits a more nuanced approach to be suggested.

Current research into human trafficking has involved various perspectives and is fairly extensive. The statistical evidence of trafficking and the difficulties in collecting reliable data have been the subject of research.³⁰ So too have the methodological problems involved when conducting research into human trafficking, due primarily to the hidden nature of the phenomenon.³¹ Research on human trafficking has also focused on particular geographical areas and sectors of labour.³² This focus on specific geographical areas also applies to research involving child trafficking.³³ Problems have been identified where victims are prosecuted for their part in the criminal activities they have been forced to undertake

³⁰ For example see F Laczko and MA Gramegna 'Developing Better indicators of Human Trafficking' (2003) 10(1) Brown Journal of World Affairs 179.

³¹ See G Tyldum and A Brunovskis, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking' (2005) 43(1/2) International Migration 17.

³² See for example M Viuhko, 'Human Trafficking for Sexual Exploitation and Organized Procuring in Finland' (2010) 7(1) European Journal of Criminology 61; H Becker, 'Victims of human trafficking in Ireland – caught in a legal quagmire' (2010) 24(2) Journal of Immigration Asylum and Nationality Law 134.

³³ M Serban, 'European movement: child trafficking in Romania' (2008) 251 Childright 22.

and research has considered how this can be prevented to ensure that victims are protected rather than treated as criminals.³⁴

Where children are specifically considered, research has encompassed a wide range of issues, for example the relationship between trafficking and child labour or the use of children within situations of conflict as child soldiers and the protection that international law can provide these children and how this can be improved.³⁵ Inter-country adoption and the relationship with trafficking has been the subject of research as has children's rights within the context of trafficking and immigration.³⁶

When domestic work is the focus of academic research it has tended to focus on adult female migrant workers, their rights and how women who have migrated for employment in domestic work can instead find themselves exploited in unpaid domestic servitude.³⁷ The focus on women in domestic work is more prevalent than a focus on children in this situation as a result of trafficking. There is a distinct lack of academic research focusing on trafficking resulting in children being exploited in domestic work in the UK. Additionally, although private fostering has been

³⁴ L Cowne, 'Victims of human trafficking protection from punishment' (2011) 7 Archbold Review 4.

³⁵ Vinkovic (n20); J McKnight, 'Child soldiers in Africa: a global approach to human rights protection, enforcement and post-conflict reintegration' (2010) 18(2) African Journal of International and Comparative Law 113.

³⁶ See for example BN Suibhne, 'Inter-country adoption: intersecting forces of globalisation and international law' (2010) 2 Irish Journal of Family Law 39; S Drew and D Nastic, 'The immigration reservation to the Convention on the Rights of the Child: an insuperable difficulty no more' (2009) 23(2) Journal of Immigration Asylum and Nationality Law 119 .

³⁷ For example see V Mantouvalou, 'Servitude and forced labour in the 21st century: the human rights of domestic workers' (2006) 35(4) Industrial Law Journal 395; 'Employment and discrimination: treatment of unpaid household servant' (2005) 6 European Human Rights Law Review 660 (note).

the subject of some research,³⁸ there has been very limited academic research making the link between private fostering and trafficking.³⁹

The thesis adds to and builds on the existing body of research by considering the capacity of the current trafficking framework to protect children and their rights using child domestic work as a case study and making the link with the tradition of private fostering. This focus is taken due to the fact that there are specific elements involved in this type of exploitation which pose particular challenges to the regulation of child trafficking. For example, as discussed earlier, family members are much more likely to be involved in this form of trafficking and it is more likely to be girls who are trafficked for this purpose. Domestic work challenges the assumptions surrounding trafficking and the stereotypical image of the trafficked child that has been created as a result of these assumptions.

5. METHODOLOGICAL AND CONCEPTUAL APPROACH

The thesis takes a desk-based interdisciplinary approach to the research, with a critique of the multi-levelled legal framework at International, European and domestic levels. The focus throughout the thesis is on UK action to deal with this phenomenon although it is essential to discuss this within the context of European and international law as it applies to the UK.⁴⁰ The policy framework and campaigns are considered and an examination of the statistical and empirical data undertaken. A review of existing research has also been conducted to place this thesis within the wider body of research on human trafficking.

³⁸ For example see C Sellick, 'Independent fostering providers: predators or pioneers, partners or procured?' (2011) 35(1) Adoption and Fostering Journal 33; E Freeman, 'Somebody else's child: everybody's responsibility' (2009) 253 Childright 19.

³⁹ ECPAT UK, 'Crossing borders: the trafficking of children into the UK.' (2005) 218 Childright 7.

⁴⁰ Reference to 'European' refers to both the Council of Europe and the European Union.

A child-focused approach has been taken, with the child rather than adults at the centre of the research. The thesis is not only child-focused in terms of the attention given to the individual child, but it also considers children's formal legal rights at International, European and domestic level, particularly through the examination of the United Nations Convention on the Rights of the Child 1989 (UNCRC) and the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR).

Theoretical perspectives on children's rights, their welfare and children's autonomy form part of the basis of the child-focused approach adopted by this thesis. There has been much debate about whether children are actually right-holders. For example, Hart considers that babies cannot be right-holders as they are incapable of having the competence to make choices for themselves.⁴¹ Other academics focus on parental rights rather than viewing children as right-holders.⁴² It has been argued that parents are in the best position to make decisions for their own children and should retain the right to raise them in the way they see fit. From this perspective, this is in itself viewed as beneficial to the child without the need for children themselves to have rights and without the need for the State to intervene in the family.⁴³ However there are many others, such as Michael Freeman, that stress the importance of children having rights rather than being the

⁴¹ HLA Hart, *Law, Liberty and Morality* (OUP, 1968) 82.

⁴² See for example J Goldstein and A Fried and A Solnit, *Beyond the Best Interests of the Child* (Free Press, 1973).

⁴³ M Guggenheim, *What's Wrong With Children's Rights?* (Harvard University Press 2005) 46.

objects of concern of parents and others.⁴⁴ If it is accepted that children do have rights, there is also debate over what rights they have.

Two key theories concerning children's rights have been the subject of debate, the 'choice theory' and the 'interests theory'. The choice theory 'assumes that the person asserting those rights will have a choice as to when and whether to exercise them.'⁴⁵ However this implies that younger children who do not have the competence to make these choices are therefore not right-holders which Fortin sees as an 'unattractive logic'.⁴⁶ Academics such as Hart⁴⁷ and Feinberg⁴⁸ supported the choice theory whilst others such as such as Eekelaar favoured the interests theory instead.⁴⁹

The interests theory refers to children's interests rather than rights. The theory revolves around the question of whether the child has an interest that is in need of protection, rather than whether the child is capable of making a choice in relation to their rights. Eekelaar categorised children's interests into basic, developmental and autonomy interests. He described basic interests as those involving a child's 'physical, emotional and intellectual care', developmental interests as children's capacities being

⁴⁴ M Freeman, 'Why it Remains Important To Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 16.

⁴⁵ T Buck, *International Child Law* (2nd edn, Routledge, 2011) 25.

⁴⁶ J Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press, 2009) 12.

⁴⁷ See HLA Hart, 'Are There Any Natural Rights?' in J Waldron (ed), *Theories of Rights*, (Oxford University Press, 1984).

⁴⁸ See J Feinberg, *Rights, Justice and the Bounds of Liberty: essays in social philosophy* (Princeton University Press, 1980).

⁴⁹ J Eekelaar, *Regulating Divorce* (Clarendon Press 1991).

‘developed to their best advantage’ and autonomy interests as children being free to make independent decisions in their lives.⁵⁰ He did however state that where there was any conflict between the categories the basic and development rights would prevail.⁵¹ From the identification of interests it was claimed that a collection of ‘moral rights’ would emerge, some of which would transform into ‘legal rights’. However the interests theory has been criticised due to the uncertainty of which interests can transform into moral rights and which of these are capable of being converted to legal rights.⁵² This thesis does not claim to add to this theoretical debate; instead it takes its starting position accepting that children are right-holders and focuses on using the existing theory and applying it within a child trafficking context.

Consideration is also given to the heterogeneity of the trafficking framework’s approach to child trafficking. This is facilitated by questioning the extent of individualisation that is apparent within the legal framework whilst also considering the level of individualisation that is both necessary and appropriate within the trafficking legal framework in order to protect children and their rights.

6. RESEARCH STRATEGY

6.1 UNCRC

The United Nations adopted the Universal Declaration of Human Rights in 1948. Although a range of international human rights treaties have been adopted it was not until 20th November 1989 (after ten years of

⁵⁰ J Eekelaar, ‘The emergence of children’s rights’ (1986) 6(2) Oxford Journal of Legal Studies 161, 170-171.

⁵¹ Ibid, 170.

⁵² T Buck, ‘*International Child Law*’ (2nd edn, Routledge, 2011

drafting) that the United Nations Convention on the Rights of the Child (UNCRC) was adopted.⁵³ The aim of the UNCRC was to increase the international protection of children's human rights.⁵⁴ The UNCRC is the most ratified international human rights instrument worldwide. There are only two countries⁵⁵ that have not ratified the convention and as such it is the most appropriate legal instrument to measure the impact that trafficking has on children's rights. This is despite the fact that the UNCRC is not binding on UK courts since the Convention has not been explicitly incorporated into UK law. The UK is however internationally bound by the Convention and there is some indication that the Convention is being referred to more frequently by English courts⁵⁶ and it is also used as an interpretative guide by the European Court of Human Rights.⁵⁷ It is the main human rights instrument specifically for the protection and empowerment of children and is the '*point of reference for all questions relating to children's rights*'.⁵⁸ It is the first international instrument which focuses solely on children's rights⁵⁹ and contains a range of civil, political, economic, social and cultural rights for children within one document. The UK signed the Convention on 19 April 1990 and ratified it on 16 December 1991 and from that point has been bound by it in international law.⁶⁰

⁵³ 1577 U.N.T.S. 3

⁵⁴ H Van de glind, and J Kooijmans 'Modern-Day Child Slavery' (2008) 22 Children & Society 150.

⁵⁵ United States and Somalia.

⁵⁶ For example *Re E (Children)* (FC) [2011] UKSC 27.

⁵⁷ For example *Maire v Portugal*, Application No.48206/99, (2006) 43 EHRR 13, para 72.

⁵⁸ Van de glind, and Kooijmans (n48) 154.

⁵⁹ A 'child' is defined in Article 1, UNCRC as anyone under the age of 18.

⁶⁰ UNICEF available < <http://www.unicef.org/crc/>> [last accessed 27.10.2011].

The UNCRC is underpinned by four general principles, non-discrimination,⁶¹ best interests,⁶² right to life, survival and development⁶³ and the right of the child to be heard in all matters affecting them.⁶⁴ Each of these general principles is required to be considered when any of the remaining Convention rights are an issue and should be reflected in domestic law.⁶⁵

Children who are trafficked and exploited in domestic work within the UK are entitled to all the rights contained in the Convention without discrimination on any basis. The general principle of non-discrimination should be integrated into the implementation of all other articles contained in the Convention. Additionally Article 2 UNCRC permits positive action to be taken in relation to particularly disadvantaged or

⁶¹ Article 2, UNCRC - All the rights contained with the convention apply to all children without discrimination on the basis of 'the child's, parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

⁶² Article 3, UNCRC – In all actions concerning children the best interests of the child shall be a primary consideration and the child will be provided with protection and care as is necessary for his or her well-being.

⁶³ Article 6, UNCRC - States Parties recognize that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child.

⁶⁴ Article 12, UNCRC - States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. See *Chapter Seven* for further discussion of Article 12.

⁶⁵ Article 4 UNCRC – States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

vulnerable groups,⁶⁶ of which trafficked children would be one such group.

Similarly Article 6 UNCRC is also of particular relevance to children exploited in domestic work. States are required to implement measures that are aimed not only at ensuring the survival of the child but also to achieving the optimal development for all children in terms of their physical, mental, spiritual, moral, psychological and social development. Children trafficked and exploited in domestic work are often deprived of an education, time to play, socialise and are often removed from their culture and community. Therefore children in these circumstances are not benefiting from their rights under Article 6 UNCRC and are generally failing to achieve their optimal development.

Children also have a right to be heard under Article 12 UNCRC. This requires States to encourage the active participation of the child in matters which affect them. This involves not only listening to children but also giving due weight to their views dependent on their age and maturity on an ongoing basis rather than in isolated situations.⁶⁷ This right to be heard is applied within the thesis particularly in relation to adolescents who are exploited in domestic work. This allows the theoretical concepts of welfare and autonomy to be explored and applied within the context of migration, employment and trafficking.

It is important to acknowledge that domestic work is not always an exploitative situation for children. However, where domestic work is exploitative, there is potential for a child's rights under the UNCRC to be

⁶⁶ General Comment No.5 'General measures of implementation of the Convention on the Rights of the Child ' CRC/GC/2003/5.

⁶⁷ Ibid, para. 12.

violated. When a child is prevented from having the opportunity to receive an education, which is often the case for children exploited in domestic work, this is a violation of their right under Article 28 UNCRC. Education encompasses both the provision of basic skills and the development of the intellectual, spiritual and emotional potential of the child.⁶⁸ The Committee on the Rights of the Child considered a child's right to education under Article 28 UNCRC and the aim of education under Article 29 UNCRC and stated:

*'The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence.'*⁶⁹

This statement demonstrates the importance of children having access to an education and the potential long-term impact on those children exploited in domestic work that are denied this opportunity.

Children exploited in domestic work often have to work excessively long hours and have little or no free time to rest or play.⁷⁰ This is a violation of their right under Article 31 UNCRC which states that children should have the right *'to rest and leisure, to engage in play and recreational activities*

⁶⁸ J Delbrück, 'The Right to Education as an International Human Right' (1992) 35 German Yearbook of International Law 92, 94.

⁶⁹ Committee on the Rights of the Child, General Comment No.1 'The aims of education' (2001) CRC/GC/2001/1 available <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> [last accessed 03.11.2011].

⁷⁰ M Woodhead, 'Psychosocial Impacts of Child Work: A Framework for Research, Monitoring and Intervention' (2004) 12 International Journal of Children's Rights 321, 344.

appropriate to the age of the child and to participate freely in cultural life and the arts'. This right has been viewed by some as a luxury when compared to other rights in the Convention.⁷¹ This was recognised by the Committee on the Rights of the Child who stated:

*'The right to rest is essential for children and failure to respect it can generate serious negative physical, psychological, cognitive and social consequences. The rights to leisure, play, and to a cultural and artistic life are also key human rights enabling every single young child to fully develop its potential skills, abilities and personality'*⁷²

The Committee also recognised that the right under Article 31 could *'...often be endangered by all manner of external constraints...'*⁷³ and children could be prevented from enjoying this right. One example given by the Committee was of children carrying out excessive chores within their own home (a problem they stated as predominantly affecting girls) and being denied their right to rest and leisure under Article 31 UNCRC.⁷⁴ Therefore it could safely be assumed that children exploited in domestic

⁷¹ A Alen and others, *Commentary on the United Nations Convention on the Rights of the Child, Article 31: The Right to Leisure, Play and Culture* (Martinus Nijhoff Publishers, 2006), 17.

⁷² Committee on the Rights of the Child, Report of the Thirty-Fifth Session, (2004) CRC/C/137, Annex II, paragraph 10, available <<http://tb.ohchr.org/default.aspx?ConvType=20&docType=36>> [last accessed 05.11.2011].

⁷³ Committee on the Rights of the Child, Report on the Thirty-Seventh Session (2005) CRC/C/143, paragraph 554 available <<http://tb.ohchr.org/default.aspx?ConvType=20&docType=36>> [last accessed 11.11.2011].

⁷⁴ Committee on the Rights of the Child, General Comment No. 7, 'Implementing child rights in early childhood' (2005) CRC/C/GC7/Rev.1 available <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> [last accessed 03.11.2011].

work will not enjoy their rights under Article 31 UNCRC given the constraints that are placed on them. They are controlled and forced to work very long hours carrying out a range of tasks, they are usually confined to the house and are not permitted to socialise with others. It has been stated that:

‘The right to rest is as important as other fundamental rights, such as the rights to nutrition, clothing and housing; not respecting this right can be considered a form of abuse. Children who habitually suffer from insufficient or poor-quality sleep can be more vulnerable to physical and psychological health problems and to developmental, social and learning deficiencies.’⁷⁵

Denial of the right to rest may therefore have a severe detrimental impact on children in domestic work and it illustrates the importance of protecting children from exploitation. This directly links with the child’s right to be protected from performing work that is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development under Article 32. Domestic work often involves excessive hours of work, but also involves carrying out tasks that are often beyond the capabilities of a child.

Use of Article 3 UNCRC⁷⁶ enables consideration of the best interests of the child(ren) who has been trafficked and exploited in domestic work.

⁷⁵ A Alen and Others (n15), 19.

⁷⁶ Article 3 (1) UNCRC In all actions concerning children. Whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas

This Article is framed in such a way that it requires not only the consideration of children as a group, but also the individual child. Article 3 UNCRC refers to '*all actions concerning children*'. The phrase '*concerning children*' represents a reference to children as a group separate from adults. It is argued that the trafficking framework fails to fully account for differences between experiences of adults and children.

Taking the best interests of children as a group into account applies not only in terms of actions which affect them directly such as education or the care system, but also actions which indirectly affect them for example issues relating to the environment or housing.⁷⁷ Therefore '*all actions*' encompasses a wide range of activities and requires that children's rights and interests are considered in all circumstances, for example in law, policy, administrative or court decisions, even where children are only indirectly affected.⁷⁸ The scope of the duty to consider the best interests of children as a group is very broad and it has been suggested that '*consideration of best interests should be built into national plans and policies for children and into the workings of parliaments and government, nationally and locally.*'⁷⁹ Therefore trafficked children should be considered separately from trafficked adults in all actions taken within this context.

of safety, health, in the number and suitability of their staff, as well as competent supervision.

⁷⁷ General Comment No.7 on 'Implementing child rights in early childhood' CRC/C/GC/7/Rev.1, para.13(b).

⁷⁸ General Comment No.5 'General measures of implementation of the Convention on the Rights of the Child (Articles 4, 42 and 44, para. 6)' CRC/GC/2003/5, para. 12.

⁷⁹ Unicef '*Implementation Handbook for the Convention on the Rights of the Child*' (United Nations Publications 2007) 36.

Article 3 UNCRC also requires a focus on the individual child with public or private social welfare institutions, courts of law, administrative authorities or legislative bodies ensuring that the best interests of **the** child are a primary consideration. Applying this to children exploited in domestic work, it is crucial that the individual child is considered as each child will have different physical and psychological needs following exploitation in domestic work dependant on their age, levels of violence experienced and the general conditions to which they have been subjected.

The application of the individual child's best interests is apparent within English courts where there is a need to decide any issue relating to the child's upbringing.⁸⁰ This is most evident in the context of contact or residence decisions following the breakdown of the family unit or in cases of child protection. The principle is described within English law as the 'welfare principle'.⁸¹ However the application of Article 3 UNCRC is broader and applies to all actions concerning children not only those which relate to the child's upbringing. Section 1 of the Children Act 1989 applies to decisions made by courts whereas Article 3 UNCRC clearly states, it is not only courts that are required to take the approach of making the individual child's best interests a primary consideration, but also legislative and administrative bodies. The other difference is that the welfare principle requires the child's welfare to be **the** court's paramount consideration, whereas Article 3 UNCRC requires the best interest of the child to be **a** primary consideration. This is an important difference, as the former places the welfare of the child before the interests of parents⁸²

⁸⁰ *Re X (A Child) (Injunctions Restraining Publication)* [2001] 1 FCR 541.

⁸¹ Section 1(1), Children Act 1989.

⁸² *J v C* [1970] AC 668.

whereas the latter places the best interests of the child alongside the interests of others that require equal consideration. Within the thesis the best interests of children are of particular concern within the context of the decisions made by families to consent to their children entering what is presented as a private fostering arrangement. This allows consideration of the role of Article 3 UNCRC in the decisions parents make on behalf of their children. Additionally the concept of best interests and the child's welfare are also relevant and discussed in the thesis in relation to the evidence of the use of Article 3 UNCRC in the legislative responses to child trafficking generally and also in the context of identification of a child as a trafficked child.

6.2 Article 3 UNCRC and Individualisation

Article 3 UNCRC also plays another role within this thesis; it illustrates two levels of individualisation.⁸³ The term 'individualisation' is used within the thesis as a method to enable examination of the extent that children are considered either as a group separate from adults, as part of a sub-group of children or as an individual child. It is a term that implies a hierarchy of individualisation encompassing the three levels:

1. Trafficked children as a separate group to trafficked adults
(The group level)
2. Children exploited in domestic work as a distinct category of all trafficked children (Sub-group level)
3. The individual child (Individual level)

The purpose of individualisation is to highlight the circumstances that only children experience and illustrate that particular consideration and action is

⁸³ The group level and the individual level.

required to adequately account for children in various exploitative situations. Individualisation refers to children considered as a group separate from adults, with separate needs and experiences. It is argued that individualisation is required in terms of children in domestic work as a sub-group of the main category of children. Using domestic work as the particular form of exploitation experienced by trafficked children allows the unique issues involved to demonstrate the importance of individualisation within the context of child trafficking. The circumstances in which it is both beneficial and practical to consider each individual child are examined.⁸⁴ This level of individualisation may be more appropriate when the child is identified as a trafficked child in order to provide specific protection and assistance depending on their own individual experiences and needs. However there may be circumstances where this level of individualisation may not be possible.

This thesis explores the extent that it is both possible and appropriate for each level of individualisation to be achieved in practice. For example, it is considered whether trafficked children should be recognised and managed entirely separately from adults with the introduction of different legal instruments specifically aimed at addressing child trafficking. Alternatively, it is considered whether the existing framework is already protecting all trafficked children and their rights and therefore there is no need for these additional legal responses.⁸⁵ It is also questioned whether separate legal instruments should be adopted for each different labour sector in which a trafficked child may be exploited (for example

⁸⁴ Level Three the individual level.

⁸⁵ Level One: the group level.

prostitution, domestic work, agriculture etc) to allow for a more individualised response to children exploited in each of these sectors.⁸⁶

6.3 Other Relevant Substantive Articles of the UNCRC

Where domestic work is undertaken by children outside their own family home as a form of employment, under Article 32 UNCRC, this would require States to protect these children from '*economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development*'.⁸⁷ States must meet the obligations under Article 32 UNCRC whilst having regard to the relevant provisions of other international instruments, which in this context would involve setting a minimum age for children entering employment in compliance with the International Labour Organisation (ILO) Minimum Age Convention (No.138) and preventing children being exploited in sectors or conditions defined as the worst forms of child labour in ILO Convention No. 182, 1999.

The WFCL Convention requires States to implement programmes of action to eliminate the worst forms of child labour⁸⁸ and to 'take all necessary measures to ensure effective implementation and enforcement of the provisions of the Convention' with appropriate penalties.⁸⁹ Article 7(2) states:

⁸⁶ Level Two: the sub-group level.

⁸⁷ Article 32, UNCRC. This issue is discussed in detail in *Chapter Seven* in the context of adolescents entering domestic work.

⁸⁸ Article 6(1), WFCL Convention 1999.

⁸⁹ Article 7(1), WFCL Convention 1999.

Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

- (a) prevent the engagement of children in the worst forms of child labour;*
- (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;*
- (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;*
- (d) identify and reach out to children at special risk; and*
- (e) take account of the special situation of girls.*

Trafficking of children into domestic work would fall within the definition of forced labour, but would also be classified as one of the worst forms of child labour and a slavery-like practice. The fact that the child has been trafficked is the decisive factor in making this classification. The question now remains as to whether there would be any legal redress available for children trafficked and exploited in domestic work under International law for the failure of the State to prevent this exploitation.

International law differs from UK law in several ways. Unlike UK law the focus is not on the individuals connected with committing offences, with a system of sanctions in place including imprisonment of the perpetrator. Instead, the primary subjects in International law are States, not individuals. There is no legislature, executive or governing entity. There is no unified system of sanctions and no court system. There is the International Court of Justice, however it can only decide cases where both

signatory States agree to the ICJ assuming jurisdiction⁹⁰ and the Court has no mechanism to ensure that the decisions are complied with.

International law exists between States, who together create and agree to obey the law. This law is primarily formulated by international agreements which create rules by which the signatories are bound. Although there is no enforcement mechanism, States do mainly follow and observe International law and violations are fairly rare. Individual States consent to be bound by international law mainly through signing treaties. An important aspect of the relationship between international and UK law is that once the UK ratifies a treaty they are bound internationally. However, until it is incorporated into UK law it will not be binding in domestic law. This means that for a child exploited in domestic work as a result of trafficking there is no direct remedy against the State available to them for a violation of international law, even if the UK is bound by the obligations of international law to provide remedies for the child in that situation. The failure to effectively implement the treaty does not give rise to a remedy for the individual victim under international law.

States must regulate the hours children are permitted to work and the conditions under which they are employed and there must be appropriate sanctions to ensure effective enforcement of the relevant laws relating to the employment of children.⁹¹ Children who are brought into the UK and subsequently undertake domestic work often do so without the opportunity to attend school, working excessive hours in extremely poor conditions,

⁹⁰ Article 36, Statute of the International Court of Justice

⁹¹ As confirmed in relation to adolescents by the Committee on the Rights of the Child, General Comment No.4, 'Adolescent health and development in the context of the Convention on the Rights of the Child' 2003CRC/GC/2003/4, paras 18 and 39(e); General Comment No.7 (n63) para36(e).

carrying out work which is often beyond their physical capabilities.⁹² Article 32 UNCRC is therefore particularly relevant to these children.

The UNCRC explicitly states that children are entitled to protection from abduction, sale or trafficking for any purpose and States are required to take *'all appropriate national, bilateral and multilateral measures'* to prevent this.⁹³ Importantly, States are also under a duty to:

*'...take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.'*⁹⁴

As discussed above, there is often an assumption that reintegration of children into their own family environment is in their best interests when they are discovered as trafficking victims. However, as it has been noted earlier, this is not necessarily going to be in the best interests of the child where the child's own family has played a part in trafficking the child. A child has the right not to be separated from their parents under Article 9 UNCRC. However, where the parents have been involved in facilitating the child's transfer, it may be more appropriate and in the child's best interests to prevent the return of the child to their family because of the

⁹² K Barling, 'Tales of slavery in modern London' BBC News 18 March 2011 available <http://www.bbc.co.uk/blogs/kurtbarling/2011/03/tales_of_slavery_in_modern_lon.html> [last accessed 05.03.2012].

⁹³ Article 35, UNCRC.

⁹⁴ Article 39, UNCRC.

risk of re-trafficking and instead make arrangements for alternative care for the child.

7. STRUCTURE OF THE THESIS

Chapter One – ‘The Legal and Policy Responses to Trafficking in Human Beings: Prosecution, Prevention and Protection’ looks specifically at the international, European and UK legislative and policy framework, focusing on the offences and penalties for traffickers and considers the protection provided for trafficking victims and the obligation placed on States to undertake preventative measures. Two main legal approaches have been taken in response to human trafficking, the first, more dominant, is a securitisation and criminalisation approach, second, the emerging and developing human rights approach. The first has a focus on the prosecution of perpetrators and serious organised criminal activity, whilst the latter focuses more on the protection of victims’ human rights. Both approaches are considered and particular provisions relating specifically to children are identified in order to assess whether the UK’s legal response actually satisfies its obligations in relation to protecting children and their rights, specifically their right to protection from abduction, sale or trafficking under Article 35 UNCRC. The chapter considers the child’s welfare and the assumption that it is in the best interests of the child to return them to their family once discovered as a trafficked child. This is explored within the context of reintegration of the child under Article 39 and the child’s right not to be separated from their family under Article 9 UNCRC.

Chapter Two – ‘Locating Children within the Current Legal and Policy Framework’ examines the legal definition of trafficking in human beings and defines child domestic work. The chapter analyses the interwoven legal elements involved in trafficking children into domestic work and

distinguishes concepts and legal terms which are often confused or used interchangeably with trafficking. These terms include smuggling, slavery, modern day slavery and servitude. It is determined how these legal terms apply to children trafficked and exploited in domestic work. *Chapter Two* considers how child domestic work violates a child's right to an education, their right to have time to rest and play and their right to be protected from performing work that is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development.⁹⁵

Chapter Three – 'Judicial Interpretations of the Trafficking Framework' examines the approach taken by the European Court of Human Rights (ECtHR) and the practical application and interpretation of the various different concepts discussed in *Chapter Two*. The chapter also examines how the UK's response to child trafficking has been influenced by the decisions of the Court. Two cases are of particular relevance to this chapter, *Siliadin v France* and *Rantsev v Cyprus and Russia*⁹⁶ which were heard in 2005 and 2010 respectively. Both cases discussed the definitions of slavery, forced labour and servitude. The first of these cases also established States' positive obligations under Article 4 ECHR and the latter considered the extent of these obligations within the context of trafficking in human beings. The examination of the ECtHR case law in this chapter also extends beyond these two key cases, to explore the potential for the ECHR to assist child trafficking victims and provide some form of additional protection.

⁹⁵ Articles 28, 31, 32 and 6 UNCRC.

⁹⁶ *Siliadin v France* [2005] 20 BHRC 654 and *Rantsev v Cyprus and Russia* Application No. 25965/04 (2010) 51 E.H.R.R.

Chapter Four – ‘Locating Children in Domestic Work within the Current Trafficking Discourse’ identifies the dominant focus and politicisation of the discourse surrounding human trafficking. The current discussion analysing human trafficking identifies the phenomenon either as migration, as a form of organised crime, or as a human rights violation, and as synonymous with sexual exploitation. *Chapter Four* acknowledges that human trafficking cannot be examined in complete isolation from these concepts and recognises that it intersects with aspects of these key legal discourses. The assumptions surrounding trafficking, organised crime, sexual exploitation and children’s place within the migration discourse are explored. It is argued that the discourse does not entirely correspond to the reality of all trafficked children’s lives, using the specific example of children trafficked for domestic work to illustrate this. The level of individualisation of trafficked children within the trafficking discourse is considered and it is argued that there is an inappropriate level of individualisation resulting in policy measures not responding suitably to the diversity of experiences implied by trafficking and particularly not in the context of trafficked child domestic workers.

Chapter Five – ‘Exploring the Research Base’ explores the current research and the statistical evidence available on the global scale of trafficking in human beings and considers the assumption that the occurrence of trafficking is increasing. The value and limitations of this statistical data is considered, as is the relationship between the research base and the resulting legal and policy responses. This allows an assessment of whether there is a connection between the perceived problem and the responses to trafficked children’s circumstances. *Chapter Five* examines whether children are considered as a distinct group within the research base and what level of individualisation is apparent within the statistical information. It questions whether

assumptions, generalisations and policies can be based around the available data with any confidence and considers the responsibilities of individual countries, including the UK, and the wider international community in relation to the improvement of data collection.

Chapter Six – ‘The Challenges Associated with Identifying and Reconceptualising Child Victims of Trafficking’ illustrates the difficulties in identifying a child who has been trafficked and exploited in domestic work. *Chapter Six* explores these difficulties by identifying the interaction between domestic work, private fostering, the private sphere and child trafficking. Identification of victims of trafficking is essential in order to provide effective protection and assistance however, because of the clandestine nature of trafficking the identification of victims is not an easy or straightforward task. This chapter focuses on the assumption that trafficked children form part of a homogenous group who share the same experiences and have identical needs. It is demonstrated that children in domestic work do not conform to the accepted image of ‘trafficking victim’ and the reasons why domestic work in particular creates difficulties for the trafficking framework is considered. This is particularly true where the tradition of private fostering is abused by traffickers. *Chapter Six* discusses the importance of identifying victims and the obligations on States to do so, despite the practical challenges.

Chapter Seven – ‘Reconceptualising the Trafficked Child: The Impact of Gender, Age and Culture’ considers the importance of recognising the role that a child’s characteristics can play in determining what type of exploitation they are more likely to experience as a result of trafficking. As an example of the impact a child’s characteristics may have, *chapter seven* focuses particularly on the child’s gender. Consideration of girls in domestic work enables the gendered nature of child trafficking to be

exposed in sectors where the exploitation does not involve prostitution and sexual exploitation. The age of children in domestic work is also discussed to illustrate the importance that this characteristic has on the recruitment and exploitation of children in domestic work. The discussion of individualisation throughout the thesis is of particular relevance in this chapter and the importance of the sub-group level of individualisation is highlighted within the discussion. A comparison is made between migrant women who have voluntarily migrated to undertake paid domestic work and female children who have been trafficked for this purpose. Migration for domestic work has been viewed through the lens of 'gender and women' and the aim of this comparison is to illustrate that domestic work undertaken by children who have been trafficked is equally gendered. For this purpose the concept of the 'global care chain' is examined and applied to children trafficked for domestic work. The gendered nature of child trafficking is explored not only in relation to the child themselves, but in terms of the role of women in the trafficking of these children. This discussion challenges some of the dominant perceptions about women as 'victims' of trafficking and questions the effect on the child. *Chapter Seven* identifies the gender-insensitive nature of the responses to child trafficking and the lack of an integrated approach to children's rights and gender.

Chapter Eight – 'Reconceptualising the Trafficked Child: Passive Victims or Empowered Actors' considers the position of children who are above the legal minimum age to enter employment who view their position in domestic work as one that they have chosen themselves as a form of employment. The purpose of *Chapter Eight* is to explore whether children are considered capable of self-determination, making decisions about their own future and whether there is any acknowledgement of the autonomy of these children. If children's autonomy is acknowledged it is

questioned how this is dealt with when they are exploited in domestic work and how it is balanced with concerns surrounding the child's welfare. When these children are discovered exploited in domestic work, the central question is whether they are viewed as trafficked children or alternatively children who are being exploited in an employment relationship. Whether the most appropriate response is one that falls under trafficking or employment laws is dependent on the answer to this question. Under Article 12 UNCRC children have a right to be heard and this is part of the consideration in this chapter. A key question is whether children's decisions to migrate to work are truly voluntary. The influence of external factors on the decisions made by children in these circumstances is important because of the extent to which they affect the child's autonomy and the validity of their ultimate decision. *Chapter Eight* considers what intervention is necessary to protect these children, but also questions how to work with these children to help to shape the decisions they make. A child's decision to migrate to work is examined within the context of the tension between a child's ability to be a self-determining individual and a child's right to be protected from exploitation under Article 32 UNCRC.

Chapter One

THE LEGAL AND POLICY RESPONSES TO HUMAN TRAFFICKING: PROSECUTION, PREVENTION AND PROTECTION

1. INTRODUCTION

This chapter considers the current trafficking legal framework, highlighting particular provisions which relate specifically to children. This involves examination of the relevant International, European and UK legislative provisions. Two legal approaches have been taken in response to human trafficking, the more dominant being the securitisation and criminalisation approach.¹ There is evidence however, of a second emerging approach which develops a human rights focus. The criminalisation approach focuses on the prosecution of perpetrators and serious organised criminal activity, whilst emerging approaches focus more on the protection of victims' human rights. To consider both approaches the following legal instruments will be examined in some detail as they directly relate to trafficking in human beings: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,² supplementing the United Nations Convention against Transnational Organised Crime 2000;³ The Council of Europe Convention on Action against Trafficking in Human Beings 2005;⁴ The EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims⁵ and the

¹ This is discussed in *Chapter Four*.

² 2000 A/55/25 Annex II, hereafter Trafficking Protocol.

³ 2000, A/55/25 Annex I.

⁴ CETS 197(the CoE Convention).

⁵ Replacing Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1; [2011] L101/1.

Asylum and Immigration (Treatment of Claimants etc) Act 2004.⁶ Throughout this thesis any reference to the 'core' instruments relates to these four instruments collectively. As trafficking is a global problem affecting most countries, it is important that there is a multi-level legal response. The EU has a particular responsibility to tackle trafficking due to the free movement provisions and the relaxation of borders internally within the EU. It could be argued that this has made the movement of victims easier within countries of the EU which has resulted in the proliferation of human trafficking and criminal activities.⁷

The purpose of this chapter is to not only consider the provisions contained within each of the core legal instruments which relate to the prosecution, protection and prevention of child trafficking, but also to examine the UK's position and legal response. The children who are the focus of this thesis are trafficked into the UK and therefore, as the country of destination, one of the overall aims of the thesis to assess the UK's ability to protect children who have been trafficked and exploited in domestic work. It is crucial to have a clear understanding of the UK's legal response, the level of protection afforded to children who are trafficked into the UK into domestic work and the possible limitations of the trafficking framework to adequately protect children in these circumstances. These 'core' instruments cannot be examined in isolation. There is a relationship and cross-fertilisation between the various legislative responses at all levels, with each affecting the UK's response in different ways.

The use of this particular matrix, (prosecution, protection, and prevention) in examining the legal responses derives from this being the adopted

⁶ Asylum and Immigration Act 2004.

⁷ T Obokata, 'Key EU Principles to Combat Transnational Organized Crime' (2011) 48 Common Market Law Review 801, 801.

approach at International, European and domestic level.⁸ These three elements are considered interconnected parts which are necessary to provide a comprehensive and multidisciplinary response to child trafficking.⁹ This template can be seen within various legal instruments and policy documents which address child trafficking. For example, Directive 2011/36/EU adopts this matrix as does the UK Action Plan on Tackling Human Trafficking,¹⁰ the CoE Convention Against Trafficking in Human Beings¹¹ and the United Nations Trafficking Protocol.¹² The detail of the three elements is considered in this chapter.

2. PROSECUTION

Trafficking in human beings is reportedly a highly profitable, low risk crime.¹³ To reduce the incidence of child trafficking there needs to be suitably severe sanctions in place to deal with the prosecution of those individuals who have trafficked human beings, whilst at the same time increasing the perceived risk to traffickers of their detection. Each of the

⁸ See for example evidence of this approach taken by the EU at <http://ec.europa.eu/justice_home/fsj/crime/trafficking/fsj_crime_human_trafficking_en.htm> [last accessed 31.10.2011]; This approach is evident within the EU Fundamental Rights Agency Report, 'Child Trafficking in the European Union: Challenges, perspectives and good practices' (2009) available http://fra.europa.eu/fraWebsite/attachments/Pub_Child_Trafficking_09_en.pdf [last accessed 11.12.2011].

⁹ H Askola, '*Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union*' (Hart Publishing, 2007), 4-5.

¹⁰ Home Office, 'UK Action Plan on Tackling Human Trafficking' (2007) available <<http://www.homeoffice.gov.uk/documents/human-traffick-action-plan?view=Binary>> [last accessed 27.07.2009].

¹¹ Explanatory report Council of Europe Convention on Action against Trafficking in Human Beings 2000, CETS 197, para 4.

¹² Trafficking Protocol Preamble.

¹³ UN.GIFT 'Human Trafficking: An Overview' (2008) United Nations Office On Drugs and Crime, available at 4 <<http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>> [last accessed 25.10.2011].

'core' instruments incorporate provisions for the prosecution of traffickers and the offences and penalties are considered below.

2.1 The International and European Response

The main international response was seen in the United Nations Convention against Transnational Organised Crime¹⁴ adopted in 2000. Its purpose is to promote cooperation in order to prevent and combat transnational organised crime.¹⁵ The Convention was supplemented by two protocols one of which deals specifically with trafficking in persons, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.¹⁶ The Protocol has three main purposes the first is to '*prevent and combat trafficking in persons, paying particular attention to women and children*'.¹⁷ The Protocol's second purpose is the need to '*protect and assist the victims of such trafficking, with full respect for their human rights*'.¹⁸ The third purpose is to '*promote cooperation among States Parties in order to meet those objectives*'.¹⁹ The primary focus of this chapter is on the first two aims, i.e. prevention and protection, with the third aim of international cooperation being discussed where appropriate. The question of whether these aims are achieved, and to what extent, is considered in detail below through consideration of the level of obligations placed on States.

¹⁴ 2000, A/55/25 Annex I.

¹⁵ Article 1, UN Convention against Transnational Organised Crime 2000.

¹⁶ 2000 A/55/25 Annex II.

¹⁷ Article 2(a), Trafficking Protocol.

¹⁸ Article 2(b), Trafficking Protocol.

¹⁹ Article 2, Trafficking Protocol.

Particular attention was given to women and children in the Trafficking Protocol because of the perception that they were particularly vulnerable to trafficking. During the negotiations, both the proposals of Argentina and the United States of America made explicit reference to this vulnerability and viewed women and children as those who were at an increased risk of being '*targeted by transnational criminal organizations engaged in trafficking in persons*'.²⁰ This focus was retained and carried forward to the revised version of the Protocol²¹ with the final text adopting this approach.²² It is acknowledged that this vulnerability exists, particularly where children are involved and that there are factors that help to create this vulnerability such as '*poverty, underdevelopment and lack of equal opportunities*'.²³ However, the categorisation of women and children as one homogenous group partially obscures and entirely fails to explicitly acknowledge the particular vulnerabilities that only children experience.²⁴

What the Protocol has successfully achieved as part of the international response to human trafficking is the provision of an internationally agreed definition, for the first time, of what constitutes trafficking in human beings.²⁵ Article 3 states:

²⁰ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, First session, 19-29 January 1999, United States of America (A/AC.254/4/Add.3) and Argentina (A/AC.254/8).

²¹ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Second session: 8-12 March 1999, Argentina and United States of America (A/AC.254/4/Add.3/Rev.1).

²² Trafficking Protocol Preamble.

²³ Article 9, Trafficking Protocol.

²⁴ These particular vulnerabilities are discussed in *Chapter Seven*.

²⁵ This definition is discussed in detail in *Chapter Two*.

(a) *“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;*

This definition has been adopted and used as the basis for defining trafficking by both the Council of Europe in the Trafficking Convention and EU Directive 2011/36.²⁶ This creates a clear synergy between these instruments despite the fact that they are ultimately being deployed for different purposes. For example, at EU level, there is rhetoric of rights but the main objective is in fact criminalisation and immigration control. The Trafficking Protocol criminalises the behaviour stated in Article 3 above when committed intentionally, but also those individuals who may attempt to commit an offence, participate as an accomplice or organise or direct other people to commit the offences stated in Article 3 of the Trafficking Protocol.²⁷ It is important that the Trafficking Protocol recognises that trafficking may involve a number of people in different ways. Without these provisions extending further than the actual person transporting and exploiting the child, the role played by others in enabling this would be overlooked and the law would fail to act as a deterrent to these individuals.

²⁶ *Chapter Two* discusses the variations in the definitions used between these core instruments in more detail.

²⁷ Article 5 Trafficking Protocol; these provisions are discussed in more detail below.

Each of the three international ‘core’ instruments explicitly deal with trafficking in human beings, but there are other legal instruments which are also relevant to children who are trafficked including the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.²⁸ The Optional Protocol was adopted 25 May 2000 and came into force on 18 January 2002. The objective was to prohibit the sale of children, child prostitution and child pornography.²⁹ Article 2(a) is particularly relevant to children exploited in domestic work who have been trafficked with the involvement of their parents. This Article states:

(a) ‘Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’

There are various forms that this ‘consideration’ may take and it is not limited only to monetary consideration. An offence under the Optional Protocol includes the offering, delivering or accepting, by whatever means, of a child for the purpose of sexual exploitation, forced labour or the transfer of organs of the child for profit.³⁰ Parents who agree to their child being taken to work within another household, carrying out domestic work for a one-off payment, a regular payment, or some other benefit, would clearly be violating Article 2(a), Optional Protocol. There may be situations where parents have not accepted a payment or any other form of consideration, and have instead acted in what they believe to be the child’s best interests and in these circumstances Article

²⁸ 2171 U.N.T.S. 227 (hereafter Optional Protocol).

²⁹ Article 1, Optional Protocol.

³⁰ Article 2 (1) (a)(i) Optional Protocol.

2(a) would not apply. The Trafficking Protocol is different in this regard and does not necessarily require any consideration for an offence to be committed. Therefore whether parents had received payment or not is irrelevant for an offence of child trafficking to be committed under Article 3 of the Trafficking Protocol, providing that an element of organised crime is involved and the trafficking is transnational in nature.³¹ States therefore, have obligations towards children transferred into domestic work with their parents' agreement under the Optional Protocol to the Convention on the Rights of the Child and the Trafficking Protocol. Importantly though, due to the requirement of the involvement of transnational organised crime, the Trafficking Protocol does not cover more informal arrangements parents may make, which is in direct contrast to the Optional Protocol which does.

Article 5, Charter of Fundamental Human Rights of the European Union³² also explicitly prohibits trafficking in human beings. Article 5 states that no one should be held in slavery or servitude, or should perform forced or compulsory labour. For some time the status of the Charter was uncertain, although there were signs that the European Court of Justice were referring to the provisions contained within it and the Charter was influencing the decisions reached by the Court.³³ However, the Charter was given binding legal effect equal to the EU treaties in December 2009 when the Lisbon Treaty came into force and may provide further support for the principles identified in Directive

³¹ As required by the UN Conventional on Organised Crime which the Trafficking Protocol must be read in conjunction with.

³² OJ [2010] C 83/389. (revised).

³³ For discussion of this point see E Drywood, 'Giving with one hand, taking with the other: fundamental rights, children and the family reunification decision' (2007) 32(3) European Law Review 396.

2011/36/EU.³⁴ Additionally the Treaty of Lisbon may provide a stronger legal basis for developing a children's rights agenda at the EU level.³⁵

2.2 The Prohibition of Human Trafficking in UK Law

The UK has signed and ratified the Trafficking Protocol,³⁶ the Council of Europe Convention³⁷ and the Optional Protocol³⁸ and in doing so have agreed to be bound by the provisions contained within them. Also as a Member State of the EU the UK is bound by Directive 2011/36/EU since opting-in to the Directive.

The UK's initial response to trafficking in human beings is reflected in section 145, Nationality, Immigration and Asylum Act 2002 which created an offence of trafficking for prostitution. However, this provision was criticised due to the continued focus on prostitution as opposed to the wider range of offences contained in the Trafficking Protocol (which includes forced labour and other forms of exploitation).³⁹ The UK Government claimed that this was a 'stop gap' and legislation was promised to repeal section 145 and deal with broader issues of trafficking

³⁴ Article 6(1) EU. See M Dougan, 'The Treaty of Lisbon 2007: winning minds, not hearts' (2008) 45(3) Common Market Law Review 617.

³⁵ See H Stalford and M Schuurman, 'Are we there yet?: the Impact of the Lisbon Treaty on the EU Children's Rights Agenda' (2011) Submitted to the International Journal of Children's Rights (Special Issue on EU Children's Rights).

³⁶ UK signed 14 December 2000 and ratified 9 February 2006.

³⁷ UK signed 23 March 2007 and ratified 17 December 2008.

³⁸ UK signed 7 September 2000 and ratified 20 February 2009.

³⁹ V Munro, 'A Tale of Two Servitudes Defining and Implementing A Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 Social Legal Studies 91,101.

in human beings and additional forms of exploitation.⁴⁰ The Sexual Offences Act 2003⁴¹ contains provisions specifically relating to trafficking in human beings for sexual exploitation.⁴² The Sexual Offences Act 2003 did not extend the scope of the offence to include exploitation other than sexual exploitation, which was the basis of the criticism of s.145, Nationality, Immigration and Asylum Act 2002.⁴³

Other forms of exploitation experienced as a result of trafficking were still not encompassed by an offence following the Sexual Offences Act 2003, and there were no provisions in UK law which specifically dealt with trafficking in human beings for labour exploitation. This was rectified by the enactment of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Section 4 of the Act extends the range of offences relating to trafficking in human beings to include not only trafficking for sexual exploitation, but other forms of exploitation including labour exploitation.

An offence of trafficking for the purpose of labour exploitation is defined by section 4, Asylum and Immigration Act 2004:

*(1) ...he arranges or facilitates **the arrival** in the United Kingdom of an individual (the “passenger”) and—
(a)he intends to exploit the passenger in the United Kingdom or elsewhere, or*

⁴⁰ Home Office, Action Plan (n10), 15.

⁴¹ The Sexual Offences Act repealed s.145 Nationality, Immigration and Asylum Act 2002 and introduced a wide range of offences and in regards to trafficking the ‘relevant offences’ are those that are contained within Part I of the Act. These offences include rape, sexual assault, indecent photographs of children, and abuse of children through prostitution and pornography.

⁴² Sections 57-59, Sexual Offences Act 2003.

⁴³ V Munro,(n39) 101.

(b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

*(2) A person commits an offence if he arranges or facilitates travel **within** the United Kingdom by an individual (the “passenger”) in respect of whom he believes that an offence under subsection (1) may have been committed and—*

(a) he intends to exploit the passenger in the United Kingdom or elsewhere, or

(b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.

*(3) A person commits an offence if he arranges or facilitates **the departure** from the United Kingdom of an individual (the “passenger”) and—*

(a) he intends to exploit the passenger outside the United Kingdom, or

(b) he believes that another person is likely to exploit the passenger outside the United Kingdom.

The UK now has legislation that prohibits trafficking of human beings for the purpose of labour exploitation which would clearly include children who are trafficked into the UK and exploited in domestic work. Although the requirements of the international instruments discussed above have now been met by the UK, in practice there still appears to be a more robust system of enforcement when trafficking involves sexual rather than labour exploitation. This is evidenced, for example, by the statistical information available of the large number of UK prosecutions under section 57-59 Sexual Offences Act 2003 when compared to the few that have occurred

under section 4 Asylum and Immigration Act 2004.⁴⁴ Alongside this is the continuing dominant focus on organised crime when enforcing the law and this is apparent with the police operations aimed at sexual exploitation which far outweigh those aimed at labour exploitation. This is despite the legal framework extending the scope of trafficking to include more informal arrangements that do not involve organised criminal groups or transnational movement of the child and situations where sexual exploitation is not involved.

2.3 Aiding, Abetting and Attempting

With exception of the Asylum and Immigration Act 2004, the ‘core’ instruments provide for an offence of aiding, abetting or attempting to commit an offence.⁴⁵ This will cover activities such as making arrangements for transport and food for the victim’s journey, forging of immigration documents and any other involvement in trafficking of human beings. Although the Asylum and Immigration Act 2004 does not explicitly contain an offence of aiding or abetting, section 4 does capture similar acts with reference to the facilitation of trafficking. In the context of this thesis, these offences may be relevant when parents have given their consent to their child being taken to live in another household, knowing that the child will undertake domestic work. Parents in these circumstances have facilitated the trafficking of their own child.⁴⁶ It is important that these offences exist, as child trafficking is a complex phenomenon with various stages and actors involved.

⁴⁴ This focus is considered in detail in *Chapter Five*.

⁴⁵ Article 5, Trafficking Protocol; Article 21, CoE Convention; Article 3 Directive 2011/36/EU.

⁴⁶ The issue of parents’ involvement is discussed further in *Chapter Six*.

Children are not necessarily recruited, transferred and exploited by the same person. Even where this is the case, other individuals may have involvement in some element of trafficking the child. The adult taking the child from their home and accompanying them to the UK may be the person who subsequently exploits them and therefore would be labelled 'the trafficker'. This adult is likely to need assistance particularly with the provision of forged documents for the child to travel to the UK. In the context of the children being discussed in this thesis, there is evidence that some children are brought into the UK by adults who claim they are a relative of the child.⁴⁷ The offence of aiding and abetting or facilitating trafficking is particularly relevant where a third person has assisted in some way. The value of this additional offence is that individuals who have played some part in facilitating the trafficking of a child but have not physically transferred or exploited the child will be criminally liable for their actions.

2.4 Using the Services of a Victim

The CoE Convention and Directive 2011/36/EU include the possibility for States to introduce a new offence not present in the other core instruments. This offence criminalises the use of a victim's services where there is knowledge that the person is a victim of trafficking in human beings.⁴⁸ The key element of knowledge that the child has been trafficked must exist for an offence to be committed. This knowledge can be '*inferred from objective, factual circumstances*', an approach expressly recommended by other international instruments.⁴⁹ This provision aims to ensure that a

⁴⁷ C Somerset, 'What the Professionals know: The trafficking of children into, and through, the UK for sexual purposes (2001) 22 available <<http://www.ecpat.org.uk/content/ecpat-uk-reports> [last accessed 05.10.11].

⁴⁸ Article 19, CoE Convention; Article 18(4) Directive 2011/36/EU.

⁴⁹ Paragraph 235, CoE Convention explanatory report illustrates evidence of this approach citing Article 6(2)(c), *Convention on Laundering, Search, Seizure and*

person using the services of a victim of human trafficking would be guilty of an offence, even though they have not necessarily been involved in the actual recruitment or transfer of the child. In the context of domestic work in the UK this would apply where an adult receiving a child into their household exploits them knowing that they have been trafficked, even though they played no role in recruitment or transfer. Potential difficulties in proving the required knowledge means that the CoE Convention and Directive 2011/36/EU do not make this a binding obligation, instead only encouraging States to adopt this particular measure.⁵⁰ These provisions have the potential to impact on the demand for trafficking in human beings. However, this will be dependent on the enforcement of such provisions.

Under UK law, an individual, who pays for the sexual services of a prostitute who has been subjected to force, will have committed an offence regardless of where in the world the sexual services are to be provided and whether they are actually provided or not. It is irrelevant whether the individual is aware or ought to have been aware that a third party has engaged in exploitative conduct. Therefore this introduces a strict liability offence and this offence would be relevant where individuals had been trafficked into prostitution.⁵¹ Where children are involved, the UK has specific provisions which criminalise individuals who use the sexual services of a child which is an offence under section 47, Sexual Offences

Confiscation of the Proceeds from Crime (ETS No.141) which states that “knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances”. This approach is adopted by Article 6(2)(f), on criminalising the laundering of the proceeds of crime, of the *United Nations Convention against Transnational Organized Crime* which states: “Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances”.

⁵⁰ Paragraph 236, CoE Convention explanatory report.

⁵¹ Section 14, Policing and Crime Act 2009 inserted section 53A into the Sexual Offences Act 2003.

Act 2003 although this is only a strict liability offence where the child is under the age of 13. Where a child is over 13 but under 18 years of age, it will not be an offence unless it can be proven by the prosecution that the person paying for sexual services did not reasonably believe that the person providing sexual services was over 18.⁵²

In contrast, the Asylum and Immigration Act 2004 contains no similar provisions for individuals using the services of a child exploited in other situations i.e. labour exploitation. This disparity not only produces inconsistencies between the treatment of adults using the services of children in different forms of exploitation, but illustrates the imbalance between the legislative attention given to trafficking for sexual exploitation and that for labour exploitation. However, the introduction of section 71, Coroners and Justice Act 2009 created an offence of holding someone in slavery or servitude. This offence is committed where an individual knows or ought to know that the person is held in slavery or servitude or requires the person to perform forced or compulsory labour. This now means that children held in slavery or servitude or required to perform forced labour can now benefit from protection under this section with a maximum penalty of 14 years imprisonment for this offence.⁵³ It is not however a child specific offence and there are no similar distinctions made (as those contained in s.47, Sexual Offences Act 2003) dependant on the age of the child exploited. Deterrence needs to be consistent with comparable penalties regardless of the exploitation experienced by the child as a result of trafficking. The differences within the legal responses only serve to

⁵² The penalties vary: under s.53A Sexual Offences Act 2003 the maximum penalty is a fine; whilst under s.47 Sexual Offences Act 2003 paying for the sexual services of a child carries a maximum penalty of life imprisonment if the child is under 13; a maximum sentence of 14 years if aged 14 or 15 and up to 7 years if the child is 16 or 17 years old.

⁵³ There is a maximum penalty of 14 years imprisonment, but this is not child specific.

increase the vulnerabilities of those children trafficked for reasons other than sexual exploitation by reducing the scope and severity of the potential penalties.

2.5 The Operational Scope of the Offences

In comparing the four ‘core’ instruments, there are similarities in the definition of the offences, but significant differences remain. The Trafficking Protocol is limited to offences committed by organised criminal groups and also requires a transnational element to constitute the offence.⁵⁴ It should be noted that the requirement of a transnational element does not necessarily mean that the child has to be moved across external borders. For example, where the child is exploited in one State but a substantial part of the preparation, planning, direction or control takes place in another State, this will be sufficient to satisfy the requirement of a transnational element.⁵⁵

In contrast, the CoE Convention adopted the definition of trafficking in human beings contained in the Trafficking Protocol and the EU used the definition as the guiding text for the development of the Framework Decision 2002/629/JHA on combating trafficking in human beings⁵⁶ and the subsequent Directive 2011/36/. However, the scope of their application was broadened to include trafficking which is either national or transnational, and the CoE Convention applied to trafficking whether linked to organised crime or not.⁵⁷ This is an important development as it

⁵⁴ Article 4, Trafficking Protocol.

⁵⁵ Article 3(2)(b), United Nations Convention against Transnational Organised Crime 2000.

⁵⁶ C Rijken, *Trafficking in Persons: Prosecution From A European Perspective* (Asser Press, 2003), 68-69.

⁵⁷ Article 2, CoE Convention.

extends the protection available to victims who had been internally trafficked and exploited within a single State, who would previously have been unprotected under the Trafficking Protocol.

The Asylum and Immigration Act appears, at first sight, to provide that offences may be committed with either national or transnational elements.⁵⁸ However, although the Act makes it an offence to traffick a person within the UK, it has its limitations. This offence only applies when a person has been brought into the UK to be exploited and is then moved.⁵⁹ A UK national or a person already legally present in the UK who has been moved internally within the UK for the purpose of exploitation is excluded from this category and no offence of trafficking will have been committed. This contrasts with the Sexual Offences Act 2003 which makes it an offence to traffick human beings internally for the purpose of sexual exploitation. The varied response to trafficking within UK law was created by the fact that trafficking for purposes other than sexual exploitation has been dealt with under the umbrella of asylum and immigration law. By taking this approach, UK nationals as well as those already legally residing in the UK will benefit from protection from internal trafficking within the UK only if the intended exploitation is sexual in nature. This leaves internally trafficked individuals vulnerable to other forms of exploitation, without an offence of trafficking being committed. This would be the case for labour exploitation including domestic work. In the context of this thesis, this is not a problem if a child exploited in domestic work has been brought to the UK from abroad. However, it illustrates the recurring imbalance of the attention given to sexual exploitation when compared to labour exploitation. More recent developments will potentially resolve this

⁵⁸ Section 4(1), Asylum and Immigration Act 2004.

⁵⁹ Section 4(2), Asylum and Immigration Act 2004.

disparity with the Coroners and Justice Act 2009 which came into force in April 2010. Section 71(1) of the Act states:

A person (D) commits an offence if—

(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or

(b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour

There is no need for trafficking to have been involved for an offence under section 71 to have been committed, which is an important development. This removes the difficulty that sometimes exists in proving the trafficking element of the offence under section 4, Asylum and Immigration Act 2004. If trafficking is involved and can be proven then section 4, Asylum and Immigration (Treatment of Claimants etc) Act 2004 should be used rather than section 71, Coroners and Justice Act 2009.⁶⁰ Although there are no greater penalties under the Asylum and Immigration Act, it is seen as important to explicitly acknowledge the fact that trafficking is involved.⁶¹

2.6 Situating Children within the Trafficking Offences

The Trafficking Protocol, CoE Convention and EU Directive 2011/36 all make special provision where victims of human trafficking are children. A

⁶⁰ Crown Prosecution Service Guidance on Prosecution of Slavery, Servitude or Forced Labour
<http://www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour/#a06> [last accessed 12.11.2011].

⁶¹ Ibid.

child is defined in each instrument as under the age of 18⁶² and each legislative instrument dispenses with the requirement of force, coercion or deception etc., where a child is the victim. It is sufficient that the child has been recruited, transported, transferred, harboured or received for the purpose of exploitation.⁶³ The Asylum and Immigration Act 2004 does not contain the same provisions. However, section 4(4)(d) does state that a person is exploited if:

‘requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement’.

This section is clearly relevant to the child who has been trafficked into the UK for the purpose of exploitation in domestic work with their parent’s consent. Both the age of the child and the family relationship are relevant and therefore offences under UK law exist that take specific account of children under the age of 18.

2.7 The Penalties

The penalties for offences of human trafficking are an important aspect of the legal framework. It is necessary for sufficiently severe sanctions to be in place to both punish those who have committed an offence and to act as deterrence to others who may be involved with or considering taking part

⁶² Article 3(d), Trafficking Protocol; Article 4(d), CoE Convention; Article 2(6) EU Directive 2011/36.

⁶³ Article 3(c), Trafficking Protocol; Article 4(c), CoE Convention; Article 2(5), EU Directive 2011/36.

in trafficking of human beings. There are general obligations under the Optional Protocol on the Rights of the Child for each State to put in place appropriate penalties, taking into consideration the grave nature of the offences.⁶⁴

The Trafficking Protocol requires each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct detailed in Article 3 of the Protocol.⁶⁵ The CoE Convention requires that criminal offences are established which are *'punishable by effective, proportionate and dissuasive sanctions'*, as well as legislative and other measures to enable the confiscation of the proceeds of criminal offences or to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings.⁶⁶ The CoE Convention also details aggravating circumstances which need to be taken into account when determining the penalty for offences committed. These include offences which deliberately or by gross negligence endanger the life of the victim, where the offence was committed against a child or where the offence was committed within the framework of a criminal organisation.⁶⁷ Importantly, there is a requirement for each State to *'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'*.⁶⁸ This provision recognises that victims of human trafficking require protection rather than prosecution for unwilling involvement in criminal activities, including breaches in immigration law,

⁶⁴ Article 3(3), Optional Protocol.

⁶⁵ As discussed in detail in *Chapter Two*.

⁶⁶ Article 23, CoE Convention.

⁶⁷ Article 24, CoE Convention.

⁶⁸ Article 26, CoE Convention.

which may occur when they were brought into the UK. The Trafficking Protocol does not contain any similar provision which may mean that it is possible that victims of trafficking could be prosecuted for any illegal activity that they have played a role in despite the fact that they have been trafficked and forced into the situation. The likelihood of this is unknown and it could be assumed that once an individual has been identified as a trafficking victim that it would also be recognised that they have not willingly taken part in illegal activities involved. It is important however that the CoE Convention explicitly deals with this situation and provides clarity to the approach to be taken in these particular circumstances in order that trafficking victims are not criminalised for any part they have been forced to undertake in criminal activities.

EU Directive 2011/36 requires Member States to take the necessary measures to ensure that offences are '*punishable by effective, proportionate and dissuasive penalties*'⁶⁹ Prosecution of offences under Directive 2011/36 shall not be dependent on the report or accusation made by a person subjected to the offence.⁷⁰ This is important in terms of achieving the objective of tackling crime as many victims of trafficking are fearful of authorities and are often reluctant to come forward themselves for fear of reprisal. Directive 2011/36/EU imposes a maximum penalty of at least ten years imprisonment where the offence has deliberately or by gross negligence endangered the life of the victim, has been committed against a victim who was particularly vulnerable (such as children), has been committed by use of serious violence or has caused particularly serious harm to the victim, or where the offence has been committed within

⁶⁹ Article 4(4) Directive 2011/36/EU.

⁷⁰ Article 9(1) Directive 2011/36/EU.

the framework of a criminal organisation.⁷¹ This has increased from 8 years under the previous Framework Decision that the Directive replaces.⁷² The UK is already compliant with this element of the Directive, as there is a maximum penalty of 14 years for both sexual and non-sexual exploitation as a result of trafficking.⁷³ The UK is bound by the obligations contained within the United Nations Trafficking Protocol⁷⁴ and the CoE Convention under international law.⁷⁵ In the UK the Sexual Offences Act 2003 and the Asylum and Immigration Act 2004 include provisions aimed at trafficking of human beings.⁷⁶ The offences can be committed in the UK or alternatively outside the UK by an individual⁷⁷ or a body incorporated under the law of any part of the UK.

The penalties for trafficking human beings under UK law for labour exploitation are not as severe as penalties for drug trafficking. Trafficking in human beings has a maximum penalty under UK law of 14 years, whilst conviction for a drug trafficking offence carries a penalty of life imprisonment.⁷⁸ The difference in penalties for traffickers appears to make

⁷¹ Article 4 Directive 2011/36/EU.

⁷² [2002] OJ L 203/1.

⁷³ Section 57-59 Sexual offences Act 2003; section 4 Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

⁷⁴ UK signed 14 December 2000 and ratified 9 February 2006.

⁷⁵ UK signed 23 March 2007, ratified 17 December 2008 and it came into force for the UK on 1 April 2009.

⁷⁶ Sections 57-59 and Section 4 respectively.

⁷⁷ A person who is a British citizen, a British overseas citizen, a British National (Overseas), a British Overseas citizen, a person who is a British subject under the British Nationality Act 1981 (c.61) and a British protected person within the meaning of that Act sections 5(2)(a)-(f).

⁷⁸ Section 4(5), Asylum and Immigration (treatment of claimants) Act 2004; Schedule 4, Misuse of Drugs Act 1971, as amended.

trafficking in human beings much less of a risk than drug trafficking. Penalties need to be harsher in order to reduce the 'attractiveness' of this crime. The combination of the high profits and lower sanctions contribute to this situation.

3 PREVENTION

Preventative action aimed at tackling child trafficking is vital. Effective prevention involves specific measures which aim to reduce the vulnerability of potential victims. Prosecution of traffickers is not sufficient on its own to prevent trafficking in children, although any action taken to criminalise trafficking and impose penalties will act as one aspect of preventative action.⁷⁹ Under Article 35 UNCRC children have a right to protection from trafficking and this would include preventative measures necessary to protect children from being trafficked in the first place. In the context of children in domestic work, any preventative measures must involve specific action targeted at families and communities from which trafficked children are known to have originated. There are two separate goals in prevention, first avoidance of the initial trafficking of the child, but also the prevention of children being re-trafficked upon return to their families. Cooperation between States, and particularly cooperation with countries of origin, is necessary to deal effectively with the source of child trafficking. Action taken within countries of destination, such as border controls, is inadequate if pursued in isolation. International child trafficking by its very nature involves two or more countries (as origin, transit and/or destination countries). Preventative action requires the same cooperative template as without which, the possibility of reducing or eliminating child trafficking is greatly diminished.

⁷⁹ A Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 European Journal of Migration and Law 163,184.

The Trafficking Protocol, the CoE Convention and Directive 2011/36/EU all detail preventative measures which include the establishment of comprehensive policies, programmes and other measures to prevent and combat trafficking in persons and protect victims from re-victimization.⁸⁰ This is particularly relevant for children who have been trafficked with their parents' consent and subsequently exploited in domestic work. This is due to the increased likelihood of re-trafficking which may occur without effective intervention prior to the child's return to their country of origin and their family. The CoE Convention states that research, information and mass media campaigns, and social and economic initiatives, as well as cooperation between non-governmental organisations are also required.⁸¹ Additionally, the legal instruments oblige States to strengthen measures to alleviate the factors that make people, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal economic opportunity.⁸² The CoE Convention also requires that States promote a '*Human Rights-based approach and the use of gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all policies and programmes*'.⁸³ All States are required to take specific measures to reduce children's vulnerability to trafficking particularly by creating a protective environment for them.⁸⁴ Gallagher views these general preventative obligations contained within the CoE Convention as '*so broad as to be*

⁸⁰ Article 9(1), Trafficking Protocol and Article 5(1), CoE Convention; similar measures exist in Article 18, Directive 2011/36/EU.

⁸¹ Article 5(2), CoE Convention.

⁸² Article 9, Trafficking Protocol; Article 5(2), CoE Convention.

⁸³ Article 5(3), CoE Convention.

⁸⁴ Article 5(5), CoE Convention. Protective environments are discussed in more detail in *Chapter Seven*.

*almost meaningless in terms of measuring compliance.*⁸⁵ However, the fact that these obligations exist is important.

In order to discourage demand that leads to trafficking, under the CoE Convention, States must adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

- (a) research on best practices, methods and strategies;*
- (b) raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;*
- (c) target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;*
- (d) preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being*⁸⁶

Although the UK legislative response⁸⁷ does not contain specific provisions for the prevention of human trafficking, the fact that the UK is bound by the international and European obligations contained within the other core instruments relating to preventative action is important. There is evidence of preventative measures being taken by the UK, for example, the action taken by UKHTC. The Blue Blindfold campaign is the UKHTC's

⁸⁵ A Gallagher, (n79) 184.

⁸⁶ Article 6, CoE Convention; Article 18, Directive 2011/36/EU contains similar obligations.

⁸⁷ Either in the Sexual Offences Act 2003 or Asylum and Immigration Act 2004.

international campaign aimed at increasing awareness of trafficking with law enforcement agencies, social services, schools and potential victim populations both in the UK and abroad in countries of origin, transit and destination. This is partly achieved through training provided for key personnel, such as the police and social services and the centre works in close partnership with NGOs and other key agencies. Additionally there is a focus on raising awareness with victims which is carried out in a number of ways, such as the provision of a multilingual help-line and posters in places where potential victims are more likely to see them i.e. in transport hubs, city centres and clinics.⁸⁸

The recent report, 'Human Trafficking: The Government's Strategy' highlighted the preventative work already undertaken and planned for the future in the UK.⁸⁹ This revolves around disrupting criminal networks abroad and increasing awareness-raising efforts in source countries. This is to be achieved through working with overseas Governments and international law enforcement agencies which both the National Crime Agency and the Crown Prosecution Service would play a role.⁹⁰ The aim is to achieve better intelligence gathering and sharing, one element of which would be the standardisation of the information gathered during de-briefing of trafficking victims and traffickers across all agencies. This would assist in increasing the understanding of how and why people become trafficking victims and enable the UK to focus preventative action on countries where the evidence of trafficking is the greatest.⁹¹ The UK aims to extend the

⁸⁸ <<http://www.blueblindfold.co.uk/aboutukhtc/>> [last accessed 12.04.2012].

⁸⁹ Home Office, 'Human Trafficking: The Government's Strategy' 2011, available <<http://www.homeoffice.gov.uk/crime/human-trafficking-strategy/>> [last accessed 13.04.2012].

⁹⁰ The National Crime Agency is to be established in 2013.

⁹¹ Home Office, (n89).

education provided to potential victims in countries of origin, as has previously been done in both China and Thailand, in an attempt to reduce or eliminate the number of individuals becoming trafficking victims in the first place.⁹²

Despite these preventative steps and obligations, the effectiveness of them is questionable as the occurrence of human trafficking is still a reportedly increasing problem.⁹³ However, it is important that attempts are being made to prevent individuals being trafficked rather than only responding once an individual has already been trafficked and exploited. The various preventative measures need to be expanded further. Each has an important role to play in tackling human trafficking as criminalisation and prosecutions do not tackle the problem alone or tackle the root causes of people being vulnerable to trafficking.

It is not possible for the UK to eradicate all trafficking of human beings into, within or out of the UK in isolation from the international community. A combined effort between countries and agencies within the international community is required and assistance needs to be provided to less developed countries in order to achieve more effective preventative action.

3.1 Monitoring Mechanisms

Monitoring mechanisms involve two particular aspects. First is the monitoring of States' implementation of the obligations contained within the various legislative provisions and second, the obligations for States to set up monitoring mechanisms to ensure that monitoring of the anti-trafficking activities of State institutions and the implementation of

⁹² Home Office, (n89) 15.

⁹³ S Stoecker, 'The Rise in Human Trafficking and the Role of Organized Crime' (2000) 8(1) *Demokratizatsiya: The Journal of Post-Soviet Democratization* 129, 129.

national legislation requirements takes place. These are two very different mechanisms carried out by different bodies, but both are important aspects involved in the assessment of how States are responding to trafficking in human beings.

The CoE Convention adds an important new mechanism for monitoring trafficking in human beings with the aim of ensuring that Parties to the Convention are implementing the provisions contained within the Convention effectively. The Convention required the creation of a monitoring committee within one year of the Convention coming into force, and the GRETA Committee has now been established to fulfil this obligation.⁹⁴ “GRETA” (Group of experts on action against trafficking in human beings) incorporates between 10-15 members, with no more than one expert from an individual signatory state. At a meeting held on 5-8 December 2008, the first appointments to GRETA were made and there are now 13 independent experts who are part of GRETA. The role of GRETA is to examine and evaluate the functioning of specific provisions within the Convention with the overall aim of assessing the implementation by individual parties. A report and conclusions will be made public (once adopted) along with comments by the State Party concerned.⁹⁵ GRETA met for the first time 24-27 February 2009 at the Council of Europe Strasbourg and again on 16-19 June 2009 to continue the preparations for the first monitoring cycle of the Convention. During the meeting on 22-25 September 2009 the preparation of the questionnaire for the first round of evaluation was continued.

⁹⁴ Article 36(4), CoE Convention.

⁹⁵ Article 38(6), CoE Convention.

GRETA's role in assessing the implementation of the Convention is limited due to the absence of a mechanism to enforce compliance if States fail to implement the Convention correctly. This is an unfortunate weakness in the monitoring framework. Any issues identified rely on the cooperation of the State involved to address the concerns identified in the report. Despite no enforcement mechanism, the publication of GRETA's reports and conclusions will provide an element of political persuasion to address the report and comply with any recommendations. This has the potential to encourage States to implement the requirements of the Convention in order to avoid embarrassment or a negative impact on a States international reputation. This form of political persuasion is in reality more effective with those countries that either already have positive reputations and relations within the International community that they wish to protect, or with those counties wishing to achieve one. Even though there are limitations involved in this mechanism it is still viewed as *'a highly novel and practically useful approach to the phenomenon of trafficking.'*⁹⁶

Similar mechanisms are required by EU Directive 2011/36/EU. The Commission is required to submit a report to the European Parliament and the Council by no later than 6 April 2015 which assesses the extent to which the Member States have taken the necessary measures in order to comply with the requirements of the Directive.⁹⁷ The Commission is required to submit an additional report by 6 April 2016 which assesses 'the impact of existing national law, establishing as a criminal offence the use of services which are the objects of exploitation of trafficking in human beings, on the prevention of trafficking in human beings, accompanied, if

⁹⁶ S Egan, 'Protecting the victims of trafficking: problems and prospects' (2008) 1 European Human Rights Law Review, 106, 113.

⁹⁷ Article 23 (1) EU Directive 2011/36.

necessary, by adequate proposals'.⁹⁸ Unlike GRETA, the EU can insist that Member States of the EU (including the UK since they opted-in) comply with the provisions in the Directive. If it is found that States are not complying they will be required to amend national law accordingly. This arguably allows the EU to play an important role in the legal responses to human trafficking.

The second form of monitoring mechanism referred to in the CoE Convention and Directive 2011/36/EU⁹⁹ requires Member States to establish national monitoring systems such as national rapporteurs or other equivalent mechanisms but with a slightly different purpose which is to '*carry out assessments of trends in trafficking in human beings, gather statistics, measure the results of anti-trafficking actions, and regularly report.*'¹⁰⁰ This is different to the National Referral Mechanism required under Article 10 CoE Convention which the UKHTC and UK Border Agency have been assigned as the competent authority to identify trafficking victims and refer them to appropriate services.¹⁰¹

To date the UK has refused to create a national rapporteur, despite there being concerted efforts to convince the Government of the need for this post.¹⁰² The Government claims that the existing interdepartmental

⁹⁸ Article 23 (2) EU Directive 2011/36.

⁹⁹ Article 29(4) CoE Convention and Preamble, Article 19 Directive 2011/36/EU.

¹⁰⁰ Recital 27, Directive 2011/36/EU.

¹⁰¹ The National Referral Mechanism (NRM) and the UK's internal monitoring of trafficking is discussed in more detail in *Chapter Five*.

¹⁰² Such as the National Rapporteur on Human Trafficking Campaign by ECPAT details available at <<http://www.ecpat.org.uk/content/national-rapporteur-human-trafficking-campaign>> [last accessed 12.04.2012].

ministerial group on human trafficking (IDMG) fulfils this role.¹⁰³ However this claim has been criticised due to the lack of independence and the extremely poor attendance and frequency of meetings.¹⁰⁴

The functions of a national rapporteur are to provide systematic collection, monitoring and analysis of comprehensive and disaggregated data. It is claimed that without independence from Government and accountability to Parliament, a national rapporteur or similar body cannot be fully effective in carrying out these functions.¹⁰⁵ However, Damien Green, the Minister for Immigration, stated that the IDMG would meet the requirements and functions required and stated that the Directive did not stipulate that independence was necessary. He did however acknowledge that some changes would be made including to the membership of the group, the frequency of the meetings and revisions of the terms of reference of the group would be made to extend it to assess trends and measure the actions being taken to address them. He also stated that an annual report would be produced in partnership with the UKHTC.¹⁰⁶ It is uncertain whether the existing body can effectively meet the required standards due to the lack of independence which it is claimed is necessary to allow anti-trafficking measures to be objectively assessed.¹⁰⁷ In a recent House of Commons Debate on the matter it was stated:

¹⁰³ HC Deb 8 Feb 2012: Column 141WH.

¹⁰⁴ Only two meetings have taken place in 18 months and more than two thirds of members sent apologies for each meeting. See HC Deb 8 Feb 2012: Column 136WH.

¹⁰⁵ ECPAT used the Netherlands as an illustration of the success and value of a national rapporteur. See <http://www.ecpat.org.uk/content/national-rapporteur-human-trafficking-campaign> [last accessed 12.04.2012].

¹⁰⁶ HC Deb 8 Feb 2012: Column 141WH.

¹⁰⁷ ECPAT See <http://www.ecpat.org.uk/content/national-rapporteur-human-trafficking-campaign> [last accessed 12.04.2012].

‘A national rapporteur, or equivalent mechanism, must be independent from Government. If they are not independent, their work will not be considered authentic, as it will always be felt that the Government have somehow rigged the figures, and that whatever view is expressed will represent a spin on Government policy. No Government organisation will criticise its own Government.’¹⁰⁸

However this is something that can only be determined once the IDMG has been operating in this role for a period of time.

4. PROTECTION AND ASSISTANCE

It is useful to examine the general approach to trafficking in human beings taken at International, European and UK level. This will provide the background context to the types of protection provided and illustrate the key purpose of these instruments. It will also highlight the effect that different approaches may have on outcomes for victims of trafficking if they are identified. Consideration of these approaches will encompass instruments other than the four ‘core’ instruments, particularly when considering the EU’s approach. The reasoning behind the adoption of particular approaches to victim protection is also considered to identify issues of competence and general mandates influencing the underlying approach at the various levels.

Under Article 35 UNCRC children have a right to protection from trafficking. This involves protection not only through removal of the child from this situation if discovered but also the provision of particular measures aimed at helping a child’s recovery. For victims of trafficking, particularly children, there is a marked difference in the level of protection

¹⁰⁸ Mr Peter Bone (Wellingborough) (Cons MP), HC Deb 8 Feb 2012: Column 136WH.

provided within the four 'core' legal instruments. The United Nations, the European Union and the UK's response to trafficking in human beings has been primarily a prosecutorial one with restricted focus given to the protection of victims' human rights.¹⁰⁹ The Council of Europe has taken an approach based on the protection of human rights of victims as the centre of action to tackle human trafficking.

4.1 The United Nations

The Trafficking Protocol has taken a prosecutorial approach to the issue of trafficking in human beings. This approach stems from the fact that the Trafficking Protocol supplements the United Nations Convention against Transnational Organised Crime 2000. The Protocol is required to be read in conjunction with the associated Convention which has the overall purpose of tackling transnational organised crime.¹¹⁰ As a consequence, the Trafficking Protocol mirrors this approach with the predominant focus on criminal sanctions rather than the human rights of victims. The Trafficking Protocol provides protection to victims mainly in the context of criminal proceedings. Anderson found that the '*...actual obligations are minimal and the protection provisions are weak*' in relation to victims of trafficking.¹¹¹ Article 6(1), Trafficking Protocol states that, in appropriate cases and to the extent possible under domestic law, each State will protect the privacy and identity of victims, in the first instance by making legal proceedings confidential. Also, in appropriate cases, States will provide information on relevant court and administrative proceedings and give

¹⁰⁹ S Egan, (n96) 110; The different approaches taken to regulating trafficking are identified in *Chapter Four*.

¹¹⁰ 2000, A/55/25 Annex I.

¹¹¹ B Anderson, 'Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates' (2007) Centre on Migration, Policy and Society, Working Paper -07-48, available <http://www.compas.ox.ac.uk/people/staff/bridget-anderson/publications/> [last accessed 28.10.2011].

assistance to enable the victim's views and concerns to be presented and considered at appropriate stages of criminal proceedings.¹¹² It is not clear what falls within the category of 'appropriate case' deserving of protection on the face of the Protocol, leaving a large margin of discretion to States when implementing these, very limited, protective measures.

The Trafficking Protocol also requires each signatory State to consider implementing measures to provide for the physical, psychological and social recovery of victims in particular, the provision of:

- (a) *Appropriate housing;*
- (b) *Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;*
- (c) *Medical, psychological and material assistance; and*
- (d) *Employment, educational and training opportunities.*¹¹³

In applying this Article, States are encouraged to take '*the age, gender and special needs of victims of trafficking in person in particular the special needs of children*' into account and this includes when making decisions about providing housing, education and care, which must be suitable for the child. In relation to the provision for assistance under Article 6(3), the interpretative note contained in the *travaux preparatoires* states:

'The type of assistance set forth in this paragraph is applicable to both the receiving State and the State of origin of the victims of trafficking in persons, but only as regards victims who are in their

¹¹² Article 6(2), Trafficking Protocol.

¹¹³ Article 6(3), Trafficking Protocol.

*respective territory. Paragraph 3 is applicable to the receiving State until the victim of trafficking in persons has returned to his or her State of origin, and to the State of origin thereafter.*¹¹⁴

Article 6(3) is important because it has the potential to provide assistance to victims of trafficking upon their return to their country. However, the value of this provision is also limited because there is no binding obligation on either the State of destination or origin to provide this protection. The Trafficking Protocol merely requires States to “*consider implementing measures*”.¹¹⁵ Therefore there is no explicit right that an individual can claim to this protection unless States have incorporated these provisions into domestic legislation, until then the protection referred to under Article 6(3) Trafficking Protocol is provided on a purely discretionary basis.

The Trafficking Protocol also requires States to ensure that national legal systems contain measures to provide victims of trafficking with the possibility of pursuing compensation for damage suffered as a result of being trafficked. Whilst this is an important aspect to victim protection and assistance, the Trafficking Protocol merely raises the possibility of obtaining compensation rather than providing any guarantee of compensation to trafficking victims, including children.¹¹⁶ Often of more importance to trafficking victims is the right to remain legally in the State of destination rather than returning to their country of origin. Each signatory State to the Trafficking Protocol are encouraged to consider

¹¹⁴ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto at 373 available at http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf [last accessed 01.10.09].

¹¹⁵ Article 6(3), Trafficking Protocol.

¹¹⁶ Article 6(6), Trafficking Protocol.

adopting measures to enable a victim to remain in its territory, either temporarily or permanently.¹¹⁷ There is no indication what form these measures may take and, as States are only obliged to *consider* adopting these measures, the effect of Article 7 will vary between States, depending on their own national legislation.

Where trafficking victims are to be returned to their country of origin, the Trafficking Protocol provides for the repatriation of trafficking victims by detailing the necessary requirements. These requirements include, where the State of which the person is a national or had the right of permanent residence at the time of entry into the receiving State, being prepared to facilitate and accept the person without undue or unreasonable delay, having due regard for their safety and for the status of any legal proceedings, and their return should preferably be voluntary.¹¹⁸ The State receiving the victim must verify whether the victim of trafficking is a national or had the right of permanent residence at the time of entry into the receiving State, and should provide travel documents where the victim is without proper documentation.¹¹⁹

The overall protection and assistance provided by the trafficking protocol remains limited with few actual enforceable rights for trafficking victims. As discussed much of the protection is framed in terms of States being required to consider adopting measures aimed at the protection and assistance of individuals, but the primary aim remains the criminalisation of trafficking and the protection of States from organised crime.

¹¹⁷ Article 7, Trafficking Protocol.

¹¹⁸ Article 8(1) and 8(2) Trafficking Protocol; Article 16(1) and 16(2) CoE Convention.

¹¹⁹ Article 8(3) and 8(4) Trafficking Protocol; Article 16(3) and 16(4) CoE Convention.

4.2 The European Union

The approach taken by the EU to the protection of victims of trafficking has similarly been to provide protection to victims of trafficking in the context of criminal proceedings. Trafficking in human beings is dealt with under the umbrella of organised crime and the primary aim is the successful prosecution of the traffickers, not the protection of the victim. This focus is as a result of the EU's competence to legislate in this area. The legal basis for action concerning trafficking in human beings results from insertion of Article 29 TEU by the Treaty of Amsterdam 1997 containing the objective to:

'...provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters...'

This objective is to be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children.

When the EU Framework Decision on trafficking in human beings was adopted in 2002¹²⁰ it recognised children as vulnerable victims and as a result they were to benefit from protection, although this remained in the context of criminal proceedings.¹²¹ This additional protection was provided

¹²⁰ [2002] OJ L 203/1.

¹²¹ See T Obokata, (n7) 'EU Framework Decision on Combating Trafficking In Human Beings: A Critical Appraisal' (2003) 40 Common Market Law Review 917-936 for a critical analysis of the Framework Decision which highlights the problem with the limitation placed on victim protection as well as the need to recognise that trafficking involves not only organised crime, but individuals and other groups who benefit equally from the profits available from trafficking.

under Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.¹²² This included the right to protection against the effects of giving evidence in open court and permitted the court to make alternative arrangements for a child giving evidence.¹²³ This was likely to take the form of videoed evidence rather than actually appearing before the court. It also provided for trained personnel to deal with vulnerable children during proceedings.¹²⁴ Article 2(2) states that children, as vulnerable victims, would be entitled to specific treatment best suited to their circumstances.¹²⁵ The Framework Decision did not however, detail what “specific treatment” actually means which results in wide discretion for each Member State. All protection provided by the EU Framework Decision 2002/629/JHA was linked to criminal proceedings even though in the Preamble Recital 3 recognised that trafficking in human beings involves serious violations of fundamental human rights and human dignity.¹²⁶

The same approach has been adopted by 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.¹²⁷ Protection is provided to victims of trafficking on a conditional basis. In order to qualify for protection, victims are obliged to cooperate with the authorities in order to assist with criminal

¹²² [2001] OJ L82/1.

¹²³ Article 8(4), Framework Decision 2001/220/JHA.

¹²⁴ Article 14(1), Framework Decision 2001/220/JHA.

¹²⁵ Article 2(2), Framework Decision 2001/220/JHA.

¹²⁶ Preamble, Recital 3.

¹²⁷ [2004] OJ L 261/19.

prosecutions. In human rights terms, the protection provided has been said to be of ‘dubious worth’ since it is directly linked to, and conditional on victims cooperating with the authorities.¹²⁸ This approach is problematic and provides little incentive for victims to come forward when they are in fear for their own or their family’s lives. Giving victims incentives to cooperate has been questioned in relation to the reliability of any evidence they may provide for use in criminal proceedings.¹²⁹ The EU experts group on trafficking in human beings stated:

‘In order to effectively address trafficking and to prevent re-trafficking, as well as meeting State’s obligations under international human rights law Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers.’¹³⁰

The European Commission has adopted a recommendation to the Council on fighting trafficking in human beings for the development of an integrated approach and proposals for an action plan.¹³¹ There is a clear statement within this document that measures adopted in relation to

¹²⁸ S Egan, (n96) 106.

¹²⁹ Irish Human Rights Commission, Observations on the Scheme of the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill 2007 paragraph 3.3.3 at 40 available at <http://www.ihrc.ie/documents/article.asp?NID=210&NCID=6&T=N&Print=> [last accessed 08.10.09].

¹³⁰ EU Expert Group on Human Trafficking, Report of 22 December 2004, Recommendation 89, 101 available <<http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=2LkCNZ8Tq1DKvfJ59Szk2724pTQXvQQyGQGrtY NnjG1PTsp6SVJl!1145937442?id=37a79d51-e316-424a-b869-6e1c941f5231>> [last accessed 01.11.2011].

¹³¹ Communication from the Commission to the European Parliament and the Council ‘Fighting Trafficking in Human Beings – An Integrated Approach and Proposals for an Action Plan’ COM(2005) 514 final, 18th October 2005.

trafficking by the EU have so far failed to effectively reduce the number of victims of trafficking.¹³² Within this recommendation the Commission calls for the European Union to sign and ratify the CoE Convention on Action against Trafficking in Human Beings as soon as possible, with the Commission being urged to initiate the procedure necessary to enable signature and ratification and the Council being urged to take the decision to sign and ratify the Convention.¹³³ This has not yet taken place. During the discussions leading to the CoE Convention, the EU insisted on the inclusion of a ‘disconnection clause’.¹³⁴ On first sight this clause affects only trafficking between EU Member States, requiring the application of EU law in these circumstances, rather than the CoE Convention. In theory, the effect of this is potentially lower standards of human rights protection than that available under the CoE Convention for individuals trafficked between Member States than for those who have been trafficked into the EU.¹³⁵ There is however, no evidence of this and on closer examination of Article 40, CoE Convention, this disconnection clause is to account for EU competence rather than to enable a lower level of rights and obligations between Member States compared to non-Member States.¹³⁶ The CoE Convention therefore provides a ‘floor’ of protection, which the EU can ideally improve upon in its own legislative activity.

¹³² [2006] OJ C 314E/355 at Note D.

¹³³ [2006] OJ C 314E/355 recommendation 1 (b).

¹³⁴ Article 40(3), CoE Convention on Action against Trafficking in Human Persons 2005 (CETS no. 197).

¹³⁵ Speech by Serhiy Holovaty, chairperson of the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs, to the 26th Conference of European Ministers for Justice, Apr, 2005 available at http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2005-Helsinki/disc_holovaty.asp [last accessed 17.03.09].

¹³⁶ Article 40(1) and Note by the Secretariat CoE Convention .

Within the general EU response to child trafficking, there are apparent differences in the attention given to the criminalisation of the sexual exploitation of children and those who are exploited in other ways, including the exploitation of a child's labour. The protection found within the EU Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography 2003 is regarded by Egan as an instrument where:

*'A more robust approach to the protection of child victims of sexual exploitation can be found...' '...which is designed to forge a common response to such offences which very often involve trafficking in children.'*¹³⁷

Although it is an improvement that the protection available is not conditional on victims cooperating with the authorities for the purposes of criminal investigations and proceedings it is questionable whether this Framework Decision provides *'a more robust approach'*. The protection is still framed and provided in the context of criminal proceedings, rather than protection which is separate from and independent of the prosecution of traffickers.¹³⁸ This Framework Decision is further evidence that the focus is still predominately on sexual exploitation rather than an equal focus and response to all forms of exploitation. This was an opportunity for the EU to improve the overall protection of trafficked children regardless of the type of exploitation experienced by the child. Advantage was not taken of this opportunity and again the message was indirectly reinforced that sexually exploited children are in need of more protection than children exploited in other ways. This unbalanced approach to the forms of

¹³⁷ OJ [2004] L 13/44, 20th January 2004. S Egan, (n96) 119.

¹³⁸ Article 9, Framework Decision.

exploitation experienced as a result of trafficking may potentially leave children who have been trafficked and exploited in domestic work more at risk and lacking the protection they need if the focus remains on criminal prosecutions, in the context of sexual exploitation.

4.3 Recent Legislative Developments within the EU

In March 2009, the European Commission proposed two new Council Framework Decisions. The first was a proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA.¹³⁹ This proposal has actually resulted in the adoption of Directive 2011/36/EU on preventing and combating trafficking in human beings, which replaces the Framework Decision on Trafficking, and was adopted under Articles 82(2) and 83(1) TFEU following the entry into force of the Lisbon Treaty in 2009. The second was a proposal for a new Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography.¹⁴⁰

Under the proposed Trafficking Framework Decision there were special protective measures for children under Article 11. Article 11 would have required States to apply Articles 14 and 15 of the proposed Framework Decision to combat sexual exploitation of children. The protection and assistance provided for children under these Articles would have included the appointment of a special representative, access to free legal counselling and legal representation in criminal proceedings. However, although the protection provided by this proposed Trafficking Framework Decision would have been a positive extension of that previously provided to

¹³⁹ COM(2009) 136 final, (hereafter Proposed trafficking Framework Decision).

¹⁴⁰ COM(2009)135 final. (Proposed Framework Decision to combat sexual exploitation).

victims, it would still be limited in two key ways. First, as already stated the protection would still be framed within the context of criminal proceedings and second, this additional protection would only have been available to children who had been sexually exploited.

This restricted application of the protection available was as a result of link drawn by the proposed Trafficking Framework Decision to the special provisions in the Framework Decision to combat sexual exploitation. There was instead a need for these additional protective provisions to be explicitly duplicated in the proposed trafficking Framework Decision itself, otherwise this would have resulted in children who are exposed to exploitation other than sexual exploitation, including children exploited in domestic work, being excluded from taking advantage of these special measures. This variation in application of these provisions would have continued and reinforced the dominant EU response to trafficking, by focusing on human trafficking in the context of sexual exploitation. Although it was claimed that the approach taken in these proposals was a more holistic one,¹⁴¹ there were still limitations on the circumstances and extent of protection provided for children who were victims of trafficking when compared to the holistic approach taken by the Council of Europe.

Fortunately, the proposal for the Trafficking Framework Decision was not adopted and instead the EU adopted Directive 2011/36/EU. Directive 2011/36/EU builds on the provisions of the UN Trafficking Protocol and the CoE Convention and adopts the definition of trafficking in human beings contained in these instruments and therefore extends the offences to include organ trafficking. Victim protection in the proposed Framework

¹⁴¹ Recital 3, proposed trafficking Framework Decision.

Decision was still in the context of criminal proceedings.¹⁴² However, Directive 2011/36/EU did not make victim assistance and protection conditional on their willingness to cooperate in the criminal investigation, prosecution or trial.¹⁴³ This is a particularly important development for victims of trafficking.

Directive 2011/36/EU also ensures that the additional protection for children is available to all trafficked children regardless of the type of exploitation experienced.¹⁴⁴ This Directive also incorporates a more children's rights informed approach and protection should be provided with a child's best interests being a primary consideration. Under the Directive, when a trafficked child is identified, an initial assessment has to be undertaken to assess the '*special circumstances of each particular child victim, taking due account of the child's views*'.¹⁴⁵ The Directive requires Member States to appoint a guardian or representative where there is no other adult with parental responsibility who can act on behalf of the child in their best interests.¹⁴⁶ The Directive therefore takes a much more child-focused approach to child trafficking than previous EU legislation. For the first time there is an explicit reference to the UNCRC which is important for the application of a consistent standard in relation to children's rights.¹⁴⁷ The Directive has incorporated a level of individualisation not

¹⁴² Article 10, proposed trafficking Framework Decision.

¹⁴³ Article 11(3), Directive 2011/36/EU.

¹⁴⁴ Article 13, Directive 2011/36/EU.

¹⁴⁵ Article 14, Directive 2011/36/EU.

¹⁴⁶ *Ibid.*

¹⁴⁷ For a discussion of children's rights in the European Union see H Stalford and E Drywood, 'Coming of age? Children's rights in the European Union' (2009) 46(1) *Common Market Law Review* 143–172.

seen in previous legal instruments through the requirement to consider **each particular** child victim.¹⁴⁸ This is undoubtedly a positive step forward in the attempt to tackle child trafficking. The child is therefore identified as a category of victim deserving special protection, but the protection provided expressly requires consideration of each individual child's circumstances.

In terms of compensation for victims and the possibility for them to remain in the UK, Article 17 of Directive 2011/36/EU requires Member States to '*ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.*' This goes beyond the approach of the Trafficking Protocol to this issue and guarantees that trafficking victims can access existing compensatory schemes. Additionally, Directive 2011/36/EU which the UK has opted-in to does envisage that some third-country nationals who are victims of trafficking may remain, but only in the situation where they are cooperating with the authorities in relation to criminal proceedings. This is the case due to the explicit link made with EU Council Directive 2004/81/EC¹⁴⁹ on this issue.¹⁵⁰ The period of recovery/reflection given under this Directive does not create any right to residence.¹⁵¹ Matter argues that the availability of a residence permit is '*a measure calculated to*

¹⁴⁸ Ibid.

¹⁴⁹ 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. OJ L261/19.

¹⁵⁰ Article 11(6) Directive 2011/36/EU.

¹⁵¹ Article 6(3), Directive 2004/81/EC.

encourage them to cooperate'.¹⁵² This assistance is therefore of limited value to victims of trafficking and particularly to children. It is less likely that a child would be viewed as a reliable witness and would thereby fail to qualify for protection under the Directive. However, when decisions are made concerning a child they have to be made in the best interests of the child.¹⁵³ Therefore before children who have been identified as trafficked, as a result of their parents' involvement, are removed from the country and returned to their parents, a risk assessment would be necessary to determine whether it is safe for the child to be returned home to their parents.¹⁵⁴

4.4 Council of Europe

The approach taken by the CoE Convention to the assistance of victims of trafficking varies from that taken by the Trafficking Protocol. Although both refer to measures aimed at assisting victims in their physical, psychological and social recovery, the wording of the Convention is much stronger than Article 6(3), Trafficking Protocol.¹⁵⁵ Both instruments appear to require similar action but the CoE Convention sets a minimum standard of assistance required, unlike the Trafficking Protocol which only encourages action by signatory States. The CoE Convention requires States to provide as the minimum:

¹⁵² MY Matter, 'Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14(2) Tulane Journal of International and Comparative Law 357, 396.

¹⁵³ Article 10 Directive 2004/81/EC.

¹⁵⁴ UK Department for Education Consultation, 'Working together to safeguard children: Safeguarding children who may have been trafficked' (2011) 28, available <<http://www.education.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1497&menu=3>> [last accessed 28.04.2012].

¹⁵⁵ Article 6(3), Trafficking Protocol; Article 12(1) CoE Convention.

*'standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance; access to emergency medical treatment; translation and interpretation services, when appropriate; counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; and access to education for children.'*¹⁵⁶

Additionally the CoE Convention states that, where children are unaccompanied and they are identified as a victim of trafficking, each Party to the Convention is required to:

- (a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;*
- (b) take the necessary steps to establish his/her identity and nationality;*
- (c) make every effort to locate his/her family when this is in the best interests of the child.*¹⁵⁷

The CoE Convention recognises that there may be situations where finding the child's family would not be in the best interests of the child and this is particularly relevant where the child's parents have been involved in their

¹⁵⁶ Article 10(1), CoE Convention.

¹⁵⁷ Article 10(4), CoE Convention.

trafficking as may be the case with the children who are the focus of the thesis. This particular aspect of the Convention has incorporated a level of individualisation which reflects the potential needs of children in domestic work following their parents providing consent to their removal from home. For this particular group of children, returning them to their family involves greater risks of re-trafficking. This illustrates one reason why the appropriate level of individualisation of children is required within the legal responses to child trafficking.

The Council of Europe Convention focuses in particular on the protection of victims' human rights. Trafficking in human beings is approached by the CoE Convention as a violation of human rights as well as a violation of human dignity and integrity.¹⁵⁸ The protection and assistance provided to victims is one particular area where the CoE Convention differs significantly to the other 'core' instruments. The human-rights approach taken by the CoE is based on the United Nations Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking.¹⁵⁹ Guideline 1 states:

'Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking...'

¹⁵⁸ CoE explanatory report, para 36.

¹⁵⁹ S Egan, (n96) 112 citing E/2002/68/Add.1 available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument) [last accessed 01.10.09].

Importantly, the protection and assistance provided by the CoE Convention is not conditional on the victims' cooperation in criminal proceedings.¹⁶⁰ However, additional specific protection is still provided in the context of criminal proceedings. For example, the CoE Convention requires States to adopt legislative or other measures as may be necessary to *'provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators'*.¹⁶¹ This applies to victims, those reporting the offence, witnesses giving testimony and, where necessary, the family of each of these groups. This may include physical protection, relocation, identity change and assistance in obtaining jobs. Where a child is the victim of trafficking they are afforded special protection measures in relation to accommodation, medical care and access to education. Decisions made in relation to children who are victims are made taking into account the best interests of the child.¹⁶²

Compensation for victims of trafficking is included in the CoE Convention as a right¹⁶³ which should be guaranteed,¹⁶⁴ for example, through special funds set up by the individual Parties to the Convention. This provision goes further than those contained in the Trafficking Protocol and EU Directive 2011/36/EU by requiring states to not only allow access to existing funds but also to set up special funds if necessary. In terms of the possibility for trafficking victims to remain in the country where they have

¹⁶⁰ Article 12(6), CoE Convention .

¹⁶¹ Article 28, CoE Convention.

¹⁶² Article 28(1), CoE Convention .

¹⁶³ Article 15(3), CoE Convention – right of victims to compensation from the perpetrators.

¹⁶⁴ Article 15(4), CoE Convention.

been trafficked to, the CoE Convention introduces a new recovery and reflection period provision under Article 13.¹⁶⁵ The aim is to automatically give every victim of trafficking a period of at least 30 days where they can remain in the host state in order to recover and escape the influence of the traffickers. This measure is also intended to help the victim make an informed decision about whether they wish to cooperate with the authorities in pursuing criminal proceedings. Parties to the Convention are not bound by the automatic period, “*if grounds of public order prevent it or if it is found that victim status is being claimed improperly*”.¹⁶⁶ This exception is aimed at preventing and/or deterring false claims of victim status in order to benefit from the protective provisions.

The issue of a renewable residence permits for victims of trafficking is required under the CoE Convention where ‘*the competent authority considers that their stay is necessary owing to their personal situation*’ or, alternatively, where it is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.¹⁶⁷ Residence permit for child victims, when legally necessary, ‘*shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions*’.¹⁶⁸ In relation to the removal of individuals from the country of destination the CoE Convention restricts the scope of the right of signatory states to do this, with a requirement on States to ensure that:

¹⁶⁵ Article 13, CoE Convention.

¹⁶⁶ Article 13(3), CoE Convention.

¹⁶⁷ Article 14(1), CoE Convention.

¹⁶⁸ Article 14(2), CoE Convention.

*‘if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence has been completed by the competent authorities and shall likewise ensure that that person receives assistance’.*¹⁶⁹

The CoE Convention goes further than the Trafficking Protocol and requires that States *‘shall adopt such legislative or other measures as may be necessary to establish repatriation programmes’*, which *‘aim at avoiding re-victimisation’*.¹⁷⁰ The re-integration of victims into the society of the State from which they originated is an important aspect of preventing re-trafficking. The CoE Convention therefore encourages States to reintegrate victims into the education system and the labour market and to secure adequate care or receipt by the family, and appropriate care structures for child victims.¹⁷¹ Child victims must not be returned to a State if there is any indication, following a risk and security assessment that returning the child would not be in the best interest of the child.¹⁷² Children whose parents have been involved in the decision which led them to be taken from their home are particularly at risk if returned without adequate checks. It is necessary to ensure that children will be protected and not re-trafficked by their family. Although children have a right not to be separated from their families under Article 9 UNCRC, this must be balanced with what is in the child’s best interests under Article 3 UNCRC.

¹⁶⁹ Article 10, CoE Convention.

¹⁷⁰ Article 16(5), CoE Convention.

¹⁷¹ Article 16(5), CoE Convention.

¹⁷² Article 16(7), CoE Convention.

There has to be an assessment to examine what changes to the family's situation have taken place since the child was first trafficked.

4.5 Possible other Avenues of Protection for the Child

Aside from the 'core' instruments, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography¹⁷³ requires States to adopt appropriate measures to protect the rights and interests of child victims at all stages of the criminal justice process. Article 8 details how in particular States are to implement this requirement:

- (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;*
- (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;*
- (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;*
- (d) Providing appropriate support services to child victims throughout the legal process;*
- (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;*

¹⁷³ General Assembly Resolution A/RES/54/263 of 25 May 2000.

- (f) *Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*
- (g) *Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.*

The initiation of criminal proceedings will not be delayed solely because the age of the victim is uncertain;¹⁷⁴ however during criminal proceedings the best interests of the child, who is a victim of an offence under the Optional Protocol, will be a primary consideration.¹⁷⁵ The Optional Protocol also requires that appropriate training, in particular legal and psychological training, is given to people who will work with children who are victims of trafficking. States must take all feasible measures to provide all appropriate assistance to victims; this includes their full social reintegration and physical and psychological recovery.¹⁷⁶ States must also provide adequate procedures to victims to enable them to claim, without discrimination, compensation for damages from those legally responsible.¹⁷⁷

4.6 The UK's Position

Trafficking children into the UK and exploiting them in domestic work is an offence under Section 4 of Asylum and Immigration Act 2004. This legislation does not detail any protective measures for victims of

¹⁷⁴ Article 8(2), Optional Protocol.

¹⁷⁵ Article 8(3), Optional Protocol.

¹⁷⁶ Article 9(3), Optional Protocol.

¹⁷⁷ Article 9(4), Optional Protocol.

trafficking. This does not mean that the UK does not provide protection for trafficking victims.

The UK's international obligations relating to victim protection arising from the Trafficking Protocol are weakly framed, mainly in terms of States being required to consider providing protection to victims rather than any binding obligations. The CoE Convention which came into force in the UK on the 1st April 2009 and Directive 2011/36/EU have changed this position. Now the UK has an obligation to provide protection which meets the minimum standards of protection specified in the Convention and Directive. Where children who are exploited in domestic work in the UK are identified as trafficked children, they will now benefit from the level of protection provided in these instruments as a minimum.

When children are first discovered and suspected of being trafficking victims, the priority is the welfare of the child. The child would be protected under the current child protection system provided for by the Children Act 1989. The Local Authority where the child was discovered would have responsibility to look after the child where they are considered to be a 'child in need' as defined by section 17 Children Act 1989. Section 17 states:

- 17(1) *It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)-*
- (a) *to safeguard and promote the welfare of children within their area who are in need by providing a range of level of services appropriate to those children's needs.*

17 (10) *For the purposes of this Part a child shall be taken to be in need if-*

- (a) *he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;*
- (b) *his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services*

17 (11) *“development” means physical, intellectual, emotional, social or behavioural development and “health” means physical or mental health.*

Clearly where a child has been exploited in domestic work, there would be little doubt that this child would be considered a ‘child in need’ and the Local Authority in which a child was discovered would have responsibility to care for the child, including accommodating them and assessing their needs. It is likely that the child would be a ‘looked after’ child and the local authority would apply for an interim care order which would allow them to consent to any necessary medical treatment or assessments.¹⁷⁸ This gives the local authority time to assess the child’s needs and situation whilst safeguarding their welfare by accommodating them. Once all assessments have been carried out a final decision is made and the child will either be returned to their country of origin or remain in the UK, whichever is found to be in the best interests of the child and will safeguard the child’s welfare.¹⁷⁹ If the child is to remain in the UK in the care of the local

¹⁷⁸ Interim Care Orders under section 38 Children Act 1989.

¹⁷⁹ Section 1 Children Act 1989: safeguarding the welfare of the child.

authority, a care order will be necessary.¹⁸⁰ This is a more permanent order which permits the local authority to care for the child and gain parental responsibility allowing them to make decisions on behalf of the child as parents would for example in the context of medical care or education. In order for the courts to issue an interim care order or a final care order, section 31 Children Act 1989 requires:

- (a) that the child concerned is suffering or is likely to suffer significant harm; and*
- (b) that the harm, or likelihood of harm is attributable to –*
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him;*

It is generally accepted that children who are discovered as possible trafficking victims are exploited and therefore would not have been provided with the care that would be expected from a reasonable parent. It would not be very difficult for local authorities to meet the threshold criteria required for the Courts to make an order.¹⁸¹ Therefore regardless of the protection and assistance provided under the legal instruments explicitly dealing with child trafficking, the UK has a child protection system which would apply to any ‘child in need’ found within the territory, regardless of their nationality and would provide the necessary medical and educational care for trafficked children. Although this system exists, the effectiveness of the system is dependent on the child becoming known to

¹⁸⁰ Care Orders section 31 Children Act 1989.

¹⁸¹ Section 31 (3) Children Act excludes these orders being made in respect of 17 year olds due to the fact that care orders are intended to be long-term solutions and they end once the child reaches the age of 18. However, these children would still be supported as a child in need and may be voluntarily accommodated under section 20 Children Act 1989.

social services or the National Society for the Protection of Children from Cruelty (NSPCC) who are authorised to make an application to the courts. The invisibility of trafficked children makes it more difficult for Local Authorities to identify the children in the first place. Therefore this protection is dependent on the effectiveness of the identification procedures discussed in *Chapter Six*.

Currently under UK law compensation may be payable to trafficking victims if a defendant is convicted and ordered by the court to pay compensation to the victim for personal injury and loss or damage resulting from the offence committed.¹⁸² Any compensation ordered by the court will not be paid to the victim until the defendant arranges the payment to be made to the court. An alternative avenue through which victims of trafficking could claim compensation is the Criminal Injuries Compensation Scheme. This is a national fund that entitles innocent victims of violent crime to compensation for injuries suffered in England, Scotland or Wales.¹⁸³ While it may be possible for a victim to take a civil action in compensation against a trafficker, the cost of doing so is likely to be prohibitive. Compensation is one element of assistance for victims of trafficking, but other measures may be equally, if not more, important to victims of trafficking. The possibility of remaining in the UK rather than being returned to their country of origin may be of greater importance than any compensation available. This is particularly relevant to children who are exploited in domestic work as a result of their parents consenting and entering an agreement for the child to be brought to a household in the UK because of the risk of re-trafficking on return to the country of origin.

¹⁸² Section 130(1), Power of Criminal Courts (Sentencing) Act 2000 (c.6).

¹⁸³ Northern Ireland has a similar, but separate scheme for victims.

The automatic reflection/recovery period introduced by the CoE Convention was an issue that the UK Government raised as a concern during negotiations. They stated that this provision within the Convention may act as a “pull” factor to the UK and may encourage false claims in order to avoid immigration control and obtain benefits fraudulently.¹⁸⁴ However, the House of Lords, House of Commons Joint Committee on Human Rights considered the Government’s concerns and found that there was no evidence to suggest that there would be problems caused by Article 13 because there are safeguards within the Convention itself to deal with the possibility of fraudulent claims.¹⁸⁵ They went on to suggest that recovery/reflection periods were actually “highly attractive” as they provide a guarantee of the protection of victims’ human rights¹⁸⁶ and recommended that three months rather than 30 days was a more appropriate length of time for reflection periods.¹⁸⁷ The Joint Committee recommended that the UK should sign and ratify the Convention and could see no convincing argument against ratification. They recognised that the UK Government had claimed that they were and could continue to adequately protect victims, but argued that the signing and ratifying the Convention would be ‘*strengthening the framework of anti-trafficking policy in the UK*’ in line with the other nations of the Council of Europe.¹⁸⁸

¹⁸⁴ House of Lords House of Commons, Joint Committee on Human Rights, Human Trafficking, Twenty-sixth Report of Session 2005-06 Volume II – Oral and Written Evidence HL Paper 245-II HC 1127-II, Memorandum from the Home Office, dated 8 May 2006, Ev 53, para 67.

¹⁸⁵ Joint Committee (n184), para 199-200.

¹⁸⁶ Joint Committee(n184), para 202.

¹⁸⁷ Joint Committee (n184), para 203.

¹⁸⁸ Joint Committee (n184), para 205.

The UK has now ratified the CoE Convention with a reflection period of 45 days¹⁸⁹ and it is in force in the UK as from 1st April 2009.

The right of a victim of trafficking to remain in the UK as a legal resident following their identification as a victim is not provided for in the Asylum and Immigration Act 2004. However, due to the fact that the UK has ratified the CoE Convention, victims may be eligible for a residence permit following the 45 day reflection/recovery period. These are issued for a minimum of one year and are renewable. Residence permits are issued where the victim is either cooperating with criminal investigation or proceedings or alternatively where it is found to be necessary due to the individual's personal circumstances. This may apply to children who have been trafficked and exploited in domestic work as a result of their own parents' agreement. Before a child can be returned to their country of origin a risk assessment needs to be conducted to assess that whether it is in the child's best interests.¹⁹⁰ Only if the risk assessment confirms that there are sufficient safeguards in place to protect the child from re-trafficking and for their reintegration would they be repatriated. Otherwise the child's best interests would be met by remaining in the UK and remaining to be cared for and looked after by the Local Authority on a more permanent basis.

4.7 Signs of Progress Towards a Unified Approach

There is currently no indication that the approach taken by the United Nations towards the protection of victims of trafficking is moving away from the prosecutorial focus currently adopted in the Trafficking Protocol.

¹⁸⁹See CPS

<http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a25>[last accessed 15.04.2012].

¹⁹⁰ UK Department for Education Consultation, (n 154), 28.

There are however, some signs that the EU's focus is shifting towards increased protection for victims, and taking particular account of children. The CoE Convention aims to strengthen existing legislative provisions in order to protect the human rights of trafficking victims. It adds value to the existing framework by not only recognising that victims should be provided with protection, but laying down minimum standards which each Party is required to meet and a report system through GRETA to monitor progress. The CoE Convention currently provides by far the highest levels of protection for children who are victims of human trafficking and as such could be considered the "gold standard" which the EU could aspire to meet. It appears with the recent adoption of Directive 2011/36/EU that this has been attempted.

The European Commission made a recommendation in November 2006 to the Council on fighting trafficking in human beings — an integrated approach and proposals for an action plan. There are many similarities between the recommendation and the CoE Convention. Both require a human-rights, anti-discrimination and victim-centred approach to be taken.¹⁹¹ The CoE Convention includes an automatic reflection/recovery period for victims of trafficking. The European Commission also recommended that victims of trafficking within the EU should automatically be given short-term residence status, regardless of whether or not they are cooperating with the authorities in relation to an investigation or prosecution.¹⁹² Although 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 provides a reflection

¹⁹¹ Communication from the Commission to the European Parliament and the Council 'Fighting Trafficking in Human Beings – An Integrated Approach and Proposals for an Action Plan' COM(2005) 514 final, 18th October 2005, recommendation 1 (d) and 1 (e).

¹⁹² Recommendation 1 (g), minimum period of 30 days.

period, the provision of this is limited to those who may consider cooperating with authorities and therefore falls short of the recommendation of the European Parliament of an unconditional short term period of residence.¹⁹³

The EU has the potential to have a greater role in the protection of children who are victims of trafficking and the protection of their rights. This stems from the binding nature of EU law on the UK. International treaties once signed and ratified by the UK become internationally binding. In contrast EU Directives are required to be transposed into UK law and any failure to implement Directive 2011/36 can be taken to the UK's national courts, or alternatively to the European Court of Justice by the Commission. There are limitations to the binding nature of EU law as there is a possibility for the UK to opt-out of legislation adopted in the Area of Freedom, Security and Justice, as has happened with Directive 2004/81/EC on residence permits issued to third-country nationals who cooperate with the authorities. However, having initially opted-out, the UK has opted in to Directive 2011/36/EU on trafficking in human beings.¹⁹⁴

Observing the legal developments at international, European and UK levels and assessing the adequacy of any resulting policies and legislation is an ongoing task. Although the Trafficking Protocol has more discretionary provisions relating to the protection and assistance of victims than binding

¹⁹³ Article 6 Council Directive 2004/82/EC; Residence permits of six months, [2004] OJ L 261/19.

¹⁹⁴ Once the date for implementation of Directive 2011/36/EU has passed (6 April 2013) its obligations are binding in English Law and have direct effect as established by the European Court of Justice in *Case 41/74 Van Duyn v Home Office* [1974] ECR 1337 and *Case 148/78 Pubblico Ministero v Tullio Ratti* [1979] ECR 1629. Prior to this date, the UK must not adopt any measures likely to seriously compromise the result imposed by the Directive as confirmed in *Case C-129/96 Inter-Environnement Wallonie ASBL v Region Walone* [1997] ECR I-7411.

ones, the fact that the UK has ratified the Protocol means that the aims and purpose of the Protocol contained within 2 of the Protocol were implicitly accepted.¹⁹⁵ These aims are to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights and to promote co-operation among state parties in order to meet those objectives. Now the UK has ratified the CoE Convention and Directive 2011/36/EU has been adopted, these instruments together achieve a more holistic approach.

5. CONCLUSIONS

The legal regulation of trafficking involving International, Council of Europe, EU and UK law creates a complex system of regulation and protection available to children who are victims of trafficking. Although instruments at each level contain similar offences and sanctions, they differ in terms of their scope and the protection available for children who have been trafficked. The Trafficking Protocol is restricted to offences which involve both organised crime and a transnational element, whereas the other three 'core' instruments extended the scope to include the possibility of either transnational or national offences.

With the enforcement of laws primarily focusing on organised criminal groups¹⁹⁶ there are less formal forms of trafficking being overlooked, such as circumstances which involve the victim's family members facilitating the process of trafficking. A human rights approach has the potential to promote a more holistic response by placing more pressure on States to

¹⁹⁵ N Finch and S Momtaz, 'Human Trafficking in the UK' [2006] International Family Law Journal 154.

¹⁹⁶ For example as illustrated by police operations focusing on trafficking resulting from organised criminal groups such as Pentameter 1 and 2.

deal with not only the prosecution of traffickers, but also with human rights issues which are relevant to the phenomenon.¹⁹⁷ A human rights approach views trafficked individuals as victims rather than criminals who are guilty of breaching immigration law. This is essential to avoid criminalisation and prosecution of trafficking victims.

The protection afforded to children who are trafficked for domestic work varies significantly between the legislative provisions and it is at this point that the two different approaches, human rights and crime, are most apparent. The Trafficking Protocol takes a criminal response to child trafficking whilst the CoE Convention approaches trafficking as a violation of human rights and is focused on the protection available to individuals who have been trafficked. Directive 2011/36/EU takes a much more balanced approach between criminalising child trafficking and protection of victims' human rights than Framework Decision 2002/628/JHA which it replaces.

The CoE Convention sets a minimum standard of assistance that needs to be provided to victims of trafficking. Importantly, the provisions of the CoE Convention are presented as binding obligations on States and rights for victims. This is in contrast to the less effective approach of only encouraging States to consider the possibility of providing such protection, which is the approach adopted by Trafficking Protocol.

The Trafficking Protocol, CoE Convention and Directive 2011/36/EU require action to be taken to try to prevent trafficking in human beings. For example, this may be achieved through research or policies and programmes aimed at alleviating the underlying problems such as poverty

¹⁹⁷ T Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006), 31-32.

and discrimination which make children more vulnerable to trafficking and exploitation. By including a child-rights approach, with specific provisions relating solely to children, the CoE Convention recognises that there are particular vulnerabilities to which children alone are subject. This is an important development since, although the Convention applies equally to men, women and children, there are not only different vulnerabilities, but also different needs and protection that are required where children are the victims of trafficking.

The EU has the potential to greatly influence and make positive changes to national legal responses to trafficking, by moving towards a more holistic response engaged with human rights obligations. This is due to the binding, and importantly, the enforceable nature of the legislative instruments which create binding obligations on Member States. There is interplay between EU law and International law and this is of great importance in the fight against trafficking. The EU has already based their current action on trafficking in human beings on the United Nations response. This is illustrated by the use of the definition in Article 3, Trafficking Protocol as the basis for the definition in Article 2, Directive 2011/36/EU. The EU should utilise international standards and extend the use of them further to develop a consistent and holistic responses to trafficking and the protection of children's rights in all Member States. The adoption of Directive 2011/36/EU on trafficking in human beings is a major step forward in the EU and because of the enforceable nature of the obligations created, has the potential to greatly improve the response of Member States at a national level.

Since the CoE Convention came into force in the UK on 1st April 2009, the UK has accepted internationally binding obligations to provide protection and assistance to child victims of trafficking discovered in the territory.

Prior to the Convention a child would still have been protected under the Children Act 1989, this development means that stronger and clearer provisions exist in relation to the protection of trafficked children under UK law. The difficulty remains, however, that regardless of the protection provided by UK law, the clandestine nature of trafficking and the fact that children are often hidden within private households and exploited in domestic work undermines the enforcement of the law. The utility of the law in the area is therefore limited and a more multi-faceted holistic approach needs to be developed.

Chapter Two

LOCATING CHILDREN WITHIN THE CURRENT LEGAL AND POLICY FRAMEWORK

1. INTRODUCTION

Having examined the provisions for prevention, protection and prosecution contained within the trafficking legal framework in the previous chapter, this chapter examines the legal concepts that are often associated with trafficking of human beings and determines how they apply to trafficked children who are exploited in domestic work. The definition of trafficking is central to this discussion and draws on the definition contained within Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹ Supplementing the United Nations Convention against Transnational Organized Crime 2000.² This definition was the first international consensus of the definition of trafficking in human beings and as such has been adopted as the basis for legally defining trafficking at International, European and UK levels.

In order for the crime of trafficking in human beings to be tackled, it is vital that the offence is clearly legally defined. This clarity is necessary to assist in the effective implementation of legislation which provides for the prosecution of traffickers, the protection of victims and provisions aimed at the prevention of the phenomenon.³ There are however some difficulties providing a clear legal definition which is consistently applied

¹ 2000, A/55/383 Annex II (hereafter the Trafficking Protocol).

² 2000, A/55/383 Annex I.

³ As discussed in *Chapter One*.

in practice due to the overlap between trafficking and other concepts. This chapter considers these overlaps including the synonymous use of the terms ‘trafficking’ and ‘smuggling’. It is necessary to separate the meanings of these terms as the legal responses vary and the outcome for individuals differs, depending on which of these concepts applies. It is not only trafficking and smuggling that are concepts that overlap; the same issue exists in relation to other terms such as ‘slavery’ and ‘servitude’. These terms are frequently used when referring to trafficking in children and it is necessary to understand the legal meaning of each and how each relates to trafficking.

First, the chapter considers the definition of domestic work in order to provide understanding of what is meant by this term and how it is being applied within the context of this thesis. The chapter demonstrates how child domestic work may violate a child’s right to an education, their right to have time to rest and play and their right to be protected from performing work that is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development.⁴

2. TRAFFICKING AND CHILD DOMESTIC WORK

In order to fully understand the legal responses to child trafficking in the context of child domestic work, it is important to have an understanding of the terms ‘domestic work’ and ‘child domestic labour’. The International Labour Organisation has defined domestic work as:

‘Household tasks performed as an economic activity in the household of a third person by adults and children over the minimum working age (i.e. work that could be regarded as ‘employment’

⁴ Articles 28, 31, 32 and 6 UNCRC.

whether or not covered by national labour law). Usually excludes domestic chores carried out by members of the family.’⁵

The ILO’s International Standard Classification of Occupations (1990) defined domestic work under the category of ‘domestic helper/cleaner’ as including roles such as washing, ironing, cooking, sweeping as well as many other roles. However, as Anderson points out, this definition does not include childcare which is usually a key element of domestic work.⁶ More recently the ILO have adopted a Convention Concerning Decent Work for Domestic Workers⁷ which defines ‘domestic work’ as work performed in or for a household or households, and ‘domestic worker’ as any person engaged in domestic work within an employment relationship.⁸ Article 1 excludes those who only carry out domestic work occasionally and not on an occupational basis.

Child domestic labour is defined by the ILO as:

‘Domestic work undertaken by children under the legal minimum working age, as well as by children above the legal minimum age but under the age of 18 under slavery-like, hazardous or other

⁵ J Kane, ‘Helping hands or shackled lives?: Understanding child domestic labour and responses to it’ (2004) ILO at VII available http://www.ilo.org/public/libdoc/ilo/2004/104B09_138_engl.pdf [last accessed 01.09.2010].

⁶ B Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books, 2000), 15.

⁷ International Labour Organization (ILO), Convention Concerning Decent Work for Domestic Workers, 16 June 2011, PRNo.15A, available at: <http://www.unhcr.org/refworld/docid/4e0d784e2.html> [accessed 13 November 2011].

⁸ Article 1, Convention Concerning Decent Work for Domestic Workers 2011.

exploitative conditions – a form of ‘child labour to be eliminated’ as defined in international treaties.’⁹

The Convention Concerning Decent Work for Domestic Workers, 2011 requires Member States to take steps towards the effective abolition of child labour. There is a distinction being drawn between ‘work’ and ‘labour’. The definition of ‘domestic work’ encompasses work undertaken by both adults and children over the legal minimum working age¹⁰ and puts it into the context of an employment relationship regardless of whether domestic work is covered by national labour laws or not. Under this definition, domestic work is viewed as an economic task which involves work for non-family members, therefore excluding general family chores within the individual’s own family.

In contrast the definition of ‘child domestic labour’ is not framed in terms of an employment relationship; instead the concern is with the protection of children from exploitative conditions. Child labour has been said to *‘revolve around some form of exploitation of children or activities that are likely to impinge negatively on the child’s education or development.’¹¹* The definition presents the view that any form of domestic work undertaken by children under the minimum working age is unacceptable, as well as work carried out in exploitative conditions by children younger than 18, but over the minimum working age. This definition recognises that children in domestic work are not always above the minimum working age. Age is therefore an important characteristic which has the ability to

⁹ J Kane, (n5).

¹⁰ As defined by International law by the Minimum Age Convention 1973, C138.

¹¹ M Pertile, ‘Introduction: The Fight Against Child Labour in a Globalized World’ in G Nesi, L Nogler and M Pertile (eds), *Child Labour in a globalized World: A Legal Analysis of ILO Action*, (Ashgate Publishing, 2008), 10.

dramatically change the nature of domestic work. The definition also implies that a child working is acceptable under certain circumstances.

For the purpose of deciding who may qualify to legally enter the UK to enter domestic work in a private household as a form of employment, the UK defines domestic workers as including ‘...cleaners, chauffeurs, cooks, those providing personal care for the employer or a member of the employer’s family, and nannies.’¹² Where an employment agency is involved with organising domestic work for an individual, employment is defined as including ‘...the reception in a private household of a person under an arrangement whereby that person is to assist in the domestic work of the household in consideration of receiving hospitality and pocket money or hospitality only.’¹³ UK law does not define child domestic work or labour, however there are specific rules that apply to children working dependent on their age.¹⁴

Throughout this thesis the term ‘domestic work’ is used to describe the actual work that a child undertakes in a private household, and not as an indication of how they arrived in this situation or to categorise the work as an employment relationship or alternatively exploitation of a child.¹⁵ A distinction will only be made between child ‘labour’ and child ‘work’ when it is necessary to do so.

¹² See <<http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/>> [last accessed 15.04.2012].

¹³ Section 13 Employment Agencies Act 1973.

¹⁴ The main piece of legislation dealing with this issue is the Children and Young Persons Act 1933. See *Chapter Eight* for a detailed discussion of children working.

¹⁵ As stated in the *Introduction*.

Children are often trafficked with the intention that they are to be exploited in domestic work. It is therefore important to understand what actually constitutes trafficking in human beings.

3. DEFINING CHILD TRAFFICKING

Child Trafficking requires a legal response to tackle this phenomenon. It is vital that there is an agreed legal definition of trafficking and this was provided for the first time by Article 3, Trafficking Protocol:

(a) "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;

(b) 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;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

This definition contains three separate elements: first the recruitment, transportation, transfer, harbouring or receipt of persons; second the use or threat of force or other forms of coercion, abduction, fraud, deception, or of the abuse of power; and third exploitation. The Protocol explicitly recognises that trafficking takes place, not only for the purpose of prostitution and sexual exploitation, but also forced labour and other forms of exploitation.¹⁶ Trafficking is a process rather than one single act and encompasses many different methods of organisation, numerous forms of exploitation and produces many different outcomes for victims.¹⁷ All three of the elements need to be present for an offence of trafficking to occur, except where a child is involved. Where a child is the victim, there is no need for *'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'*, i.e. the second element of the offence, coercion, need not be proven.¹⁸ The fact that the child has been recruited, transported, transferred or harboured for the purpose of exploitation with the involvement of organised criminal groups is sufficient for an offence under the Trafficking Protocol. Children are viewed as being particularly vulnerable to trafficking due to their age and the potential for others to abuse the power they may have over the child. During the negotiations for the Trafficking Protocol this term was originally framed as

¹⁶ V Munro, 'A Tale of Two Servitudes Defining and Implementing A Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 Social Legal Studies 91, 96.

¹⁷ J O'Connell Davidson, 'Will the real sex slave please stand up?' (2006) 83 Feminist Review 4, 8.

¹⁸ Article 3(c), Trafficking Protocol.

the ‘abuse of authority’. There were some concerns relating to the exact meaning of the word ‘authority’ and this was subsequently amended to ‘power’. This power includes ‘...*the power that parents might have over their children.*’¹⁹

The High Commissioner for Human Rights suggested during the negotiations that it was necessary to have a separate definition of child trafficking which included ‘...*an acknowledgement that children had special rights under international law and that child victims of trafficking had special needs that must be recognized and met by State parties.*’²⁰ An explicit reference to the United Nations Convention on the Rights of the Child, particularly Article 32 and 34 which deal with economic exploitation and sexual exploitation respectively, was also recommended. Where States were parties to the UNCRC they were already under an international legal obligation under Article 35 to ‘...*prevent the abduction of, the sale of or traffic in children for any purpose or in any form.*’²¹ Unfortunately, in the final text of the Trafficking Protocol there is no mention of the UNCRC at all. This was a missed opportunity to incorporate a child’s rights approach into the trafficking responses.

The definition in Article 3, Trafficking Protocol was adopted by the Council of Europe Convention which adopts an identical definition of trafficking. Similarly, EU Directive 2011/36/EU used the definition as the

¹⁹ Travaux Preparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2006), 343 available <<http://www.unodc.org/unodc/en/treaties/CTOC/travaux-preparatoires.html>> [last accessed 11.11.2011].

²⁰ United Nations General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Fourth session, Vienna, 28 June – 9 July 1999 ‘Informal note by the United Nations High Commissioner for Human rights’ Fourth session, A/AC.254/16, paragraph 13.

²¹ Ibid, paragraph 14.

basis for Article 2, which defines the offences.²² The UK introduced the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 which introduced offences of trafficking.²³ Although this legislation does not use the identical definition contained in Article 3 of the Trafficking Protocol,²⁴ sections 57-59 Sexual Offences Act 2003 cover trafficking into, within and out of the UK, as does section 4 Asylum and Immigration Act 2004. Both apply whether organised crime is involved or not which meets the required standards of the CoE Convention and together they cover the forms of exploitation contained in Article 3 of the Trafficking Protocol definition which includes sexual exploitation, forced labour, slavery or practices similar to slavery or the removal of organs.

3.1 Analysing the Definition

The use of the definition contained in Article 3, Trafficking Protocol by the Council of Europe, the EU and the UK was seen as significant as it represents and reinforces an international consensus regarding the definition of human trafficking.²⁵ It created the possibility of a consistent legal approach at all levels to the offences involved in trafficking in human beings. A major strength of the definition in Article 3 is that it assists in the avoidance of competing or contradictory definitions of trafficking which could potentially undermine the global

²² Article 2, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, [2011] OJ L 101/1.

²³ Sections 57-59 and section 4 respectively.

²⁴ The UK did not ratify the Trafficking Protocol until 6 February 2006 which was after the enactment ss.57-59 of the Sexual Offences Act 2004 and s.4 Asylum and Immigration Act 2004.

²⁵ Note 72, Explanatory report Council of Europe Convention on Action against Trafficking in Human Beings 2000, CETS 197. The UK was obliged to adopt this definition as an aspect of its international obligations.

legal response to trafficking. The development of the definition of trafficking has been seen as a positive step forward in tackling the problem of trafficking in human beings, as Gallagher states:

*'By incorporating a common understanding of trafficking...into national legislation, states parties will be able to cooperate and collaborate more effectively than ever before. Common definitions will also assist in the much needed development of indicators and uniform data collection procedures.'*²⁶

Although the broad application and comprehensiveness of the definition has been commended²⁷ there has been criticism regarding the complexity of the definition and lack of clarity in relation to the language used.²⁸ It has been argued that the lack of definition of terms such as 'exploitation' contained within Article 3, Trafficking Protocol compounds the problem and provides little clarity.²⁹

Within the EU, Directive 2011/36/EU and previously Framework Decision 2002/628/JHA aimed to create a uniform standard between Member States to assist in the enforcement of trafficking laws and to ensure traffickers do not avoid prosecution. It also had the effect of preventing one Member State being 'more attractive' to traffickers than

²⁶ A Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975, 1004.

²⁷ J Raymond, 'Coalition Against Trafficking in Women, Guide to the New UN Trafficking Protocol' (2001) 4-5 available <http://action.web.ca/home/catw/readingroom.shtml?x=33647&AA_EX_Session=34c9ca6f9887af0200772eac07dac19> [last accessed 30.10.2011].

²⁸ Global Rights, 'The Annotated Guide to the Trafficking Protocol' (2003) 3 available <<http://www.globalrights.org/site/DocServer/Annotated Protocol.pdf?docID=2723>> [last accessed 31.10.2011].

²⁹ J O'Connell Davidson, (n17) 8-9.

others due to a lack of legislation or weaker legislation which makes trafficking in human beings an offence.³⁰ However, due to the reliance on the wide and vague definition in Article 3, Trafficking Protocol and the discretion afforded to Member States in setting the penalties for human trafficking offences, it permits to some extent varying interpretations by Member States of their obligations and any perceived harmonisation or uniform standards are mainly absent.³¹ This illustrates the difficulty in achieving a consistent approach to trafficking even between the EU Member States. The adoption of International, European and domestic legislation produces difficulties in finding an appropriate, straightforward and effective definition of trafficking that will assist in adequately protecting children and preventing trafficking.³²

4. EXPLOITATION OF THE CHILD

The children who are the focus of this thesis are those who are in domestic work in a private household in the UK and therefore it is necessary to consider whether this domestic work would be considered exploitative and under what circumstances this would be the case. Article 3, Trafficking Protocol does not explicitly list domestic work as an exploitative condition. Therefore there is a need to establish domestic work as exploitative. This is important due to exploitation being a key element that needs to be present in order for an offence of trafficking in human beings to be committed.

³⁰ Communication from the Commission to the European Parliament and the Council 'Fighting Trafficking in Human Beings: An Integrated Approach and Proposals for an Action Plan COM(2005) 534 final

³¹ Askola H, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13(2) European Law Journal 204, 211.

³² In this context 'domestic' refers to UK law, specifically the law applicable in England and Wales rather than the law in each Member State of the European Union.

For an offence to be committed under the Trafficking Protocol it is necessary that the adult moves the child and has the intention to exploit them. The intention to exploit the child is therefore the relevant issue, rather than the necessity for the child to have actually been exploited by the time they are discovered. The preparatory nature of this is quite unique within criminal law. Article 3 must be based on intention to exploit, rather than the existence of actual exploitation, otherwise children suspected of being trafficked who are detected at the border upon entry into the UK would not be protected under trafficking laws from the intended exploitation and the individuals responsible would not be charged with trafficking offences.

Both the Trafficking Protocol and the Council of Europe Convention define exploitation as including ‘...at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’³³ It is necessary that there is sufficient flexibility in the definition of exploitation to ensure that some forms of exploitation are not excluded. In order to achieve this, the words “at a minimum” were included in the definition in Article 3 in relation to exploitation. It was stated that this would ensure that, not only were the listed forms of exploitation covered by the Protocol, but also other future forms of exploitation that were not yet known. In this sense it would allow the Protocol to “adapt” to new exploitative circumstances that may develop in the future which an exhaustive list of the various forms of exploitation would not.³⁴

³³ Article 3, Trafficking Protocol; Article 4, Council of Europe Convention.

³⁴ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Ninth Session, Vienna, 5-16 June 2000 A/AC.254/4/Add.3/Rev.6 ; Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto at 344.

The EU Framework Decision was similar but its wording differed. Article 1 required '*exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.*' The only significant difference in the EU Framework Decision's definition of exploitation was the absence of the removal of organs as a form of exploitation. Directive 2011/36/EU³⁵ which replaces the Framework Decision has rectified this. The Directive still bases the definition of trafficking of human beings for the purposes of EU law on the definition contained in Article 3, Trafficking Protocol. However, the definition of exploitation has been extended to include forced begging which would fall under the definition of forced labour as defined by the ILO Forced Labour Convention 1930. Additionally, the new Directive includes the removal of organs, forced marriage and illegal adoptions as falling within the definition of exploitation. It also introduces exploitation of criminal activities which refers to '*exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.*'³⁶ The Directive therefore extends the definition of exploitation and brings additional forms of exploitation explicitly within the definition of trafficking.

Under UK law and the Asylum and Immigration Act 2004, exploitation of an individual is defined as behaviour that contravenes Article 4 ECHR and

³⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, [2011] OJ L 101/1.

³⁶ *Ibid*, preamble paragraph 11.

where an individual has been subjected to force, threats or deception which is designed to induce him to provide services or benefits or enable another person to acquire benefits.³⁷ Similarly section 71 Coroners and Justice Act 2009 is concerned with holding someone in slavery or servitude or in forced labour. This section explicitly refers to Article 4 ECHR which states:

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*

For the purposes of Article 4 ECHR child domestic work, must fall within the category of either: forced labour, servitude or slavery in order for it to be considered exploitation.

5. IDENTIFYING THE OVERLAPS AND DISTINGUISHING THE CONCEPTS

Human trafficking is a legally defined concept. However, in practice it is often confused with smuggling in human beings. There is a distinction between these two concepts.³⁸ The reason behind the confusion is that overlaps may occur during the trafficking process. It is important to understand the legal distinction between these concepts as each has a different legal response and different outcomes for individuals. Trafficking and slavery are also two different legal concepts, but often trafficking is referred to as slavery. Legally this is not a sustainable position and the distinction between the concepts is important as clarity in definitions provides greater clarity in the responses.

³⁷ Sections 4(4)(a) and 4(4)(c)(i-iii), Asylum and Immigration Act 2004.

³⁸ McCreight . makes a further distinction between smuggling and trafficking and irregular migration with the former two being crimes whilst the latter is not, see MV McCreight, 'Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on a Comparative Perspective' (2006) 12(1) European Law Journal, 106.

5.1 Trafficking and Smuggling

Although there are similar characteristics in these two concepts, such as an element of clandestine entry that results in both concepts being defined as illegal,³⁹ there are also differences. For example, trafficking does not always take place through illegal entry into the UK which further complicates the matter.⁴⁰ Even though there may be some overlap between them, they remain different concepts.⁴¹ These two concepts '*...raise fundamentally different issues, which require fundamentally different responses*'.⁴² As Flynn states '*These are not just differences in the use of terminology, but matters of real consequence to the framing of the policies needed in the fight against trafficking in human beings.*'⁴³

Trafficking is defined in Article 3, Trafficking Protocol (above) whilst smuggling is defined in Article 3, Protocol Against the Smuggling of Migrants by Land, Sea and Air, (the Smuggling Protocol).⁴⁴ Both Protocols supplement the United Nations Convention Against Transnational Organized Crime.⁴⁵ Article 3(a), Smuggling Protocol states:

³⁹ A Geddes, 'Chronicle of a Crisis Foretold: The Politics of Irregular Migration, Human Trafficking and People Smuggling in the UK' (2005) 7 British Journal of Politic and International Relations 324, 327.

⁴⁰ D Flynn, 'Human Trafficking and Forced Labour: What Perspectives to Challenge Exploitation?' (2007) Platform for International Cooperation on Undocumented Migrants (PICUM) available <http://picum.org/en/publications/policy-briefs/> [last accessed 30.10.2011].

⁴¹ K Skrivankova, 'Combating Trafficking in Human Beings' (2006) 20(1) International Review of Law Computers & Technology 229, 229.

⁴² P Twomey, 'Europe's Other Market: Trafficking in People' (2000) 2 European Journal of Migration and Law 1, 7.

⁴³ D Flynn, (n40).

⁴⁴ 2000, U.N.Doc. A/RES/55/25 Annex III, entered into force 28 January 2004.

⁴⁵ 2000, U.N.Doc. A/RES/55/25 Annex I, entered into force 29 September 2003.

“Smuggling of migrants” shall mean 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.’

Trafficking involves force, coercion and/or deception, (although where a child is concerned there is no need for this element of the trafficking definition to be met); it requires an intention to subsequently exploit the victim, it can take place either internally within one State or across external borders and may involve either legal or illegal entry of a person into a State. In contrast, smuggling does not revolve around force and can be entered into voluntarily; the relationship with the smuggler does not continue on arrival in the country of destination, it can only take place where movement across external borders of a State takes place and is characterised by illegal entry into another.⁴⁶ Egan summarised the differences as smuggling essentially being a crime against the state, whereas trafficking is a crime against individuals with the key element separating these two different concepts being the exploitative element.⁴⁷ Although UK law does not explicitly define the term “smuggling”, there are offences could be described as synonymous with smuggling. Under section 25 Immigration Act 1971 it is an offence where someone:

⁴⁶ See T Obokata, ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17 International Journal of Refugee law 394 for discussion of the human rights concerns that smuggling raises to the same extent as trafficking and also a discussion of the distinctions between the two concepts. Also see T Obokata, ‘Trafficking in Human Beings as a crime against humanity: Some implications for the international legal system’ (2005) 54 International and Comparative Law Quarterly 445 for similar discussions in regard to the distinctions between the two concepts.

⁴⁷ S Egan, ‘Protecting the victims of trafficking: problems and prospects’ (2008) 1 European Human Rights law Review 106, 108.

- a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union;*
- b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual; and*
- c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union*

The Home Office views organised immigration crime as including ‘both ‘people trafficking’, where someone is brought to the UK in order to be exploited, and ‘people smuggling’ where, at least to some extent, entry is facilitated with their consent.’⁴⁸ Drew regards the distinction in terms of the human being as the consumer in the case of smuggling and as the commodity in a trafficking situation.⁴⁹ However, these concepts are often confused and the fact that there is, in practice, some fluidity between the two concepts does not help to clarify this confusion.⁵⁰

It is not always a straightforward task to identify a person as a victim of trafficking rather than someone who has been smuggled. This problem of identification occurs because an arrangement which may originally be framed as smuggling turns into trafficking upon arrival in the country of destination when the individual is forced into an exploitative situation. In

⁴⁸ Home Office White Paper, CM5387, ‘Secure Borders, Safe Haven: Integration with Diversity in Modern Britain’ (2002) 75 available at <www.archive2.official-documents.co.uk/document/.../cm5387.pdf> [last accessed 12.10.2011].

⁴⁹ S Drew, ‘Human trafficking: a modern form of slavery?’ (2002) (4) European Human Rights law Review 481, 484.

⁵⁰ J Bhabha, ‘Trafficking, Smuggling and Human Rights’ (2005) Migration Policy Institute available <<http://www.migrationinformation.org/Feature/print.cfm?ID=294>> [last accessed 31.10.2011].

these circumstances what began as smuggling (as defined under the Smuggling Protocol) converts into trafficking (as defined under the Trafficking Protocol), the nature of the behaviour moving between the two legal categories. This, it has been suggested, raises an operational link between smuggling and trafficking that was not acknowledged by either of the Protocols.⁵¹

Due to the additional protection provided for trafficking victims in the Trafficking Protocol, there are more costs and more administrative requirements which, it has been argued, may act as an incentive to government to find an individual as having been smuggled rather than trafficked.⁵² There has been some discussion over whether consent, or alternatively exploitation, can be effectively used to distinguish between trafficking and smuggling as suggested earlier⁵³ although distinctions made on the basis of consent create difficulties in applying a strict distinction between these two concepts.⁵⁴ The suitability of using consent and exploitation to differentiate between trafficking and smuggling will be considered in *Chapter Eight* in relation to children who have voluntarily migrated to undertake domestic work.

5.2 Addressing Child Trafficking in the Context of Slavery

Trafficking and slavery are separate legal concepts, defined in the Trafficking Protocol and the Slavery Convention 1926 respectively. Although there is a connection between the two concepts, there is some confusion as to the exact relationship. In the same way that trafficking and

⁵¹ A Gallagher, (n26) 1001.

⁵² A Gallagher, (n26) 1000.

⁵³ K Skrivankova, (n41) 232.

⁵⁴ V Munro, (n16) 98.

smuggling are terms which are often used synonymously, trafficking and the resulting exploitative relationship have been referred to as slavery, 'modern-day-slavery' or 'contemporary slavery'.⁵⁵ For example, in March 2007, Save the Children stated that one of the eight most prevalent forms of child slavery is child trafficking.⁵⁶ The characterisation of trafficking as slavery is viewed by some as appropriate as it is argued that *'it involves the buying and selling of human beings, forced labour and prostitution, and other affronts on individuals' freedom.*⁵⁷ However, even though the United Nations shares this viewpoint, the question remains whether these are distinct legal concepts and also what legal status, if any, the term 'modern-day slavery' or 'contemporary slavery' may have. It has been argued that definitional problems and boundary disputes are exacerbated as *'different agencies and groups identify trafficking as a problem for very different reasons and have very different political agendas with regards to the issue'*.⁵⁸ The clarification of any distinction between these concepts is particularly relevant to the assessment of the scale of trafficking in human beings and to the formulation of responsive policies.⁵⁹

Slavery is defined in Article 1(1), Slavery Convention 1926,⁶⁰ which entered into force 9 March 1927, as:

⁵⁵ N Finch and S Momtaz, 'Human Trafficking in the UK' [2006] International Family Law Journal, 154.

⁵⁶ Save the Children UK 'The Small Hands Of Slavery, Modern day child slavery: A report by Save the Children UK' (2007) available <<http://www.crin.org/docs/ChildSlaveryBrieffinal.pdf>> [last accessed 31.10.2011].

⁵⁷ V Garrard, 'Sad Stories: Trafficking in Children – Unique Situations Requiring New Solutions' (2006) 35 Georgia Journal of International and Comparative Law 145, 149.

⁵⁸ J O'Connell Davidson, (n17) 7.

⁵⁹ K Manzo, 'Exploiting West Africa's children: trafficking, slavery and uneven development' (2003) 37 (4) Area 393, 394.; see *Chapter Five* for discussion of the statistical evidence.

⁶⁰ 60 LNTS 253.

'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.

Article 1(2) defines the slave trade as including:

'...all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts of disposal by sale or exchange of a slaver acquired with a view to being sold or exchanged, and in general, every act of trade or transport in slaves.'

Although the aim of the Slavery Convention is to prevent and suppress the slave trade⁶¹ and the ultimate abolition of slavery in all its forms,⁶² its focus is primarily the prevention of compulsory or forced labour which could develop into conditions equivalent to slavery.⁶³ States are under an obligation to ensure that there are severe penalties in place which can deal with violations of the Slavery Convention.⁶⁴ The Convention was criticised for a lack of clear definitions and, although a wide interpretation could have been given to the definition of slavery contained in Article 1 of the Convention, in practice, “chattel slavery”⁶⁵ remained the only focus.⁶⁶

⁶¹ Article 2 (a) Slavery Convention 1926, 60 LNTS 253.

⁶² Article 2 (b) Slavery Convention 1926.

⁶³ Article 5 Slavery Convention 1926.

⁶⁴ Article 6 Slavery Convention 1926.

⁶⁵ The term “Chattel slavery” has been used in the ICTY case of *Prosecutor v Kunarac, Vukovic and Kovac*, IT-96-23 & IT-96-23/1-A , 12 June 2002 as describing slave-like conditions. To be reduced to “chattel” generally refers to a form of movable property as opposed to property in land.

⁶⁶ CE Welch, ‘Defining Contemporary Forms of Slavery; Updating a Venerable NGO’ (2008) 34 Buffalo Legal Studies Research Paper Series Paper No. 2008-002 available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081920 [last accessed 31.10.2011].

In 1956 the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and institutions and Practices Similar to Slavery⁶⁷ (Supplementary Convention) was adopted and was designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery.⁶⁸ The definition of slavery in Article 1, Slavery Convention 1926 was adopted for the purposes of the Supplementary Convention, but the Supplementary Convention details four main institutions or practices which are similar to slavery. They are debt bondage;⁶⁹ serfdom;⁷⁰ marriage without consent (forced marriage: this includes the transfer or inheritance of the woman to another person)⁷¹ and the delivery of a child or young person by another person with a view to the exploitation of the child or young person or of his labour.⁷² The Supplementary Convention required each State Party to take all practicable and necessary measures to bring about the complete abolition or abandonment of these institutions or practices. The fact that the Supplementary Convention was necessary indicates that not all forms of exploitation can amount to slavery and there are legal distinctions between concepts.

⁶⁷ 266 UNTS 3.

⁶⁸ Supplementary Convention Preamble.

⁶⁹ Article 1(a) of the Supplementary Convention: 'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined'.

⁷⁰ Article 1 (b) of the Supplementary Convention: 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'.

⁷¹ Article 1 (c) (i)-(iii) of the Supplementary Convention.

⁷² Article 1 (d) of the Supplementary Convention.

It has been reported that millions of people around the world are affected by debt bondage, often working long hours for little or no pay and receiving basic food and shelter as a form of 'payment'. The inability to repay the original loan often means that the debt is transferred through generations of the same family.⁷³ This is relevant to this thesis as families may see giving their consent for their child to enter domestic work as a means of repaying a debt. When children have been trafficked, they are often expected to repay the cost of their travel from their country of origin to the country of destination⁷⁴ and this ties the child to the household to which they have been trafficked. These situations would therefore be classed as debt bondage which is used as a means of controlling the child and keeping them in domestic work.

Article 1(d), Supplementary Convention is most relevant for a child who is trafficked and exploited in domestic work with their own family being complicit in this arrangement. This indicates that labour exploitation in domestic work as a result of the trafficking would fall under the category of 'a practice similar to slavery' rather than slavery per se. It has been argued that there are greater risks of children being trafficked with the family's involvement due to children's vulnerability as well as family's economic hardship.⁷⁵ Research conducted by the ILO, which focused on the trafficking of children into the worst forms of child labour in Uganda, found that the majority of children were enticed or forced by a member of

⁷³ Antislavery, available <http://www.antislavery.org.uk/english/slavery_today/bonded_labour.asp> [last accessed 23.10.2011].

⁷⁴ M Melrose and D Barrett, 'The Flesh Trade in Europe: Trafficking in Women and Children for the Purpose of Commercial Sexual Exploitation' (2006) 7(2) Police Practice and Research 111, 119.

⁷⁵ H Van de Glind and J Kooijmans, 'Modern-Day Child Slavery' (2008) 22 Children & Society 150, 158.

the family into trafficking, rather than being abducted or kidnapped.⁷⁶ Although this research focused on Uganda, there is no reason why this finding is not applicable on a wider geographical scale and that parents in other countries act in similar ways.

As Quirk states '*...it can be difficult to identify the point where particular circumstances "cross a line" and should therefore be described as forms of slavery.*'⁷⁷ The question remains whether children trafficked and exploited in domestic work would be considered subjected to slavery, or alternatively servitude or slavery-like practices. When examining the relevant legislative provisions it is extremely unlikely if not impossible that a child trafficked and exploited in domestic work would ever be considered as held in slavery in the 'classic' sense as laid down in Article 1, Slavery Convention 1926 (chattel slavery). Article 1 requires any or all of the powers attaching to the right of ownership to be exercised. If ownership is the crucial element, the question remains whether a person can now assume ownership of another person. In a legal sense the answer is no, as the slave trade was legally abolished in Britain in 1807 and the legal entitlement to buy and sell a person and own them was removed.⁷⁸

⁷⁶ ILO-IPEC 'Rapid assessment report in trafficking of children into worst forms of child labour, including child soldiers in Uganda' (2007. 21-22) available http://www.ilo.org/public/english/region/afpro/daressalaam/download/c_trafficking_uganda.pdf [last accessed 30.10.2011].

⁷⁷ J Quirk, 'The Anti-Slavery project: Linking the Historical and Contemporary' (2006) 28 (3) Human Rights Quarterly 565, 566.

⁷⁸ An Act for the Abolition of the Slave Trade, Royal Assent was given on 25th March 1807.

In the case of *Prosecutor v. Kunarac, Vukovic and Kovac*⁷⁹ the International Criminal Tribunal for the Former Yugoslavia considered the traditional concept of slavery and found that it has

*“...evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree ...”*⁸⁰

This judgment effectively broadened the intended meaning of slavery as defined in the Slavery Convention 1926 to include other exploitation which did not involve “chattel slavery”. It could be argued that this undermines the intended purpose of the Convention, or conversely that it actually provides alternative avenues of protection for those individuals exploited in domestic work. However, the judgment in *Kunarac* leaves the definition of slavery in an ambiguous position. The court has to all intents and purposes created a ‘scale of slavery’ where various forms of exploitation may meet the criteria and therefore be classified as slavery. The court created the criterion that needs to be satisfied and concluded that:

“...the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of

⁷⁹ 12 June 2002.

⁸⁰ *Kunarac*, IT-96-23 & IT-96-23/1-A, 12 June 2002, para 117.

*enslavement [including] the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea ..."*⁸¹

In practical terms whether a child was found to have been held in slavery or in servitude would make no practical difference to the child in terms of protection they would be afforded. Providing there is a legal sanction to punish and deter the exploitation of the child and provide for their protection, it is doubtful whether the label given to the treatment would be of importance to the child. However the distinctions do create real issues, such as how the law is applied in practice and whether legal certainty can be achieved and it is important in terms of punishing traffickers appropriately. The importance in distinguishing these terms is also to understand whether reference to trafficking as a form of slavery is legally sustainable and to clarify the exact legal framework which applies to trafficking of children exploited in domestic work. The similarities and seriousness of the exploitation experienced by someone held in slavery and a trafficked individual remain important. This leads to the frequent use of the term 'contemporary' or 'modern-day slavery', not only by the ICTY but also academics, non-governmental organisations and the media when referring to trafficking. Although not a legal term defined within the trafficking legal framework, it still has value and it is to this that this thesis turns.

⁸¹ *Kunarac*, para 119.

6. MODERN-DAY OR CONTEMPORARY SLAVERY⁸²

Defining the term ‘modern-day slavery’ requires an examination of the context it is being used in. Kevin Bales refers to ‘new slavery’⁸³ and states that ‘*throughout history, slavery had meant a loss of free will and choice backed up by violence*’. He goes on to say that ‘*even when there is no beating or other physical torture it [slavery] brings about a psychological degradation that often renders victims unable to function in the outside world.*’ New, or modern-day, slavery involves a person losing their freedom, their right to choose and subjection to violence, either physical or psychological. Manzo regards slavery as involving violence and loss of freedom, but also identifies the lack of remuneration as a key element. She argues that those who are paid even a small wage cannot be classed as subjected to slavery and slavery per se is defined as unpaid forced labour.⁸⁴

Economic exploitation is central to modern-day slavery, with large profits available without the added responsibility of legal ownership. As the population has grown, ‘slaves’ are available for much cheaper prices and Bales refers to them as ‘disposable people’. When someone has outlived their usefulness or become ill, they are cast aside and replaced by someone more financially productive.⁸⁵ A distinction is made between ‘slaveowners’ and ‘slaveholders’, which reflects the change from legal

⁸² Any reference to modern-day slavery refers equally to contemporary slavery and the two terms are being used synonymously within the thesis.

⁸³ K Bales, ‘The Social Psychology of Modern Slavery’ <http://www.sciam.com/article.cfm?SID=mail&articleID=0005F839-CC90-1CC6-B4A8809EC588EEDF> [Last Accessed 30.10.2011].

⁸⁴ K Manzo, ‘Modern Slavery, Global Capitalism & Deproletarianisation in West Africa’ (2005) 106 Review of African Political Economy, 522.

⁸⁵ K Bales, *Disposable People: New Slavery in the Global Economy* (Rev edn, University of California Press, 2004) at 14.

ownership to control through violence or threat of violence and marks a change in the relationship between 'slaves' and 'slaveholders'.⁸⁶ As Bales identifies, *'The common perception of slavery as the ownership of people has led to confusion about what constitutes slavery today.'*⁸⁷

As already highlighted, the main difference is that 'traditional' slavery was defined by legal ownership, whilst modern-day slavery can be defined by control without legal ownership. Violence played a major part in 'traditional' slavery and often continues to do so in modern-day slavery in both gaining and maintaining control over the slave. Bales suggests that race is now not the defining factor in slavery, and although he does acknowledge in some situations it is still relevant, he identifies vulnerability and poverty as the common denominator stating that:

*"The criteria of enslavement today do not concern color, tribe, or religion; they focus on weakness, gullibility and deprivation. The common denominator is poverty not color."*⁸⁸

Violence, control and loss of freedom are all elements common to both 'old' and 'new' slavery. The loss of freedom affects people subjected to modern-day slavery in two ways: first they lose their ability to enter *and withdraw* [author's emphasis] from a particular labour market; and secondly there is a loss of freedom of movement.⁸⁹

⁸⁶ Ibid, 5.

⁸⁷ K Bales, 'Expendable People: Slavery in the Age of Globalization' (2000) 53(2) Journal of International Affairs 461, 461.

⁸⁸ K Bales, (n85) 10-11.

⁸⁹ K Manzo, (n84) 523.

The key differences between ‘traditional’ slavery and modern-day slavery, apart from the issue of legal ownership, include the fact that modern slave relationships are often of a short duration and the costs involved in obtaining someone for the purpose of exploiting them is relatively low. There is no incentive for traffickers to take care of the people they are trafficking as they are easily replaced and there are reportedly very high profits involved in comparison to those available in ‘traditional’ slavery, where the costs of buying a slave and looking after them to some extent in order to protect their investment were much higher. With modern-day slavery there is no legal right to ownership of another human being, but there exists an advantage for the traffickers in actively avoiding legal ownership as high profits can be enjoyed without the burden of protecting their investments.⁹⁰

From the definition of trafficking contained within Article 3, Trafficking Protocol it is evident that there is a move away from a focus on legal ownership towards recognising the reality of exploitation in the 21st century which results from control and vulnerability. This development mirrors the elements of modern-day slavery discussed above. Manzo states that the definition makes *‘an analytical distinction between trafficking and slavery’* clarifying that: *‘Slavery is a form of exploitation whereas trafficking is a means to exploitation.’*⁹¹ It has been argued that as children⁹² are specifically mentioned in Article 3, Trafficking Protocol, and the use of force or coercion set out in Article 3(a) is not necessary in order for a trafficking offence to be committed in relation to children under Article 3 means that: *‘Not only does this take into account their special*

⁹⁰ K Bales, (n85) 15.

⁹¹ K Manzo K, (n59) 396.

⁹² Under the age of 18, Article 3(d), Trafficking Protocol.

*vulnerability, but it also makes it easier for law enforcement agencies and prosecutors to provide evidence to ensure that child traffickers are punished.*⁹³ This could also result in the lack of differentiation between trafficked children and the recognition of children's agency with the possibility that they have freely chosen to migrate to work.⁹⁴ The nature of slavery has changed and the Trafficking Protocol recognises this. Organised crime plays a major, although not exclusive, role in trafficking and the resulting exploitation and the Trafficking Protocol is specifically meant to deal with this issue.

Manzo suggests that trafficking and slavery should be viewed as *'related yet different forms of exploitation, rather than treating trafficking as a new or modern form of slavery'* and sees the real advantage of separating these concepts as *'it prompts additional questions about power and its exercise.'*⁹⁵ The discussion above recognises the practices and the reality of people's situations, with violence, control, loss of freedom and autonomy at the centre of these situations. Although it could be argued that slavery in its traditional form of chattel slavery is a distinct concept, it should also be recognised that slavery has developed into economic exploitation and control and trafficking could be included in this broader concept. As Twomey states, *'...the large scale global industry of slavery has been transformed rather than eradicated...'*⁹⁶ The terms 'modern-day slavery' or 'contemporary slavery' acknowledges that differences exist with slavery and legal ownership is no longer involved but also that control, violence, vulnerability and poverty have taken its place. Trafficking involves the

⁹³ H Van de Glind and J Kooijmans, (n75) 156.

⁹⁴ This issue is discussed in detail in *Chapter Eight*.

⁹⁵ K Manzo, (n59) 400.

⁹⁶ P Twomey, (n42) 1.

exercise of power and the exploitation of individuals and, particularly in relation to children, there is recognition that violence is not a necessary component of trafficking. The Trafficking Protocol acknowledges the possibility that people may not be subjected to violence, instead being trafficked as a result of an ‘abuse of a position of vulnerability’ which relates to a situation where an individual has no real and acceptable alternative but to submit to the abuse involved.⁹⁷ The term ‘modern-day slavery’ is a socially constructed term rather than a legal one, but it captures the similarities of slavery and trafficking whilst still acknowledging the differences. ‘Modern-day slavery’ describes more closely slavery-like practices as defined in the Supplementary Convention rather than the definition of slavery contained in the Slavery Convention 1926.

7. FORCED LABOUR AND THE WORST FORMS OF CHILD LABOUR

Aside from the concepts discussed above which are of relevance to this thesis, children in domestic work may be viewed as individuals who are in forced labour. Within an international context forced labour has been a concern of the International Labour Organisation (ILO) and non-governmental organisations such as Anti-Slavery International. The Forced Labour Convention 1930⁹⁸ was adopted by the ILO with the requirement that each signatory state ratifying the Convention would undertake to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.⁹⁹ The Convention defines “forced or compulsory labour” as *‘all work or service which is exacted*

⁹⁷ Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2006 Interpretive notes C, at.347.

⁹⁸ Convention (No.29).

⁹⁹ Article 1, Forced Labour Convention 1930.

*from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*¹⁰⁰ A child who is in domestic work as a result of trafficking has not freely chosen to work and traffickers adopt a variety of methods to exert control over the child in order to ensure their compliance. This clearly satisfies the definition of forced or compulsory labour under the Forced Labour Convention.

Furthermore in relation specifically to children, the ILO adopted the Worst Forms of Child Labour Convention 1999¹⁰¹ in order to address the specific issue of child labour. Each signatory state was required to take *'immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.*¹⁰² This Convention applies to children under the age of 18¹⁰³ and does not distinguish between children above or below the minimum legal working age. The Convention defines the 'worst forms of child labour' in Article 3 of the Convention as:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

¹⁰⁰ Article 2, Forced Labour Convention 1930. The Convention excludes from this definition, compulsory military service; normal civic obligations; cases of emergency and minor communal services.

¹⁰¹ C182 (WFCL Convention 1999).

¹⁰² Article 1, WFCL Convention 1999.

¹⁰³ Article 2, WFCL Convention 1999.

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Child domestic work is not explicitly defined as one of the worst forms of child labour in the Convention. However domestic work may potentially satisfy the criteria if there is likely to be harm to the health, safety or morals of the child.¹⁰⁴ The fact that this work takes place in a private household increases this possibility due to the decreased visibility of these children. Alternatively, if domestic work is categorised as slavery or practices similar to slavery then it would be viewed as one of the worst forms of child labour under the WFCL Convention.

Van de Glind and Kooijmans argue that '*Only where child labour is performed under the conditions defined in Article 3(a) of Convention No.182 can we speak of it as slavery or a slavery-like situation.*'¹⁰⁵ However, the fact that children have been trafficked would be enough to ensure that, regardless of the degree of the subsequent exploitation in domestic work, this would fall within the definition of one of the worst forms of child labour. Trafficking is explicitly included as a practice similar to slavery within Article 3(a), WFCL Convention.¹⁰⁶

Domestic work may in some circumstances be viewed as an employment relationship and is not always necessarily exploitative. The labelling of

¹⁰⁴ Article 3(d), WFCL Convention 1999.

¹⁰⁵ H Van de Glind and J Kooijmans, (n75) 155.

¹⁰⁶ Article 3(a), WFCL Convention 1999.

child domestic work as exploitative or a slavery-like practice will be dependent on the age of the child and the conditions under which the work is carried out. Van de Glind and Kooijmans argued that: *'If all exploitation of children were to be simply categorised as slavery or slavery-like practices, this would lead to the watering down of the concept and insufficient attention being paid to those in dire need.'*¹⁰⁷ However, where the entry of the child into domestic work is placed into the category of trafficking then the domestic work is automatically viewed as exploitative. For an offence of child trafficking to have been committed, the child must have been moved for the purpose of exploitation; therefore without the characterisation of the domestic work as exploitative there cannot be an offence of trafficking. Problems arise where an adolescent makes their own autonomous decision to enter domestic work as a form of employment and this situation subsequently becomes exploitative. The question in these circumstances is whether the adolescent would be viewed as a trafficked child exploited in domestic work or whether it would be acknowledged that they are being exploited in an employment relationship. This raises wider questions of children's autonomy and capacity to make decisions which determine their own lives.¹⁰⁸

8. CONCLUSIONS

This chapter has considered the definition of trafficking in human beings and domestic work. It has illustrated that not all domestic work is exploitative and it can in fact in some circumstances be a form of employment. In addition not all domestic work is a result of trafficking. However, the characterisation of domestic work as either employment or

¹⁰⁷ H Van de Glind and J Kooijmans, (n75) 155.

¹⁰⁸ These are issues discussed in *Chapter Eight*.

exploitation depends on various factors including the age of the child and the conditions in which the work is undertaken.¹⁰⁹

The discussion above identifies that, although trafficking has similarities to slavery and slavery-like practices and overlaps with smuggling, it still remains a distinct legal concept. The argument has been made that trafficking is not the same as slavery for the reasons discussed above, but is more accurately legally linked to slavery-like practices. Similarly, trafficking is a separate concept to smuggling and requires different responses although it is acknowledged that there may be considerable overlap between these legal categories in certain circumstances. Viewing trafficking through the lens of child domestic work raises some particular issues that potentially distinguish this form of trafficking from others.

In the context of this thesis, defining domestic work, forced labour and the worst forms of child labour enable consideration of the circumstances in which domestic work would fall within the definition of either of these concepts. This examination has revealed that, not only could domestic work satisfy the criteria to be considered forced labour, but where a child had been trafficked into domestic work, the trafficking is explicitly characterised as a slavery-like practice in the WFCL Convention. Therefore, where a child is in domestic work, the correct identification of the child as having been trafficked is extremely important. Some adolescents may have voluntarily migrated to work and an assumption that they have been trafficked will automatically mean that they will be seen to have been exploited which may have the effect of ignoring their autonomous decision to migrate to work.¹¹⁰

¹⁰⁹ Discussed in *Chapter Eight*.

¹¹⁰ Whether it is appropriate for adolescents to migrate to work in domestic work will be considered in detail in *Chapter Eight*.

Compounding the difficulty of establishing clear and effective definitions is the interchangeable use of different terms such as trafficking, smuggling, slavery and modern-day slavery. It has been illustrated above that each of these terms have different legal meanings and application.

There are many similarities between the concepts of slavery and trafficking, but a distinction can be drawn between legal ownership of a person by another person (slavery) and the abuse of the vulnerability and poverty which is more applicable to trafficking. To acknowledge the link and similarities between the two, the term 'modern-day slavery' has been adopted in both academic and NGO literature which although not a legally defined term enables at the same time an acknowledgment of the differences between the concepts. Slavery, trafficking and smuggling are all legal terms and are separately defined; modern-day slavery is not. However, this does not mean that this term is not of value to the discussion surrounding trafficking. What emerged is that 'modern-day slavery', 'contemporary slavery', 'new slavery', and references to trafficking as slavery, are all terms and expressions which, although at first sight appear to refer to slavery as defined in the Slavery Convention 1926, are more in line with slavery-like practices as defined under the Supplementary Convention 1956. In the context of this thesis this is particularly true with three of the four practices introduced by the Supplementary Convention potentially being of direct relevance to the situation of a child in domestic work.¹¹¹

¹¹¹ Article 1 Supplementary Convention 1956; (1) Children trafficked and exploited in domestic work with the complicity of the family; (2) the arrangement often involving debt bondage (with the child being forced to work to repay the cost of their travel) and (3) serfdom where there child has no other choice but to live in the household where they have been trafficked to and have no choice but to work and is not free to change his status'.

It has been illustrated that categorising trafficking and the resulting exploitation is a complex task. However, the overlaps and ambiguity between the concepts are exacerbating the effective practical application of the law. The chapter has drawn out the differences in the various concepts and how this relates to children who have been trafficked and exploited in domestic work. The following chapter considers the practical application of the various terms and the judicial interpretations involved.

Chapter Three

JUDICIAL INTERPRETATIONS OF THE TRAFFICKING FRAMEWORK

1. INTRODUCTION

Chapter Two focused on defining the various different legal concepts often associated with child trafficking. Through consideration of the decisions of the European Court of Human Rights (ECtHR) *Chapter Three* adds to this analysis and considers the interpretation and practical application of the various terms in the context of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR). *Chapter Three* also examines how the UK's response to child trafficking has been influenced by the decisions of the ECtHR and the obligations placed on the UK as a result of the decisions of the Court.

Two cases are of particular relevance to this chapter, *Siliadin v France* and *Rantsev v Cyprus and Russia*¹ which were decided in 2005 and 2010 respectively. Both cases discussed the definitions of slavery, forced labour and servitude with the Court attempting to define what level of treatment satisfied the definition of each of these legal terms. *Siliadin v France* also established States' positive obligations under Article 4 ECHR and the *Rantsev v Cyprus* considered the extent of these obligations within the context of trafficking in human beings. The nature of these obligations is considered, particularly in relation to how they influence the UK's response to child trafficking. The examination of the ECtHR case law in this chapter also extends beyond these two key cases in order to explore the potential for the ECHR to assist child trafficking

¹ *Siliadin v France* Application No. 73316/01, (2006) 43 EHRR. 16; *Rantsev v Cyprus and Russia* Application No. 25965/04, (2010) 51 EHRR.1.

victims and provide additional protection separate to the existing trafficking legal framework.

2. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

Under UK law there is an explicit relationship between the exploitation experienced as a result of trafficking under section 4, Asylum and Immigration (Treatment of Claimants etc) Act 2004,² section 71, Coroners and Justice Act 2009 dealing with forced labour and Article 4, ECHR. Section 4, Asylum and Immigration (treatment of claimants etc) Act 2004 states:

For the purposes of this section a person is exploited if (and only if)—

(a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),

(b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplants Act 1989 (c. 31) or the Human Organ Transplants (Northern Ireland) Order 1989 (S.I. 1989/2408 (N.I. 21)),

(c) he is subjected to force, threats or deception designed to induce him—

(i) to provide services of any kind,

(ii) to provide another person with benefits of any kind, or

(iii) to enable another person to acquire benefits of any kind, or

(d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that—

² Hereafter Asylum and Immigration Act 2004.

(i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
(ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.

The Asylum and Immigration (Treatment of Claimants etc) Act 2004 and the Coroners and Justice Act 2009 do not define slavery or forced labour and therefore it is necessary to consider the relevant case law of the ECtHR to understand the Court's use of these terms and their relevance for domestic law. The first case, *Siliadin v France*,³ was extremely important in establishing that States had positive obligations under Article 4 ECHR. It is also the only reported case concerning a child exploited through forced labour in domestic work where this has amounted to servitude.⁴ The second, more recent case, *Rantsev v Cyprus and Russia*⁵ confirmed that States had positive obligations under Article 4 ECHR in the context of human trafficking, and also examined the extent of these positive obligations, on both countries of origin and of destination. Although this case concerned suspected sexual exploitation of an adult woman, it still remains directly relevant to children in domestic work.

3. *SILIADIN AND RANTSEV: THE FACTS*

The case of *Siliadin v France* concerned a girl (Siwa-Akofa) who was 15 years old when taken from her home in West Africa by 'Mrs D' to live within a household in France. The arrangement was that the child would receive an education and her immigration status would be regularised in

³ Application No. 73316/01, (2006) 43 EHRR. 16.

⁴ No other case could be found as at 10.11.2011.

⁵ Application No. 25965/04 (2010) 51 EHRR. 1.

France. She was effectively in a private fostering arrangement, although it was not formally regulated as such. However, on her arrival in France she was forced to work excessive hours and was subsequently 'lent' to another couple (Mr and Mrs B).⁶ Following the birth of this couple's third child, Mr and Mrs B decided to 'keep' Siwa-Akofa. During her time with this family she was not provided with a room of her own. Instead she slept on a mattress in the baby's room and had to take care of him if he woke during the night. The only time she was permitted to leave the house was under the instructions of Mrs B in order to take the children to nursery or to their social activities, and to do the shopping as instructed. She worked 15 hours a day cooking, cleaning and looking after the children. She received no remuneration for her work and had no time off from her duties. Her documents and passport were retained by Mrs B and the fact that her immigration status had never been regularised was used by the couple to keep her in fear of arrest and of authorities.

The Trafficking Protocol and the Council of Europe Convention were not in force at the time Siwa-Akofa was taken to France. Mrs D⁷ (who was a French national of Togolese origin), who originally took Siwa-Akofa from her home in Togo, West Africa, to France for the purpose of exploiting her, was not charged or prosecuted for the part she played in Siwa-Akofa's migration. Even if the Trafficking Protocol had been in force at the relevant time it would not have been useful in bringing a charge of child trafficking against Mrs D. The offence of trafficking in human beings under Article 3, Trafficking Protocol requires an element of organised crime, which was not present in this case. In contrast, if the Council of Europe Convention had been in force at the material time, Mrs D could

⁶ Application No. 73316/01, (2006) 43 EHRR.16 at para 12.

⁷ The judgment stated that Mrs D was a relative of the girl's father although the exact relationship was not elaborated on, para 126.

have been prosecuted for the role she played in trafficking Siwa-Akofa since individuals can also fall within the definition of the trafficking offence in Article 4 of the Convention. The Court's focus was not directly on trafficking in human beings but instead on whether the girl's experience and the exploitation she was subjected to amounted to slavery, forced labour or servitude and whether France was under a positive obligation to prevent this situation arising.

*Rantsev v Cyprus and Russia*⁸ concerned a Russian national who migrated to Cyprus under an "artiste" visa to work in a cabaret. Within three days of her arrival she left her employment and was later seen in a club. Her employer reported this sighting to the police for her arrest and deportation in order for him to be able to replace her with someone else. The employer subsequently took Ms Rantsev to the police station himself and left her there after going to the club to find her. However, as she was not listed as wanted by the police for breach of her visa conditions they called her employer and detained her until he arrived. The police released her to his custody with instructions to return with her at 7am the following morning. The employer took her and kept her contained within a second floor apartment and at 6.30am she was found dead on the pavement below the apartment room window.

The Cypriot autopsy revealed that there were a number of injuries to Ms Rantsev's body and internal organs and came to the conclusion that the fall was the cause of her death. The subsequent inquest found no criminal liability of any third party and stated that:

⁸ Application No. 25965/04 (2010) 51 EHRR. 1.

'[I]n an attempt to escape from the ... apartment and in strange circumstances, jumped into the void as a result of which she was fatally injured'⁹

When the body was returned to Russia, another autopsy was carried out and it found that some of the injuries were sustained a short time before death and were not caused by the fall.

3.1 The Application to the European Court of Human Rights

Ms Siliadin complained to the European Court of Human Rights, relying on Article 4 ECHR, arguing that the criminal law of France did not provide her sufficient and effective protection against being held in servitude or at the very least the forced and compulsory labour which she had been required to perform. The ECtHR had to establish whether Article 4 ECHR was applicable to her situation and whether States had positive obligations to protect people from forced labour and slavery under Article 4. The French government did not dispute that Article 4 was applicable but did dispute that a positive obligation existed. However, Ms Siliadin further argued that under Articles 1 and 4 ECHR taken together, the state had failed to comply with its positive obligation to put in place adequate criminal law provisions to prevent and effectively punish the perpetrators of the exploitation to which she had been subjected whilst a minor.

In *Rantsev* claims were made against Cyprus under Articles 2, 3, 4, 5 and 8 ECHR¹⁰ due to the insufficient investigation into Ms Rantsev's death, an

⁹ *Rantsev*, para 41.

¹⁰ Article 2, the right to life; Article 3, the right of protection from inhumane or degrading treatment; Article 4, the right to protection from slavery, servitude and forced labour; Article 5 the right to liberty and security of person; Article 8, the right to respect for private and family life.

absence of steps taken aimed at punishing the individuals responsible for her death and ill-treatment, and the failure of the Cypriot authorities to protect her while she was still alive. It was also claimed that Russia had violated Article 2, the right to life, and Article 4 by failing to investigate Ms Rantsev's alleged trafficking and death and because of the failure to take steps to protect her from the risk of trafficking.

3.2 The ECtHR's Consideration of 'Slavery', 'Servitude' and 'Forced Labour'

In *Siliadin* the ECtHR considered the terms within Article 4 ECHR, namely 'slavery', 'servitude' and 'forced labour' in order to establish whether there had in fact been a violation of Article 4 ECHR by France. Slavery is not defined in the ECHR and therefore the Court in both *Siliadin* and *Rantsev* referred to the definition of slavery contained within Article 1, Slavery Convention 1926. In the case of *Siliadin* the Court found that although Ms Siliadin had been deprived of her personal autonomy, she was not held in slavery in the 'classic' sense. It was found that Mr and Mrs B had not exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object'.¹¹ The Court therefore considered the distinctions between slavery and servitude and retained the traditional meaning of slavery as legal ownership of another human being, defined in the Slavery Convention 1926. In reaching the decision that Ms Siliadin was in servitude the Court found that the treatment did not reach the level required to be categorised as slavery. Arriving at this decision the Court clearly indicated that there were important differences between slavery and servitude, particularly surrounding the issue of legal ownership.

¹¹ *Siliadin v France*, para 122.

In *Rantsev* the Court took the approach of questioning whether trafficking itself was based on slavery rather than considering the individual terms within Article 4 ECHR separately. In reaching the decision that trafficking itself is based on slavery the Court referred to a decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹² which found that *'the concept of slavery had evolved to encompass various contemporary forms of slavery based on the exercise of any or all of the powers attaching to the right of ownership.'*¹³ The Court in *Rantsev* pointed to the decision of the ICTY which held that:

*'...relevant factors included whether there was control of a person's movement of physical environment, whether there was an element of psychological control, whether measures were taken to prevent or deter escape and whether there was control of sexuality and forced labour.'*¹⁴

Article 4 ECHR therefore has the potential to be extremely important to trafficking victims. The ECHR may provide some recourse for individuals where domestic law has failed to provide adequate protection and/or criminal sanctions. The aim of the ECtHR was to ensure that there was protection for individuals who have been trafficked by imposing positive obligations on States beyond merely adopting criminal sanctions to punish traffickers. In order to achieve this aim the Court interpreted and applied

¹² The ICTY was set up to deal with International Crimes and apply international law in the context of the conflict in the former Yugoslavia. The Tribunal's decisions are not binding on the ECtHR, but are persuasive.

¹³ *Rantsev* referring to the case of *Prosecutor v Kunarac, Vukovic and Kovac*, IT-96-23 & IT-96-23/1-A, 12 June 2002.

¹⁴ *Prosecutor v Kunarac, Vukovic and Kovac*, IT-96-23 & IT-96-23/1-A, 12 June 2002. Para 119.

the ECHR 'so as to make its safeguards practical and effective.'¹⁵ However, there remain potential problems which have been created by the Court's approach to Article 4 ECHR.

It has been argued that, since it is not a requirement to identify and categorise the exploitation as slavery, servitude or forced labour it has 'muddied the waters' in terms of where the legal distinctions should lie between these concepts.¹⁶ The Court focused solely on the exploitative element of trafficking in human beings and in doing so overlooked the importance of the two other elements of the offence, namely, the recruitment, transfer or harbouring of a person, and the use or threat of use of force. Additionally, the Court's finding that trafficking is based on slavery has the effect of ignoring other forms of exploitation which are explicitly acknowledged in the definition of trafficking in Article 3, Trafficking Protocol. These include '*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services...*' or '*practices similar to slavery, servitude or the removal of organs*'.¹⁷

The Court's finding that trafficking is based on slavery appears to contradict particular provisions within international law including, for example, Article 1(d), Supplementary Convention on the Abolition of Slavery, the Slave trade, and Institutions and Practices Similar to Slavery 1956.¹⁸ This provision describes the exact circumstances of the children who are the focus of this thesis. These children have been trafficked for the

¹⁵ Rantsev, para 274.

¹⁶ J Allain, '*Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*' (2010) 10 Human Rights Law Review 546, 546.

¹⁷ *Ibid*, 554.

¹⁸ As discussed in *Chapter Two*.

purpose of their labour being exploited and their parents are complicit in this arrangement. The Supplementary Convention categorises this treatment as a practice similar to slavery, not as slavery itself. In addition, the Worst Forms of Child Labour Convention explicitly refers to trafficking of children and again categorises it as a practice similar to slavery.¹⁹ During the negotiations of the Supplementary Convention time was taken to discuss the scope and exact wording of the definition of practices similar to slavery and explicit distinctions were drawn between slavery and servitude. If all forms of exploitation fell within the category of slavery there would be little need for these categories of exploitative treatment to be defined separately in International law. As Vinkovic suggests, despite predominantly clear international legal sources there remains a lack of understanding of the meaning of these terms²⁰

3.3 Servitude and Practices Similar to Slavery

The concept of servitude under Article 4 ECHR was considered by the ECtHR in both cases. In *Siliadin* it was claimed that the right not to be held in servitude as laid down in Article 4 ECHR was an absolute one. It was argued before the Court that her situation corresponded to three of the four servile institutions or practices referred to in Article 1, Supplementary Convention 1956; (1) Debt bondage; (2) The delivery of a child or adolescent to a third person, whether for reward or not, with a view to the exploitation of his or her labour; (3) Serfdom. It was noted that she had not gone to France in order to work as a domestic servant, but had been

¹⁹ Article 3(a), WFCL Convention.

²⁰ M Vinkovic, 'The "unbroken marriage" - trafficking and child labour in Europe' (2010) 13(2) *Journal of Money Laundering Control* 87, 91.

obliged to because of the behaviour of Mrs D who trafficked her into France²¹ after having obtained her parents' agreement.²²

The meaning of servitude is also not defined by the ECHR and the Court in *Siliadin* found it necessary to refer to previous case law.²³ The Court found that servitude characterises situations in which denial of the individual's freedom is not limited to the compulsory provision of labour imposed by the use of coercion, but also extended to his or her living conditions, with an obligation on the "serf" to live on the other's property with no potential for improvement or changing their status.²⁴ The Court found that although servitude was linked with the concept of slavery it was a distinct legal concept because servitude did not involve legal ownership. The Court also drew a distinction between servitude and forced and compulsory labour. In the light of these findings, the Court reached the decision that Ms Siliadin was held in servitude within the meaning of Article 4 ECHR.

In *Rantsev* the Court took a different approach. Although the Court did not find it necessary to determine which of the concepts captured the exploitation experienced by Ms Rantsev, it did state that it had previously been established that for circumstances to amount to servitude a "*particularly serious form of denial of freedom*"²⁵ was required. Servitude

²¹ At the material time there was no legislation in France that directly made it an offence to traffic human beings. Application No. 73316/01, (2006) 43 EHRR 16, para 98.

²² Mrs D said she would provide their daughter with the opportunity to attend school and receive an education and that she would ensure her immigration status was regularised.

²³ *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443; This case involved detention in prison.

²⁴ Application No. 73316/01, (2006) 43 EHRR 16, para 104.

²⁵ *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, para 58.

involved individuals who were coerced into providing their services and was a concept which is linked with slavery.²⁶

The case of *Siliadin* is of importance to this thesis as it illustrates each of the elements that are of concern; trafficking, private fostering arrangements, domestic work and exploitation. It also demonstrates the Court's attempt to clarify the meaning of these terms. This case established for the first time that States have a positive obligation under Article 4 ECHR, which means that States need to have criminal law in place which protects individuals from slavery, slavery-like practices or forced labour. The circumstances of *Siliadin* illustrate that trafficking a child for the purpose of exploiting them in domestic work would fall within Article 4 ECHR.

While *Rantsev* indicates that trafficking itself falls within the scope of Article 4 ECHR, whether the ECtHR would decide in the same way in the future is unknown given that there are potential problems with the approach. The case of *Rantsev* had the effect of confusing and blurring the boundaries between the legal categorisation of trafficking and slavery. Most countries now have trafficking legislation in place and therefore this would have arguably satisfied the obligations required by Article 4 ECHR prior to *Rantsev*. State obligations under the Trafficking Protocol and Council of Europe Convention extend much further than Article 4 alone, including effective cooperation in cross-border cases, the removal of individuals from a real or immediate risk of being trafficked in certain circumstances, and effective investigations into potential and actual cases of trafficking. The obligations under Article 4 ECHR extend to

²⁶ *Siliadin v France*, para 124.

relationships between private individuals, not just the State and the individual. As Mantovolou suggests:

'States' duty to intervene in private relations may have various justifications: on the one hand, it may stem from the fundamental character of Convention rights, which, arguably, becomes even more significant when it comes to non-derogable provisions, and on the other, from the clear unequal status of individuals in certain private relations'.²⁷

4. THE NATURE OF STATES' POSITIVE OBLIGATIONS UNDER ARTICLE 4 ECHR

The ECHR places both negative and positive obligations on States. The negative obligations require States to refrain from action which would interfere with the rights contained in the Convention, whilst positive obligations require States to take positive action to protect and prevent an individual's rights under the Convention being violated.²⁸ Due to the lack of case law under Article 4 ECHR Ms Siliadin tried to establish that States had a positive obligation which encompassed prevention and protection from actions taken by private individuals by analogy with case law concerning Articles 3²⁹ and 8³⁰ ECHR where States' positive obligations had already been established. The public prosecutor's office in France had

²⁷ V Mantouvalou, 'Servitude and forced labour in the 21st century: the human rights of domestic workers' (2006) 35(4) *Industrial Law Journal* 395, 406.

²⁸ For further discussion see D Harris and Others, *Law of the European Convention on Human Rights* (2nd edn OUP, 2009), 18-21.

²⁹ *A v United Kingdom* (1999) 27 EHRR. 611, (parental chastisement); *Z v United Kingdom* (2002) 34 EHRR. 3, para 73 (Neglect/abuse - Local Authority failure to protect); *E v United Kingdom* (2003) 36 EHRR 31 para 99 (sexual abuse – Local Authority failure to protect); and *MC v Bulgaria* (2005) 40 EHRR 20, para 149 (rape and sexual abuse).

³⁰ *X and Y v Netherland* (1986) 8 EHRR 235; *MC v Bulgaria* (2005) 40 EHRR. 20.

not appealed on points of law on the grounds of public interest against the acquittal of Mr and Mrs B. The acquittal had subsequently become final and the fine and payment of damages could not be seen as an acknowledgment, whether express or in substance, of a breach of Article 4 ECHR. It was argued by the French Government that there was a certain margin of appreciation permitted to states where relationships between individuals were concerned.

The ECtHR confirmed that States did have positive obligations in relation to both Article 3 and 8 ECHR and also found that children and other vulnerable individuals are entitled to effective state protection in the form of effective deterrence.³¹ In reaching this decision the Court found that limiting compliance with Article 4 ECHR only to direct action by state authorities would be inconsistent with the international instruments specifically concerned with this issue³² and would amount to rendering it ineffective. The Court therefore found that States do have positive obligations under Article 4 in the same way as under Article 3.³³ Harris viewed *Siliadin* as having:

'...signalled the relevance of Article 4 to what are sometimes called modern forms of slavery. These currently present much more serious human rights issues in European States than the traditional forms of

³¹ Application No. 73316/01, (2006) 43 EHRR. 16, para 79.

³² For example, the Court referred to the following international conventions during the judgment: Slavery Convention 1926; Forced Labour Convention 1930; Council of Europe Convention on Action against Trafficking in Human Beings 2005; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956; United Nations Convention on the Rights of the Child 1989.

³³ Application No. 73316/01, (2006) 43 EHRR. 16, para 89.

*ill-treatment that are associated with slavery, servitude and forced or compulsory labour in response to which Article 4 was drafted.*³⁴

It was therefore established in this case that States have a positive obligation under Article 4 ECHR to adopt criminal law provisions which penalise slavery and servitude to and to apply them in practice. The decision in *Siliadin* was also seen as possibly ‘...a first step towards recognizing the gender-specific impact of modern forms of servitude within the Convention framework’.³⁵ The decision is significant in providing a rights-floor, establishing a basic standard of protection for exploited individuals that the signatory States are obliged to uphold.

5. THE EXTENT OF STATES’ POSITIVE OBLIGATIONS IN THE CONTEXT OF CHILD TRAFFICKING

The case of *Rantsev* considered the extent of States’ positive obligations as established by *Siliadin*. *Rantsev* explicitly considered these obligations within the context of trafficking in human beings and extended the discussion beyond Article 4 ECHR to also consider the obligations under Articles 2, 3, 5 and 8. The Court found the complaint under Article 8 inadmissible and the claims of ill-treatment under Article 3 as not requiring separate consideration. The Court considered that ‘...in the absence of any specific allegations of ill-treatment, any inhuman or degrading treatment suffered by Ms Rantsev prior to her death was inherently linked to the alleged trafficking and exploitation.’³⁶ The Court therefore dealt with the

³⁴ D Harris and Others, (n28), 118-119.

³⁵ B Rudolf and Eriksson A, ‘Women’s rights under international human rights treaties: Issues of rape, domestic slavery, abortion, and domestic violence’ (2007) 5(3) International Journal of Constitutional Law 507-525; The gendered nature of child trafficking is discussed in detail in *Chapter Seven*.

³⁶ *Rantsev*, para 252.

general issues raised in the context of the complaint raised under Article 4 ECHR.³⁷

In relation to the Article 5 complaint against Cyprus the Court found that there had been a violation of the right to liberty due to the detention of Ms Rantsev by police, who subsequently released her into the custody of her employer who she was trying to leave. She was detained in the apartment by her employer and the Court found this detention to be a deprivation of her liberty which was both arbitrary and unlawful.³⁸ The main discussions revolved around Articles 2 and 4 ECHR.

The Court found no operational violation of Article 2 by Cyprus as the particular chain of events leading to Ms Rantsev's death could not be foreseen when she was released from police custody.³⁹ However, the Court did find that there was a procedural violation of Article 2 by Cyprus due to the failure to conduct an adequate investigation into her death.⁴⁰ In contrast, Russia was not under an obligation to investigate the death of Ms Rantsev as this responsibility remained with Cyprus as the country where she died. There was therefore no violation of Article 2 ECHR by Russia. The Court stated that the Article 2 obligation on Member States implies:

'...in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual....For the Court to find a violation of the positive

³⁷ *Rantsev*, para 252.

³⁸ *Rantsev*, para 323-325.

³⁹ *Rantsev*, para 222-223.

⁴⁰ *Rantsev*, para 235-242.

*obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.*⁴¹

This ‘real and immediate risk to life’ needed to be more than a general risk of ill-treatment and violence.⁴² This ensures that the obligation placed on States is a proportionate one.

In *Rantsev* the Court moved beyond the positive obligation on States to have effective criminal sanctions to punish traffickers to consider whether trafficking itself fell within the scope of Article 4. The Court took this approach rather than deciding whether the exploitation experienced by the individual amounted to either slavery, servitude or forced labour. This was regardless of the fact that Article 4 does not explicitly encompass trafficking on its face. The Court stated:

‘In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of

⁴¹ *Rantsev*, para 218-219.

⁴² *Rantsev*, para 222.

*proscribed conduct are engaged by the particular treatment in the case in question.*⁴³

The Court concluded that it was necessary for the ECHR to be interpreted as a living instrument in the light of present-day conditions⁴⁴ and stated that *'there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention.'*⁴⁵ The Court found that *'...trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.'*⁴⁶ The Court effectively concluded that trafficking in human beings was based on slavery. This is apparent from the statement:

*'The Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour...'*⁴⁷

In both *Siliadin* and *Rantsev* the ECtHR stated that Article 4 makes no provision for exceptions and no derogation is permissible under Article 15(2) in time of war or other public emergency threatening the life of the

⁴³ *Rantsev*, para 279.

⁴⁴ *Rantsev*, para 277. This is the Court's well-established approach to interpretation of the Convention.

⁴⁵ *Rantsev*, para 282.

⁴⁶ *Rantsev*, para 282 and see earlier for the definition in Article 3(a), Trafficking Protocol.

⁴⁷ *Rantsev*, para 281.

nation.⁴⁸ Allain identifies that this is '*factually wrong and a glaring error by the Court.*' with the 'no derogation' clause only applying to Article 4(1) which deals with slavery and servitude and not extending to Article 4(2) or (3) which concern forced or compulsory labour.⁴⁹

As a result of *Rantsev*, States have a positive obligation to put in place criminal sanctions to punish traffickers. They must also remove an individual from a real or immediate risk of being trafficked or exploited where they were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk. This obligation forms part of States prevention strategies.⁵⁰ States are also required to ensure that they regulate businesses often used as a cover for human trafficking, for example the entertainment industry demonstrated by Ms Rantsev's employment within a cabaret. States must also investigate potential cases of trafficking and States of origin or transit have a duty to cooperate effectively in cross-border cases.⁵¹

6. THE INFLUENCE OF THE ECHR ON THE UK'S RESPONSE TO CHILD TRAFFICKING

Although the ECHR is not explicitly child focused, '*children are entitled to claim the protection of all its Articles*'⁵² with States under an obligation to ensure that individuals (including children) who are in the jurisdiction

⁴⁸ *Siliadin*, para 112 and *Rantsev*, para 283.

⁴⁹ J Allain, (n16), 551.

⁵⁰ See *Chapter One* for provisions concerning protection of victims.

⁵¹ *Rantsev*, para 289.

⁵² J Fortin, 'Children's Rights and the Developing Law' (3rd edn, CUP, 2009), 18.

enjoy the rights contained in the Convention.⁵³ The ECHR has proved useful in providing a rights floor for victims of trafficking as discussed above and has greatly influenced the UK response since the UK has incorporated most of the articles of ECHR into UK law via the Human Rights Act 1998. The ECHR is a judiciable instrument with case law which helps to interpret the requirements of the Convention. It is not an isolated instrument; instead there is a cross-fertilisation between the ECHR and the UNCRC with the ECtHR often referring to the UNCRC when deciding cases before them.⁵⁴

The cases of *Siliadin* and *Rantsev* establish States' obligations and the extent of these obligations under Article 4 ECHR. However, there are other, additional obligations which may assist children who are victims of trafficking or which have already helped to shape the legal response to child trafficking. The following is not an exhaustive discussion dealing with every Article of the ECHR but is aimed at highlighting the key principles and cases which illustrate the influence the ECtHR's decisions on UK law and identify the potential for child trafficking victims to use the Convention an additional avenue for the protection of their rights.

In some circumstances child trafficking will involve treatment and conditions which may amount to inhumane or degrading treatment and therefore a violation of Article 3 ECHR. States have an obligation to protect individuals from treatment which violates Article 3 ECHR. This applies not only to State authorities, but also to protection from the situation where degrading treatment is administered by private

⁵³ Article 1 ECHR.

⁵⁴ For example see *Siliadin v France* para 81, 87, 143.

individuals.⁵⁵ However, not all treatment will meet the level of severity necessary to establish inhuman or degrading treatment as a high threshold has been set.⁵⁶

‘Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative. It depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some circumstances, the sex, age and state of health of the victim.’⁵⁷

In *A v UK* the fact that the child was beaten with a garden cane with considerable force on more than one occasion was sufficient to satisfy the threshold. Applying Article 3 ECHR and the positive obligations this entails for States to the situation of children exploited in domestic work, it is possible that the required threshold would be met due to the conditions and treatment that is often experienced by these children.

States’ positive obligations under Article 3 ECHR apply where authorities had, or ought to have had, knowledge of the ill treatment.⁵⁸ These obligations have been applied in various settings, for example corporal punishment of children by their parents, rape and prisoners’ health.⁵⁹

⁵⁵ *A v UK* [1998] 2 FLR 959.

⁵⁶ *Bensaid v UK* (2001) 33 EHRR 205

⁵⁷ *A v UK*, para 37.

⁵⁸ *Z and Others v United Kingdom*, Application No.29392/95, (2002) 34 EHRR 3.

⁵⁹ For discussion of the application of Article 3 ECHR see: S Parsons, ‘Human rights and the defence of chastisement’ (2007) 71(4) Journal of Criminal Law 308-317; C McGlynn, ‘Rape, torture and the European Convention on Human Rights’ (2009) 58(3) International and Comparative Law Quarterly 565-595; R Lines, ‘Injecting reason: prison syringe

Clearly Article 3 will also apply to trafficked children exploited in domestic work providing that the required level of severity of the treatment is reached since '*Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence against such serious breaches of personal integrity.*'⁶⁰

Investigations into alleged breaches of Article 3 and 4 ECHR have also been established as a positive obligation on the State. It is not necessary for a complaint to be received from the alleged victim for this obligation to be triggered. As soon as a credible allegation is received, regardless of how the authorities are notified, then the requirement for an investigation is triggered and needs to be conducted without delay.⁶¹ The obligation to investigate also applies to Article 2 ECHR, as illustrated in relation to Cyprus by *Rantsev*. It is possible that in some circumstances trafficking may result in the death of a child. In these circumstances States have a duty to investigate their death even where State authorities are not directly responsible for the child's death. If the authorities fail to conduct an adequate and effective investigation into the death this would be a violation of Article 2 ECHR.⁶² The obligation under Article 2 ECHR includes not only the requirement to investigate an individual's death, but also to take preventative measures to protect an individual whose life was at risk from another. The State will be liable if the authorities knew or ought to have known that there was a real and immediate risk to life.⁶³

exchange and Article 3 of the European Convention on Human Rights'(2007) 1 European Human Rights Law Review 66-80.

⁶⁰ *A v UK* para 22

⁶¹ *OOO v Commissioner of Police of the Metropolis* [2011] EWHC 1246 (QB); [2011] U.K.H.R.R. 767.

⁶² *Ergi v Turkey* (App. 233818/94), (2001) 32 EHRR 18.

⁶³ *Osman v United Kingdom* (App.23452/94) , (2000) 29 EHRR 245.

Aside from the investigations and the protection available through the positive obligations established under the various Articles, there are other potentially useful obligations on States that are equally applicable to child victims of trafficking. Individuals, including trafficked children must have an effective right of access to the courts as established in *Airey v Ireland*⁶⁴ and an effective remedy available to them at national level for any breach of their Convention rights as required under Article 13 ECHR.⁶⁵ An effective remedy may include ensuring that there are procedures in place to enable trafficking victims to obtain an enforceable award of compensation. In *Z and Others v UK* this was applied in the context of a breach of Article 3 ECHR. However it has been suggested that '*Compensation may not be adequate given the harm that has occurred; it does nothing to protect the victim and is ultimately reliant on the victim initiating a claim*'.⁶⁶ Compensation does however, form an aspect of the legal instruments directed specifically at trafficking which were examined in *Chapter One*.

The obligation to provide compensation would extend to where there had been a breach of other Convention rights. As the Court stated in *Bensaid*:

'The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be

⁶⁴ Application No. 6289/73, (1981) 3 EHRR 592.

⁶⁵ *Ergi v Turkey* (App. 233818/94), (2001) 32 EHRR 18.

⁶⁶ A Nicholson, 'Reflections on *Siliadin v. France*: slavery and legal definition' (2010) 14(5) *International Journal of Human Rights* 705, 709.

*unjustifiably hindered by the acts or omissions of the authorities of the respondent State.*⁶⁷

States are allowed some discretion as to how they meet their obligations under the Convention but failure to ensure that there is an effective remedy available for breaches of an individual's Convention rights would amount to a breach of Article 13 ECHR.

In relation to returning children who are victims of trafficking to their country of origin, this may only occur if the authorities find that it is in their best interests to do so. In some circumstances however, there may be a claim that a return would risk them being subjected to inhuman or degrading treatment or slavery, servitude or forced labour. Therefore a claim of a breach of Articles 3 or 4 ECHR may be possible in these circumstances. States have the right to control entry and residence of individuals into the territory, but when exercising the right to return individuals, States must have regard to the Convention rights.⁶⁸

Despite the fact that positive obligations under the ECHR have been established and confirmed through the decisions of the ECtHR, there are still alleged breaches of Convention rights being brought before the ECtHR. Some of these cases are relevant to child trafficking victims exploited in domestic work, even where they do not directly involve children. Cases yet to be decided by the ECtHR are equally important in illustrating potential breaches and may have implications for the obligations placed on the UK.

⁶⁷ *Bensaid v UK* (2001) 33 EHRR 205, para 53.

⁶⁸ *Bensaid v UK* (2001) 33 EHRR 205.

*Kawogo v United Kingdom*⁶⁹ involves a Tanzanian national who legally entered the UK in 2006 on a domestic worker visa which was valid for 3 months. Her employer, Mrs Alibhai, returned to Tanzania two weeks later leaving her with the employer's parents, 'the Dhanjis'. Her movements were restricted by the Dhanjis and she was initially not permitted to leave the house. She was subsequently only allowed to leave the house to go to church. She was told by her employer that she could not return to Tanzania with her and that she needed to work to repay the cost of her flight, which constitutes bonded labour. Ms Kawogo did not receive any wages for the work she undertook and her passport was retained by her employer and then by her employer's parents. She was threatened that her illegal status would be reported to the authorities in order to have her removed from the UK before she could make any claim against them. The Dhanjis photocopied her passport and sent it to the UK Border Agency with a letter referring to her unauthorised stay for this very purpose.

Ms Kawogo made repeated reports to the police and her representatives corresponded with them over a period exceeding two years, between 22 July 2007 and 29 September 2009. The police initially refused to investigate her claim of forced labour as a crime instead treating it as a civil matter and it was not until February 2009 the police confirmed that a criminal investigation would be conducted. No criminal charges were brought as a result of this investigation under section 4, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The Dhanjis were not responsible for the cross-border element, which is necessary element of the offence and Mrs Alibhai was out of jurisdiction and could not be prosecuted. The Crown Prosecution Service stated that there was insufficient evidence to prove that the Dhanjis had committed any crime.

⁶⁹ Application no. 56921/09, 14 October 2009.

At the material time section 71, Coroners and Justice Act 2009 prohibiting forced labour was not in force, which would not have required proof that Ms Kawogo had been trafficked. The focus would have been on the treatment she had been subjected to by the Dhanjis and it would have been possible to prosecute them on this basis alone.

Ms Kawogo made a claim to an Employment Tribunal that she had been discriminated against on racial grounds arguing that she had been treated less favourably than a British person would have been treated. She claimed that she had not been paid any wages, had not received a written contract of employment, wage slips and claimed that by working between 7am and 10.30pm each day that there had been a breach of the Working Time Regulations. Her claim was successful and she was awarded £58,585.80 but she has not yet received any payment and it is believed that the Dhanjis have since left the UK. She made an application to the ECtHR claiming a violation of Article 4 ECHR, being held in forced labour in the UK, and a failure by the authorities to investigate and prosecute the forced labour as a criminal offence. She is also claiming that she had no effective remedy, in breach of Article 13 ECHR. This case could have easily involved a child and the same claims could be made in relation to the alleged breaches of the child's Convention rights. This case illustrates that it is not only necessary to criminalise trafficking and forced labour, but also that the implementation of these laws is effective. Procedural requirements such as effective and timely investigations are important to ensure that individuals' rights are protected. However, it could be argued that an earlier investigation would not have made a difference since the same defects in Article 4 ECHR would have still been present at the time.

The case of *C.N. v United Kingdom*⁷⁰ is also a case yet to be determined by the ECtHR. It concerns a Ugandan national who suffered prolonged forced labour and, whilst her complaints to the police resulted in an investigation, there was no prosecution. Since the victim had entered the UK voluntarily, with a false passport and documents, there was no evidence of trafficking and this prevented any prosecution under Section 4, Asylum and Immigration (Treatment of Claimants etc.) Act 2004. These cases clearly highlight the importance of the introduction of the Section 71, Coroners and Justice Act 2009 which provides an offence of holding someone in forced labour with no cross-border element. *CN* has now made an application to the ECtHR to complain that, at the time her labour was exploited, the UK Government was in breach of Article 4 ECHR as there was no criminal offence penalising forced labour and servitude. She has also complained that her right to respect for her private life and the failure to adopt criminal law penalising forced labour and servitude meant the UK Government was in breach of its positive obligations under Article 8 ECHR. She claimed that there was no remedy in domestic law for her ill-treatment, contrary to Articles 4 and 8.

Similar claims have been submitted but not yet decided. For example, in *L.R. v United Kingdom* it is claimed that returning individuals to their country of origin would expose them to a risk of being treated in a way that would amount to a breach of Article 4 ECHR.⁷¹ A claim has also been made that the failure of authorities to undertake an adequate investigation breaches Article 4, in the case of *Lilyana Sahskova Milanova and Others v Italy and Bulgaria*.⁷²

⁷⁰ Application no. 4239/08.

⁷¹ Application no. 49113/09.

⁷² Application no. 40020/03.

The pending cases illustrate that the UK in particular has had ineffective procedures in place for carrying out adequate investigations. Even where a decision has been reached in favour of the victim and damages have been awarded, the fact that these damages have not been received is problematic. Finding in the victim's favour is not in itself an effective remedy and the UK needs to ensure that the positive obligations under the ECHR are met. The introduction of the stand-alone forced labour offence by section 71, Coroners and Justice Act 2009 has the potential to remedy the situation as there is no need to prove trafficking to mount a prosecution.

7. CONCLUSIONS

The decisions of the ECtHR are significant and have helped to shape the UK's response to the various aspects of human trafficking. The ECtHR has an important role to play in helping to clarify the practical application of the various terms of Article 4 ECHR which is directly concerned with labour exploitation. It has been suggested that, rather than clarifying the definitions, there has been some confusion and blurring between the concepts. This is unfortunate as it is important for '*States to at least apply in practice the distinctions between the three types of practice in Article 4*'⁷³ and without clear guidance, this is particularly difficult.

The ECtHR has established and confirmed the extent of States' positive obligations under Article 4 ECHR. The obligations are fairly wide. They range from preventing the inhuman or degrading treatment, slavery, servitude or forced labour of individuals within the States' territory to ensuring that if violations occur then effective remedies are available. It has been suggested that: '*In the longer term, as the phenomenon of*

⁷³ H Cullen, '*Siliadin v France: positive obligations under Article 4 of the European Convention on Human Rights*' (2006) 6(3) Human Rights Law Review 585, 592.

*trafficking of children is better understood, positive obligations in relation to protecting and rehabilitating these children may also be imposed.*⁷⁴

This suggestion is a real possibility given the ECtHR's recent approach to extending the positive obligations under the ECHR to include Article 4.

States must ensure that they have effective sanctions in place to criminalise the treatment which is the subject of the violation. However, Mantouvalou, commenting on *Siliadin v France*, has questioned whether at the time the case was heard the UK satisfied this requirement.⁷⁵ Since the decision in *Siliadin* the UK has introduced section 71, Coroners and Justice Act 2009 which appears to have resolved the difficulties of proving the trafficking element and focuses instead on the treatment and exploitation of the individual, which would arguably satisfy the requirement of effective criminal laws.

The ECtHR has the ability to continue to shape the UK's response to child trafficking. There remain applications that have been brought to the ECtHR but are yet to be decided. These ongoing cases will further clarify the obligations under Article 4 relevant to child trafficking and may involve further positive obligations for States and additional protection for trafficking victims. It may result in more extensive cross-fertilisation between international instruments which would provide more consistency across all levels of legal regulation.

Having explored the ECtHR's approach and potential impact on UK action in relation to child trafficking, the following chapter explores the dominant focus of the legal discourse surrounding human trafficking

⁷⁴ Ibid.

⁷⁵ V Mantouvalou, 'Modern slavery: the UK response' *Industrial Law Journal* (2010) 39(4) *Industrial Law Journal* 425, 427.

and its politicisation and applies this to the situation of children trafficked into domestic work.

Chapter Four

LOCATING CHILDREN IN DOMESTIC WORK WITHIN THE CURRENT TRAFFICKING DISCOURSE

1. INTRODUCTION

This chapter focuses on the dominant theorisations of the legal discourse surrounding trafficking. These identify the phenomenon either as migration, as a form of organised crime, as synonymous with sexual exploitation and as a human rights violation. It is acknowledged that human trafficking cannot be examined in complete isolation from these concepts and recognises that it intersects with aspects of these key legal discourses.¹ Each of these areas make up the dominant theorisations being discussed in this chapter and each is highly politicised which complicates an already complex situation further.²

The chapter discusses the consequences of the dominant theorisations in relation to children who are trafficked.³ It is argued that the discourse does not entirely correspond to the reality of trafficked children's lives, using the specific example of children trafficked for the purpose of domestic work. Consequently, this lack of individualisation and visibility of children results in responses which do not appropriately cater for the diversity of

¹ V Munro, 'A Tale of Two Servitudes Defining and Implementing A Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 Social Legal Studies 91,93 It is acknowledged that there are other features/factors involved in the trafficking discourse. However, those mentioned are the dominant ones and the focus of this chapter.

² G Tyldum and A Brunovskis, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking' (2005) 43(1/2) International Migration 17, 18.

³ The children who are the focus of the thesis are children who are third country nationals who have been internationally trafficked and exploited in domestic work in the UK rather than UK or EU nationals internally trafficked within the UK or the EU.

experiences implied by trafficking and does not accurately capture the situation of child domestic workers.

Chapter four also identifies the emerging developments and changes in the approach taken to human trafficking. In particular it explores the benefits and challenges of a human rights approach where the rights of child trafficking victims are placed at the centre of the legal response.

2. TRAFFICKING AS AN ASPECT OF MIGRATION

Child trafficking, by definition, involves an element of migration. It is therefore necessary to explore how both children and trafficking are categorised within the migration discourse. The discourse covers a diverse range of different forms of migration and effectively creates concepts of “positive” and “negative” or “desirable” and “undesirable” migration with trafficking in human beings falling into the latter category.⁴

2.1 Children within the Migration Discourse

There is often an assumption that children migrate as part of a family unit or in order to be reunited with their family in a state other than their country of origin. Children are not only affected when migrating with their family, but also when they are either ‘left behind’ when their parent(s) migrate in order to work, or alternatively when the child migrates independently of their family unit.⁵ A common approach to child migration has been to view the child migrating as part of a family

⁴ B Anderson, “‘Illegal Immigrant’: Victim or Villain?’ ESRC Centre on Migration, Policy and Society Working Paper No. 64, University of Oxford, (2008) 2 available <http://www.compas.ox.ac.uk/publications/working-papers/wp-08-64/> [last accessed 30.1.2011].

⁵ UNICEF, Innocenti Research Centre, ‘Making Children Visible at the Brussels Global Forum on Migration and Development’ (2007) available <http://www.gfmd.org/fr/gfmd-documents-library/cat_view/934-brussels-gfmd-2007/946-contributions-to-roundtable-preparations.html?limit=10&order=date&dir=DESC> [last accessed 12.07.10].

unit or conversely as passive victims whose migration has been forced. There is comparatively little middle ground between these polarised positions.

Research which considers children's migration has predominantly developed within the context of family migration where migration takes place for the purpose of parents' employment arrangements. Traditionally the worker was male and economic decisions were reached for the family as a whole rather than for individual members of the family. There is now more focus on both spouses' contribution to the migration decision as well as the capacity for women to be dual-earners. This has led to more attention being given to the impact of migration on family life.⁶ For example, research has considered the impact of migration on married women compared to married men⁷ and the impact on the employment of married migrating women with children compared to those without.⁸ Children are considered in terms of the impact on them when migrating as part of a family unit or, conversely, the impact the existence of children has on parents' decisions to migrate.⁹

Children's migration is often assumed to be part of this family unit and they are viewed as a dependent of the family. This results in their status

⁶ See for example L Ackers and H Stalford, *'A Community for Children?: Children, Citizenship and Migration in the European Union'* (Ashgate, 2004).

⁷ AJ Bailey, and TJ Cooke, 'Family migration, migration history, and employment' (1998) 21(2) *International Regional Science Review* 99.

⁸ TJ Cooke, "'Trailing wife" or "trailing mother"? The effect of parental status on the relationship between family migration and the labor-market participation of married women' (2001) 33(3) *Environment and Planning* 419.

⁹ L Ackers and HE Stalford, 'Managing Multiple Life-Courses: The Influence of Children on Migration Processes in the European Union' in K Clarke and T Maltby and P Kennett, ed(s), *'Social Policy Review 19: Analysis and Debate in Social Policy'* (Policy Press 2007).

being determined on the basis of their parents' status rather than in their own right.¹⁰ The child's experience is conflated with those of the parents and this also has the effect of reinforcing children as appendages of their parents. This approach to child migration is clearly evident within both EU and domestic immigration law.¹¹ Great significance is placed on the family either in terms of "family unity" or "family reunification". Stalford considers that:

*'...the concept of family unity denotes a range of migration entitlements relating to admission and residence which are aimed at ensuring that the family remains together following migration. In contrast, family reunification or 'reunion' refers to the efforts of family members already separated by forced or voluntary migration to regroup in a country - usually other than their country of origin...'*¹²

There are numerous influences on family decisions to migrate where children are involved. These include, for example, parents considering the possible disruption to their child's education and, possibly the affordability of private education for the children in the host State. The availability of childcare in the host state is also important and is particularly relevant where family members may currently be providing childcare to enable the

¹⁰ J Bhabha, 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework' (2008) UNICEF Innocenti Research Centre, Discussion Paper, IDP No. 2008-02 at 1, available <http://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf> [last accessed 30.10.2011].

¹¹ For example, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12; UK Immigration Rules provide restricted options to enter the UK see <<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>> [last accessed 15.04.2012].

¹²H Stalford, *Children and the EU: Rights, Welfare and Accountability* (Hart Publishing, forthcoming July 2012) Chapter 3.

parents to work but will not be available to do so if the family migrate. Decisions are not necessarily made purely from the perspective of what is in the best interests of the individual child, but in terms of what the parents perceive to be the best outcome for the family unit. In some circumstances the child may actually be 'left behind' with relatives rather than migrating with the parents.¹³

By placing the focus primarily on the family unit rather than the individual child, dependency is the determining factor in establishing a child's right to be present in the host State.¹⁴ This results in the focus remaining on the migrating adult worker rather than the individual child. The child derives their status from their parent, with dependency being used as a tool for determining who qualifies as a member of the migrating adult's family. The child will be permitted to migrate with the adult and be present in the host state only if they are found to be dependent on the migrating adult. This dependency was initially assessed in terms of financial dependency on the adult but has subsequently developed to take account of wider elements of dependency, such as care and welfare.¹⁵

As a result of the dominant focus on family migration, children's perceived migration experiences are largely confined within these parameters. This has the effect of reinforcing the view of children's dependency within the migration discourse. As Ackers and Stalford state: '*...children tend to be*

¹³ See R Parrenas, 'Long distance intimacy: class, gender and intergenerational relations between mothers and children in Filipino transnational families' (2005) 5(4) Global Networks 317-336.

¹⁴ As evidenced, for example by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12.

¹⁵ The aim is not to discuss the detail of EU migration law, but to highlight the assumptions and the significance placed on families within the context of child migration. For detailed discussion of EU migration law in relation to children and families see H Stalford, (n12).

*viewed as the passive appendages or, indeed, intractable obstacles to their parents' migration.*¹⁶ This dependency does not reflect the reality of many children's experiences of migration and does not assist in the recognition of children as individuals in their own right.

2.2 Independent Child Migration

In addition to the family migration approach, there is some recognition of the independent migration of children. This migration falls into four main situations as identified by Bhabha:

(a) Children who travel in search of opportunities, whether educational or employment related

(b) Children who travel to survive - to escape persecution or war, family abuse, dire poverty

(c) Children who travel for family reunion - to join documented or undocumented family members who have already migrated

*(d) Children who travel in the context of exploitation (including trafficking).*¹⁷

Categories (b)-(d) above are catered for within UK law and policy i.e. asylum seeking children, family reunification and child trafficking.¹⁸ However, the first category of migration above is different. A child who is a third country national¹⁹ is only permitted to independently migrate and enter the UK for the purpose of education under restricted

¹⁶ L Ackers and HE Stalford, (n9).

¹⁷ J Bhabha, (n10) 2.

¹⁸ UK Immigration Rules at Part 11, para 350; The Immigration (European Economic Area) Regulations SI 2006/1003; Sexual Offences Act 2003 ss.57-59 and Asylum and Immigration Act 2003 s.4.

¹⁹ Such as the child who is the focus of this thesis.

conditions.²⁰ Additionally a child independently migrating in order to work is not accounted for or recognised as a legitimate concept under UK law.

Within the migration discourse there are certain implicit assumptions being made about children. The concern with children in the migration discourse when they are migrating independently from their parents revolves around them as victims who have been forced to migrate and are in need of protection.²¹ They are assumed to be lacking the capacity to make autonomous decisions to migrate and are consistently perceived as passive victims without the possibility of being viewed as empowered actors.²² As Farrow notes, '*Assuming that children can only ever be forced or colluded into migrating is a falsehood that overlooks the reality of many children's lives.*'²³

²⁰ For example: having the consent of the parent or legal guardian of the child for them to travel and be cared for within the UK, there is to be no recourse to public funds and attendance must be at an independent fee-paying school not a publically funded one with confirmation of acceptance onto a course being provided at the time of the application. The full requirements are laid down in Part 6A (paragraphs 245ZZ to 245ZZD) of the UK Immigration Rules. The Secretary of State has the power to put amendments to these Immigration Rules before Parliament as stated in section 3(2) of the Immigration Act 1971. Due to the complexity of the immigration rules and for ease of reference the home office consolidated version has been referred to and is available at <<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>> [last accessed 12.11.2011].

²¹ S Punch, 'Migration Projects: Children on the Move for Work and Education' September 2007, Paper Presented at Workshop on Independent Child Migrants: Policy Debates and Dilemmas' Organised by development and Research Centre on Migration, Globalisation and Poverty, University of Sussex and UNICEF Innocenti Research Centre available http://www.migrationdrc.org/news/reports/icm/Punch_migration_paper.pdf [last accessed 30.10.2011].

²² This issue is considered in detail in *Chapter Eight*.

²³ C Farrow, 'A Review of European Research Finding on Children in Migration' (2007) 6-9 in S Sward and L Bruun (eds) *Conference Report Focus on Children in Migration – From a European Research and Method Perspective* available <http://resourcecentre.savethechildren.se/content/library/documents/conference-report-focus-children-migration-european-research-and-method-pe> [last accessed 30.10.2011].

Children trafficked into domestic work do not conform to the preconceived ideas of migrating children.²⁴ They are not migrating with their family and, although they would be considered separated children, they are not necessarily unaccompanied on their arrival in the UK and are not seeking asylum. A separated child is defined as a child separated from her/his parents or primary guardian, who is under the age of 18 and is not in their country of origin.²⁵ Applying this definition to trafficked children, it encompasses both those children who arrive in the UK unaccompanied or accompanied, as well as children who either do or do not claim asylum.²⁶ The children discussed in this thesis are entering domestic work after arriving in the UK accompanied by an adult who is claiming they are the child's relative.²⁷

With the focus on children migrating either as part of a family unit or as an unaccompanied asylum seeking children, those children arriving in the UK who are accompanied and who are not claiming asylum are 'falling between the gaps' of current policy responses. These children are at an increased risk of being overlooked when action is being taken to prevent child trafficking.

²⁴ CEOP 'Making Every Child Matter.... Everywhere: An update on human trafficking' (2011), 10, available <http://ceop.police.uk/Documents/ceopdocs/child_trafficking_update_2011.pdf> [last accessed 16.04.2012].

²⁵ As defined in the Separated Children in Europe Programme, Save the Children Annual Report 2007 available <http://www.separated-children-europe-programme.org/separated_children/publications/reports/index.html> [last accessed 28.10.2011].

²⁶ F Bokhari, 'Falling Through the Gaps: Safeguarding Children Trafficked into the UK' [2008] *Children and Society* 201,201.

²⁷ C Somerset, 'What the Professionals know: The trafficking of children into, and through, the UK for sexual purposes (2001) 22 available <<http://www.ecpat.org.uk/content/ecpat-uk-reports> [last accessed 05.10.11].

2.3. Trafficking as Irregular Migration

Within the migration discourse categories of regular and irregular migration exist. Irregular migration involves individuals being present or attempting to enter the UK illegally, in breach of immigration regulations, and is discussed in terms of smuggling or trafficking of human beings.²⁸ The categorisation of trafficking as irregular migration is no doubt influenced by the link created between trafficking and smuggling. There is a policy objective to restrict illegal entry and protect UK borders and despite the difference between the concepts, both trafficking and smuggling are dealt with under the umbrella of asylum and immigration. Both smuggling and legal migration are voluntary with individuals willingly migrating into the UK. In contrast the only reason for individuals to be trafficked is for them to be exploited and trafficking is not entered into willingly. Theoretically these two concepts are easily distinguishable although in practice this is more problematic.²⁹

The UK focus on securing borders and preventing illegal immigration are at the heart of policies and legislative provisions which concern trafficking in human beings with trafficking being viewed as a threat to the security of the State. As Gallagher states:

'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

²⁸ F Pickup, 'More words but no action? Forced migration and trafficking of women' (1998) 6(1) Gender and Development 44, 45.

²⁹ The distinctions between trafficking and smuggling were discussed in detail in *Chapter Two*.

*driving force behind such efforts – interference with orderly migration and circumvention of national immigration restrictions.*³⁰

Twomey has described trafficking as ‘Europe’s other market’.³¹ Over the last 15 years, there has been a rapid increase in legislative responses to human trafficking within the context of immigration control. Prior to this, *‘trafficking in human beings was very rarely referred to in debates about migration policy.’*³² The primary aim is to prevent and eradicate this irregular migration through tighter border controls and criminal sanctions. This, it is thought, will protect the integrity of the State and the nation from the perceived threat posed by irregular migration.³³ The fear that irregular migration may result in ‘a risky and dangerous society’ stems from the link drawn within the migration discourse with terrorism, crime and unemployment.³⁴ Migration is also viewed as *‘compromising states’ control over their borders, eroding interdependent sovereignty, raising fears over illegal migration and unauthorized access to territory, and constituting a human rights violation’.*³⁵ A securitization approach to

³⁰ A Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 Human Rights Quarterly 975, 976.

³¹ P Twomey, ‘Europe’s Other Market: Trafficking in People’ (2000) 2 European Journal of Migration and Law 1.

³² F Laczko and MA Gramegna, ‘Developing Better indicators of Human Trafficking’ (2003) 10(1) Brown Journal of World Affairs 179, 179.

³³ R Vayrynen, ‘Illegal Immigration, Human Trafficking and Organized Crime’ (2003) Discussion Paper No.2003/72, United Nations University, World Institute for Development Economics Research, at 2 available http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-072/ [last accessed 30.10.2011].

³⁴ D Bigo, ‘Security and Immigration: Toward a Critique of Governmentality of Unease’ (2002) 27(1) Alternatives 63, 64.

³⁵ N Avdan, ‘Human Trafficking, Organized Crime, and Border Control: Vicious or Virtuous Cycle?’ (2011) American Political Science Association Annual Meeting Paper, Available <<http://ssrn.com/abstract=1900501>> [last accessed 13.10.2011].

immigration has been taken in order to prevent this perceived threat to the State.

The categorisation of trafficking as irregular, undesirable migration is problematic. Although there are children brought into the UK illegally by an adult claiming that they are a relative of the child and using forged documents, children may also enter the country by legal means, for example on student visas or visitors permits.³⁶ The fact that entry has been achieved legally does not prevent the movement of the individual from falling within the definition of trafficking in human beings.³⁷ It is still possible that the intention exists to exploit the individual upon their arrival in the UK, or they may have been trafficked between countries prior to a legal move to the UK.³⁸ It is therefore unhelpful to think of trafficking only as illegal irregular migration. By conflating trafficking with illegal entry into the UK it creates a distorted picture of the reality of child trafficking and risks these children being overlooked within the response to trafficking in human beings.

2.4 “Blameless Victim” or “Criminal”

Whilst trafficking in human beings is viewed as a problem of irregular, illegal migration, the individuals who have been trafficked are treated as either victims or criminals. Generally they are viewed as ‘blameless victims’ who have had no choice in their migration, but on occasion they will be characterised as criminals who have breached immigration law and

³⁶ A Geddes, ‘Chronicle of a Crisis Foretold: The Politics of Irregular Migration, Human Trafficking and People Smuggling in the UK’ (2005) 7 British Journal of Politic and International Relations 324, 326.

³⁷ The definition of trafficking in human beings is discussed in detail in *Chapter Two*.

³⁸ F Pickup, (n28) 47.

punished accordingly.³⁹ This applies to both adults and children to varying degrees.

Assigning a child to the category of ‘blameless victim’ is inevitable, particularly with younger children. This may arise due to the paternalistic approach taken to children’s welfare and the need to protect them from harm. This paternalistic approach overrides any acknowledgement that the child may have taken an active role in the decision which has resulted in their migration. Under the definition of trafficking contained in Article 3 of the Trafficking Protocol a child cannot consent to an exploitative migratory arrangement.⁴⁰ This means that a child whose labour is exploited after having moved for this purpose would not be able to claim that they had made their own decision to migrate even if they claimed they knew of the conditions that they would live and work in.⁴¹

There are occasions where individuals who have been trafficked are treated as criminals who have crossed borders illegally rather than being characterised as victims. In these circumstances they may be viewed as having breached immigration laws and punished for doing so regardless of the fact that they will not have done so freely.⁴² This has been recognised as an issue of concern which needed to be addressed and to some degree this has been attempted within the trafficking legal framework. For example, the Council of Europe Convention explicitly recognises the

³⁹ B Anderson, (n4) 2-3.

⁴⁰ As defined in *Chapter Two*

⁴¹ This is discussed in detail in *Chapter Eight*.

⁴² C Aradau, ‘The Perverse Politics of Four-Letter Words: Risk and Pity in the Securitisation of Human Trafficking’ (2004) 33(2) Millennium: Journal of International Studies 251, 253.

importance of avoiding the criminalisation of trafficking victims.⁴³ Under the Convention States are to '*provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*'⁴⁴ The EU has also identified this problem and Article 8, Directive 2011/36/⁴⁵ states that '*competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings*'. The previous Council Framework Decision⁴⁶ that this Directive replaced did not have this provision and neither does Directive 2004/81/EC.⁴⁷ There was no explicit acknowledgement within EU law that victims of human trafficking were entitled to protection from prosecution where their involvement in criminal offences was involuntary until the development of the new Directive.

It is a positive step that the EU has now recognised that this is a potential problem. However, both the Council of Europe Convention and the EU Directive do not actually guarantee that a victim will never be criminalised. This is due to the negative formulation of the wording used which '*considerably weakens its [the provision's] force and likely impact*'.⁴⁸ It is

⁴³ Article 26 Council of Europe Convention CETS No.197.

⁴⁴ Ibid .

⁴⁵ Directive 2011/36 of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/628/JHA OJ [2011] L101/1, 15th April 2011.

⁴⁶ Council Framework Decision on combating trafficking in human beings 2002/629/JHA OJ [2002] L203/1, 1st August 2002.

⁴⁷ 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 or who have been the subject of an action to facilitate illegal immigration who cooperate with the competent authorities OJ [2004] L261.

⁴⁸ A Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 European Journal of Migration and Law 163, 178.

however, an important aspect of the protection provided for trafficking victims, without which it is possible that victims may be prosecuted for breaches of immigration law or alternatively for crimes in which they have been unwilling participants. There have been instances where individuals have been assessed and found to be victims of trafficking, given a 45 day reflection period and then subsequently charged with offences they were involved in as a result of having been trafficked.⁴⁹ To illustrate this, the case of V, a Vietnamese boy who was assessed as aged 17 but was actually 15 when he arrived in Britain was raised during the House of Commons debate on human trafficking.⁵⁰ V had been identified as a victim of trafficking by the competent authorities and given a 45-day reflection period as required by the Council of Europe Convention. However, following this period, he was charged and convicted in August 2009 of cannabis cultivation. This was despite the fact that he had been found to be a trafficking victim and therefore someone who had not been voluntarily involved in this crime.⁵¹

As the UK are bound by the CoE Convention, the UK's approach to avoiding prosecuting victims of trafficking is for prosecutors to be aware of the possibility that the individual may be a victim of trafficking. They must advise the senior investigating officer to make enquires about the circumstances surrounding their apprehension and make a referral to the UKHTC for an assessment. Where there is clear evidence that the individual has been coerced and acted under duress, no proceedings should continue against them. Prosecutors and defence lawyers must be proactive

⁴⁹ HC Deb 20 January 2010, vol 504, col 105WH.

⁵⁰ Ibid .

⁵¹ Anthony Steen MP, HC Deb, 20 January 2010, vol 504, col 106WH.

in their approach to obtaining the information required⁵² and the Code for Crown Prosecutors must be followed.⁵³

Children are as susceptible as adults to being treated as criminals rather than victims although this risk of characterisation as a criminal increases as a child gets older. When the victim is clearly a child, there is no question that they are anything other than a “blameless victim” with the protection of the child being the paramount consideration. However, this is not necessarily as straightforward for children who are not easily identifiable as children. This would be the case where the child’s physical appearance suggests that they have reached the age of eighteen and therefore no longer considered to be a child.⁵⁴ There may be a need for a child’s age to be substantiated and there have been reports of children being viewed with suspicion, their honesty questioned and doubts as to whether their claimed age is genuine.⁵⁵ Initial judgments as to a child’s age are made not only on the child’s physical appearance, but their demeanour and any documentation they may be carrying.⁵⁶ This is potentially problematic as the documents the child is carrying may in fact state that they are older than they actually are. Traffickers may have instructed the child to say that they were older to ensure that the child avoids being dealt with under the child protection system. This may be preferred by some traffickers to make

⁵² *R v O* [2008] EWCA Crim 2835.

⁵³ *LM, MB, DG, Betti Tabot and Yutunde Tijani v The Queen* [2010] EWCA Crim 2327.

⁵⁴ ‘child’ is defined by Article 1 UNCRC as any person under the age of 18. This definition is used consistently throughout the trafficking legal framework.

⁵⁵ H Crawley, ‘When is a child not a child? Asylum, age disputes and the process of age assessment’ (2007), Immigration Law Practitioners Association, Research Report at 14 available <<http://www.ilpa.org.uk/pages/publications.html>> [last accessed 13.10.2011].

⁵⁶ *Ibid.*

it easier for them to subsequently collect the child.⁵⁷ In these circumstances the child may be assessed as an adult and treated as breaching UK immigration law. The child would therefore not benefit from the protection afforded to trafficked children.

Removing the negative correlation between trafficking and irregular migration would enable a more balanced and holistic response to the problem.⁵⁸ This would involve a more equal focus on protecting borders, preventing trafficking and protecting victims of trafficking. Approaching and responding to trafficking in human beings only as issue of border control is ineffective.⁵⁹ Although it is acknowledged that securing borders is an important goal, the identification of individuals as trafficking victims is equally important. Currently there is an imbalance between these two approaches which needs to be addressed to enable recognition of the complex and varied methods used to traffick human beings.

3. TRAFFICKING AS ORGANISED CRIME

There is no doubt that trafficking in human beings involves organised crime and there are reportedly high profits available to these groups for relatively low risks.⁶⁰ These economic factors are the reason that this particular crime is viewed as attractive to organised criminal groups. The UK has responded to trafficking in human beings primarily as a problem of

⁵⁷ H Crawley, (n55) 18.

⁵⁸ D Flynn, 'Human Trafficking and Forced Labour: What Perspectives to Challenge Exploitation?' (2007) Platform for International Cooperation on Undocumented Migrants (PICUM) available <http://picum.org/en/publications/policy-briefs/> [last accessed 30.10.2011].

⁵⁹ S Drew, 'Human trafficking: a modern form of slavery?' (2002) 4 European Human Rights Law Review 481, 489.

⁶⁰ T Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006) at 30.

organised immigration crime.⁶¹ In that sense, the policy focus has been to place trafficking policy within a securitisation and criminalisation agenda rather than a human rights one.⁶² This is despite the fact that UK law encompasses all forms of trafficking whether organised crime is involved or not. Even though there have been recent developments which have attempted to redress the balance between the approaches,⁶³ organised crime remains the key priority in UK policy on trafficking in human beings. Without this balance, the aim of protecting victims remains secondary to securing borders.

Recent legal instruments have clearly adopted a focus on transnational organised crime.⁶⁴ The UN Trafficking Protocol for example clearly illustrates this position. The main aim of defining the term “trafficking in persons” in the Trafficking Protocol was to provide, for the first time, an international consensus of what constituted the crime of trafficking in order to encourage and support international cooperation in investigating and prosecuting cases involving organised crime.⁶⁵ The Trafficking Protocol is attached to, and must be read in conjunction with, a Convention which is

⁶¹ Home Office White Paper, CM5387, ‘Secure Borders, Safe Haven: Integration with Diversity in Modern Britain’ (2002) at 92 available at <www.archive2.official-documents.co.uk/document/.../cm5387.pdf> [last accessed 12.10.2011].

⁶² AD Jordan, ‘Human rights or wrongs? The Struggle for a rights-based response to trafficking in human beings’ (2002) 10(1) Gender and Development 28, 29.

⁶³ Such as the Council of Europe Convention on Action against Trafficking in Human Beings 2005 (CETs No. 197).

⁶⁴ For example internationally The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000; The EU Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.

⁶⁵ B Anderson, ‘Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates’ (2007) Centre on Migration, Policy and Society, Working Paper -07-48, available <http://www.compas.ox.ac.uk/people/staff/bridget-anderson/publications/> [last accessed 28.10.2011].

explicitly concerned with transnational organised crime. It is also accompanied by a Protocol which is concerned with smuggling in human beings. This is further evidence of the focus on organised crime and the concern with the protection of States' borders.⁶⁶

The origin of the Trafficking Protocol can be traced back to Argentinean concerns about the trafficking of minors.⁶⁷ Argentina had originally proposed that an additional protocol be attached to the United Nations Convention on the Rights of the Child. However, progress with this strategy was very slow with reluctance from the international community to adopt measures which were approaching the issue solely as a human rights one. Frustrated with the lack of progress made with this proposal, Argentina proposed that the trafficking in minors be dealt with as an issue involving organised crime and proposed a Convention in the hope that the international community would be more willing to commit to such an approach.⁶⁸ This was clearly the case as within a relatively short period of time the Transnational Organised Crime Convention and the attached Protocols were opened for signature. This indicates that there was more willingness to deal with preventing transnational criminal activities than the protection of victims' human rights. Argentina's interest in the issue

⁶⁶ Ibid.

⁶⁷ D Vlassis, 'The Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process' (2001) 475, 492, Paper presented at the 119th United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) Training Course: Current Situation of and Countermeasures against Transnational Organized Crime, Japan, available <http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch24.pdf> [last accessed 15.07.2010].

⁶⁸ At the same time Austria proposed a Convention against illegal trafficking and transport of migrants which was supported by Italy who proposed a protocol to deal with trafficking at sea to be attached to Austria's proposed Convention. Canada and Japan proposed a new instrument against the illicit manufacturer of and trafficking in firearms - See D Vlassis (n67).

coincided with the decision by the EU to develop policies which would deal with human trafficking.⁶⁹

The EU's Framework Decision on combating trafficking in human beings explicitly refers to the need to respond to organised crime, stating that:

*'It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime'*⁷⁰

Directive 2011/36/EU which replaces the Framework Decision also takes a particular view of trafficking as often involving organised crime. Although organised crime is not the sole focus of the Directive, it is apparent through explicit reference to organised crime at various points throughout the Directive.⁷¹

In relation to UK law, the motivation behind sections 57-59 Sexual Offences Act 2003 and section 4 Asylum and Immigration (Treatment of Claimants etc) Act 2004 was to criminalise trafficking in human beings with a clear focus on criminal prosecutions, sanctions and border control. Despite the fact that these legal instruments do not explicitly refer to organised crime, the government explained the rationale for its intervention

⁶⁹ A Gallagher, (n30) 982.; For more information on these initiatives see: United Nations Economic Commission for Europe, 'Trafficking in Women and Girls' Note prepared by the Office of the High Commissioner for Human Rights and the ECE Secretariat, Regional Preparatory Meeting on the 2000 Review of Implementation of the Beijing Platform for Action, 19–21 Jan. 2000, U.N. Doc. E/ECE/RW.2/2000/3 (2000), esp. at 29–35 available <http://www.unece.org/gender/beijing5.html> [last accessed 31.10.2011].

⁷⁰ Recital 8, Council Framework Decision on combating trafficking in human beings 2002/629/JHA.

⁷¹ Recital 1, 9, 13, 15, Article 4(2)(b), Article 9(4),

in terms of human trafficking which is often carried out by organised crime groups.’⁷² The financial profits available through trafficking human beings has been recognised as *‘...a major revenue earner for transnational organised criminal groups and a source of political, social and economic insecurity for States as well as for individuals.’*⁷³ It is no coincidence that a criminalisation approach has been taken across the various levels of governance. There is communication and cooperation between the United Nations and the European Union. They interact with each other and all 27 Member States of the EU are also Member States of the UN.

The focus on organised crime is not only apparent in the legislation itself, but can be observed in the various international, European and UK agencies and bodies whose remit includes human trafficking. For example, in the UK, the Serious Organised Crime Agency (SOCA) views trafficking in human beings as an issue of organised illegal immigration and aims to focus 25% of its operational efforts dealing with this issue. Both trafficking and smuggling of human beings are placed within the category of organised immigration crime.⁷⁴ This crime is seen as creating *‘problems for the UK through the economic costs and impact on social cohesion brought about by large numbers of illegal migrants.’*⁷⁵ Human smuggling is considered by the agency as much more of a problem in terms of the

⁷² Home Office, ‘UK Action Plan on Tackling Human Trafficking’, (2007) 91, available <<http://www.scotland.gov.uk/Topics/Justice/crimes/humantraffick/UKAPOrig2007>> [last accessed 27.04.2012].

⁷³ A Gallagher, (n30).

⁷⁴ See for example the UK Serious Organised Crime Agency (SOCA) 2009/2010 Report ‘United Kingdom Threat Assessment of Organised Crime’ available <<http://www.soca.gov.uk/threats>> [last accessed 30.10.2011].

⁷⁵ SOCA available <http://www.soca.gov.uk/orgCrime/immigration.html> [last accessed 23.09.2009]

numbers involved than human trafficking,⁷⁶ although there are currently no definitive statistics that can be relied on to substantiate this supposition.⁷⁷

Shelley views the '*...decision to address human trafficking within the context of transnational crime as highly significant, as it defines the problem not as a small scale one but as a phenomenon tied to international organised crime.*'⁷⁸ Although this is often the case, Obokata recognises that by taking this approach there is the possibility that other actors will be ignored if they fall outside this narrowly defined category of traffickers.⁷⁹

3.1 Examining the Definition of "Organised Crime"

The term "organised crime" is not defined in UK law. However, the United Nations Convention against Transnational Organised Crime⁸⁰ contains the definitions of both an "organised criminal group" and "serious crime". Article 2 of the Convention states:

For the purposes of this Convention:

(a) "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

⁷⁶ SOCA (n74), paragraph 40.

⁷⁷ See the statistical evidence discussed in *Chapter Five*.

⁷⁸ L Shelley, 'Human trafficking as a form of transnational crime' in M Lee (ed) *Human Trafficking* (Willian Publishing, 2007), 117.

⁷⁹ T Obokata, (n60) 32.

⁸⁰ 2000, A/55/383 Annex I.

(b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

(c) “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

The dominant focus on organised crime (as discussed above) results in potential gaps in provision for children who are trafficked into domestic work under the circumstances described earlier. There is no doubt that trafficking is a serious crime⁸¹ with offences under UK law carrying maximum sentences of 14 years.⁸² However, not all trafficking necessarily involves “structured groups” or “organised criminal groups” and more informal arrangements may be used. Despite all trafficking, (whether involving organised crime or not) is encompassed by UK trafficking laws, the practical application of the law and the dominant focus of police operations remains on organised crime. By responding in this way to child trafficking, only part of the problem is dealt with and many different permutations of trafficking are being given less attention.

Trafficking involves three different stages, recruitment, transfer and exploitation, and it is often assumed that these stages are carried out by different actors.⁸³ However, this is not always the case. For example, the person removing the child from their home country may be the same

⁸¹ As defined in Article 2(b) of the UN Convention against Transnational Organised Crime (2000, A/55/383 Annex I.

⁸² s.4(5) Asylum and Immigration Act 2004; ss.57-59 Sexual Offences Act 2003.

⁸³ C Rijken, *Trafficking in Persons: Prosecution From A European Perspective* (Asser Press, 2003), 85.

person who accompanies them to the UK and subsequently exploits them in domestic work upon their arrival.⁸⁴ The child may never be transferred to someone else's control. Trafficking in human beings by organised criminal groups will satisfy the criteria laid down in the Convention on Transnational Organised Crime. However, where children are taken by an individual with their parents' agreement to live in their home in the UK this situation would not satisfy the criteria as an "organised criminal group". This would effectively bar this behaviour falling within an offence under the Trafficking Protocol and the child would not be considered to have been trafficked. This is a major flaw of the blinkered focus on trafficking which involves organised crime. The Trafficking Protocol provides no protection for the child or sanction for the individuals who have informally trafficked the child into domestic work because of this narrow approach. More informal arrangements permit traffickers to abuse this loophole with the knowledge that their behaviour would not amount to an offence of child trafficking under the Trafficking Protocol.⁸⁵ This leaves this particular category of children more vulnerable to trafficking and exploitation as less risk would be involved for the trafficker.

Although the focus on organised crime remains within the Trafficking Protocol, leaving less formal arrangements falling outside the definition of the offence of trafficking, the Council of Europe Convention rectifies this position. Under Article 4 of the Convention there is no need for the involvement of organised crime for an offence of human trafficking to be committed. The Convention therefore recognises the more informal

⁸⁴ UK Department for Education Consultation, 'Working together to safeguard children: Safeguarding children who may have been trafficked' 9 para 3.2.1. <<http://www.education.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1497&menu=3>> [last accessed 18.04.2012].

⁸⁵ Other offences would still have been committed.

arrangements which may take place. This is reflected in the other core instruments, although not explicitly (apart from the Trafficking Protocol). It is important not to under-estimate the level of cross-fertilisation required throughout the international, European and domestic legal responses to child trafficking. Even though these more informal arrangements have been recognised in the law, there still remains a distinct lack of focus placed on these situations in practice.

4. TRAFFICKING AS SYNONYMOUS WITH SEXUAL EXPLOITATION

The third dominant assumption of the trafficking discourse is that it is a crime which involves mainly adult women, who are trafficked into prostitution and sexual exploitation.⁸⁶ Although it is acknowledged that this is a particular problem, there is a real need to further recognise that trafficking involves many other situations. With this dominant focus on the sexual exploitation of women, children exploited in domestic work are not fully accounted for in the same way as women who are sexually exploited. Although all different types of exploitation are covered by the legal instruments dealing with trafficking, the reality is that equal attention is not given to other forms of exploitation, without which these children will continue to be overlooked. Jordan sees the focus as particularly problematic and argues that:

*'This gendered focus and conflation of trafficking with forced prostitution is especially problematic in Western Europe, where governments and NGOs ignore other forms of trafficking as well as the trafficking of men.'*⁸⁷

⁸⁶ J Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 Harvard Human Rights Journal 65, 65.

⁸⁷ AD Jordan, (n62) 31.

It is apparent that in the years since this statement was made a greater awareness of trafficking of men and other forms of exploitation is developing.⁸⁸ However, the main focus remains on the gendered issue of prostitution and organised crime. Most countries retain this focus within their anti-trafficking regimes.⁸⁹

4.1 The Development of the Focus on Sexual Exploitation

Historically trafficking was recognised as an issue concerning women who were sexually exploited by organised criminal groups.⁹⁰ The 1949 United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others illustrates this approach to trafficking. The primary aim of this legislation was to eradicate trafficking resulting in prostitution. The legislative developments had the effect of reinforcing the association between women and children and trafficking for the purpose of prostitution, creating the gendered trafficking and prostitution nexus.⁹¹ These legislative developments will have undoubtedly influenced the current direction taken by policy-makers when responding to trafficking in human beings. McSherry and Kneebone saw the development of the Trafficking Protocol as a positive step which extended the crime beyond sexual exploitation and state:

⁸⁸ For example the Chinese cockle pickers in Morecombe Bay 'Tide kills 18 cockle pickers' available <<http://news.bbc.co.uk/1/hi/england/lancashire/3464203.stm>> [last accessed 26.10.2011].

⁸⁹ J O'Connell Davidson, 'Will the real sex slave please stand up?' (2006) 83 Feminist Review 4, 9.

⁹⁰ For example: International Agreement for the Suppression of the White Slave Traffic (1904); The International Convention for the Suppression of White Slave Traffic (1910), 1 L.N.T.S. 278; and the Convention for the Suppression of Traffic in Women and Children (1921), 3 L.N.T.S. 415; the International Convention for the Suppression of the Traffic in Women of Full Age (1933) 150 L.N.T.S. 431 and the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 U.N.T.S. 13.

⁹¹ B McSherry and S Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) International Journal of Human Rights, 67, 70.

*'The definition of 'trafficking in persons' in the UN Protocol marks a significant step away from previous definitions that linked trafficking offences solely with the provision of sexual services. By including the terms 'forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs', the definition emphasises that exploitation may take on a variety of forms other than prostitution.'*⁹²

Although this development is a welcome one, the focus on sexual exploitation was still evident during the negotiations leading to this definition in the Trafficking Protocol. The debates and negotiations of the Trafficking Protocol involved much discussion about prostitution with the issue of consent at the heart of the discussions.⁹³ Each of the eleven ad-hoc committee meetings involved debate surrounding the definition of trafficking and the particular elements of prostitution.⁹⁴ There were two strong, opposing feminist viewpoints put forward. First, that prostitution is forced and exploitative and it is not possible for women to consent to it and secondly, that women may consent to prostitution and have a free choice to enter prostitution as a form of work.⁹⁵ The strength of these lobbying groups and the prolonged debate about the definition of trafficking in terms of prostitution resulted in fewer opportunities for a human rights and children's rights approach to be argued.

⁹² Ibid, 69.

⁹³ See J Doezema, 'Who gets to choose? Coercion, consent, and the UN Trafficking Protocol' (2002) 10(1) Gender and Development 20.

⁹⁴ M Ditmore, 'The negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 NEMESIS 79, 82.

⁹⁵ B McSherry and S Kneebone, (n91) 70.

4.2 Sexual Exploitation Bias: Agencies and Operations

The perception of trafficking as a problem involving prostitution and sexual exploitation has, in some part, been created by the development of international law as discussed above. However, this focus is also evident when looking at the actions taken by bodies and organisations such as those by the UK Human Trafficking Centre which has centred primarily (although not exclusively) on trafficking for the purpose of sexual exploitation.⁹⁶

The UK Government, until recently, funded the Poppy Project which focused on providing accommodation and supporting women who had been trafficked and sexually exploited in prostitution.⁹⁷ In 2006 funding was provided by the Home Office which allowed the project to extend to provide outreach services to women across the country. The purpose was to provide short-term support and advice on matters such as immigration or accessing healthcare and enabled the project to make onward referrals to other services which may be of assistance to the women.⁹⁸ However, the project is limited for several reasons. First, there are only 54 beds available to the project which limits the number of women they are able to accommodate, although there are partnerships between the project and other organisations that are often able to assist. Secondly, when the project began, the provision of support and accommodation was confined entirely for women who had been exploited in prostitution. It was not until after Operation Tolerance in 2008 that the criteria were changed to extend

⁹⁶ Such as Pentameter 1 and 2.

⁹⁷ POPPY Project available <http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php> [last accessed 25.01.2010]. Government funding was withdrawn in 2011.

⁹⁸ See Poppy Project Outreach http://www.eaves4women.co.uk/POPPY_Project/Outreach_Service.php.

provision of services to women exploited in domestic work. Although the remit of the project was broadened to include women exploited in domestic work the project still does not assist trafficked children.

Operation Tolerance was a multi-agency operation led by the UK Border Agency.⁹⁹ It was designed to improve the UK's understanding of trafficking for the purpose of labour exploitation and indicated a shift within the UK anti-trafficking response. This marked a shift towards a more inclusive approach to trafficking in human beings rather than a move away from the central focus of trafficking for the purpose of sexual exploitation.¹⁰⁰ Eighteen victims of trafficking for forced labour were discovered. Although it was found that many of those in forced labour required minimal levels of support, those who had been trafficked into domestic service had similar levels of support needs as those sexually exploited.¹⁰¹

Although victims of trafficking exploited in domestic work are now recognised as being in need of high levels of specialised support due to the conditions they experience, children are not catered for within the remit of the Poppy Project's work. There is no comparable project for children and this is the case regardless of whether the child has been exploited in prostitution or domestic work. Instead, under UK law the provisions of the

⁹⁹ Eaves, 'Of Human Bondage: Trafficking in Women and contemporary slavery in the UK' (2009) 29-31 available <http://www.eaves4women.co.uk/Documents/Recent_Reports/Of_Human_Bondage_trafficking_in_women_and_contemporary_slavery_in_the_UK.pdf> [last accessed 17.04.2012].

¹⁰⁰ The Government Reply to the Sixth Report From the Home Affairs Committee Session 2008-2009 HC 23 'The Trade in Human Beings: Human Trafficking in the UK' Paragraph 14, Cm 7693. available <http://www.official-documents.gov.uk/document/cm76/7693/7693.pdf> [last accessed 28.10.2011].

¹⁰¹ Ibid, Paragraph 33.

Children Act 1989 apply in order to provide protection for these children.¹⁰² This is potentially problematic if specialist trained staff are required to provide support for trafficked children, yet because the children are being accommodated through the UKs general child protection system rather than a specialist unit such as the poppy project these specialist staff may not be available.

4.3 Sexual Exploitation Bias: Enforcement of UK Laws

Under UK law, the bias towards sexual exploitation as a result of trafficking rather than other forms of exploitation is apparent in the number of prosecutions for each legal offence. The Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004 deal with trafficking for sexual exploitation and labour exploitation respectively. Both Acts came into force in 2004 and between then and May 2009 there have been 267 prosecutions and 106 convictions under sections 57-59, Sexual Offences Act with only 16 prosecutions and 7 convictions under section 4, Asylum and Immigration Act for labour exploitation.¹⁰³ The disparity in the conviction rates is possibly an indication there is more attention currently being given to sexual exploitation while other forms of exploitation are being, to some degree, overlooked.¹⁰⁴ If the law is not being enforced rigorously it may result in traffickers viewing exploitation in forced labour or domestic work as carrying less risk than trafficking for the purpose of sexual exploitation. This may result in an increase in trafficking for forced labour and domestic work and increase the vulnerability of children exploited in domestic work if the criminal law is not being implemented effectively.

¹⁰² Protection and assistance provided for children are discussed in *Chapter One*.

¹⁰³ Hansard HC Deb 24 June 2009, Vol 494 C890W.

¹⁰⁴ V Munro (n1) 106; See *Chapter Five* in relation to the perceptions of trafficking and the focus of UK action and campaigns for further discussion of this point.

The disparity in the number of prosecutions and convictions cannot be blamed entirely on the focus given to sexual exploitation over other forms of exploitation. Legal enforcement is not necessarily a good indication of progress to tackle exploitation in forced labour, including domestic work. The difference can be explained in some part by the problems associated with proving that someone has been trafficked for forced labour. There are known difficulties in establishing the required proof to successfully bring prosecutions of trafficking for forced labour and domestic work under section 4, Asylum and Immigration Act.¹⁰⁵

Section 71, Coroners and Justice Act (CJA 2009)¹⁰⁶ introduced an offence of holding someone in slavery, servitude or forced labour. The intention was to introduce clear, enforceable offences to give ‘*specific protection to those who may be the victims of forced labour.*’¹⁰⁷ Where the individual is held in forced labour, but has not been trafficked, section 71, CJA 2009 could apply. Alternatively, where there are problems proving the trafficking element to the required criminal standard then section 71 is available. This section only applies where there is insufficient evidence to bring charges for trafficking under section 4, Asylum and Immigration (Treatment of Claimants etc.) Act 2004, or sections 57-59, Sexual Offences Act 2003. Section 71, CJA 2009 states:

(1) A person (D) commits an offence if—

¹⁰⁵ A suggestion raised during telephone conversation with UKHTC on 27.07.09. An individual may be charged instead under s.25 of the Immigration Act 1971 for immigration offences.

¹⁰⁶ (C.25) Hereafter CJA 2009.

¹⁰⁷ CPS available

<http://www.cps.gov.uk/legal/s_to_u/slavery_servitude_and_forced_or_compulsory_labour/> [last accessed 30.10.2011].

(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or

(b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.

*(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour)*¹⁰⁸

Importantly, the section 71 offence does not require the prosecution to demonstrate that the person subjected to forced labour has been trafficked and is aimed instead at preventing the exploitation of individuals in forced or compulsory labour. Section 71, CJA 2009 is important for children exploited in domestic work. If any of the necessary elements of recruitment and transfer for the purposes of exploitation are difficult to prove to demonstrate a trafficking offence, the exploitative element is addressed by the introduction section 71 and carries the same maximum sentence of 14 years imprisonment as a trafficking offence. This ensures that the exploitation rather than the movement of the child can be addressed without the same associated difficulties of proof.

¹⁰⁸ This section is in force as of 6 April 2010.

5. MOVING FORWARD: A VICTIM-CENTRED APPROACH TO TRAFFICKING

As discussed earlier it was seen that both policy and research have previously focused primarily on prostitution and organised crime and this is reflected in the trafficking legal framework to a great degree.¹⁰⁹ There have been more recent developments which have moved towards recognition of the need to also protect the human rights of trafficking victims and place more focus on forms of exploitation other than sexual exploitation.

The advantage of a human rights approach to trafficking is that the focus moves from '*...seeing trafficked persons as objects towards understanding them as people bearing human rights.*'¹¹⁰ It represents a move towards viewing trafficking '*as a human rights issue with immigration implications, rather than an immigration issue with human rights implications.*'¹¹¹ If a human rights approach is embraced it would have the effect of prioritising the protection of victims and their human rights over the issue of border controls. Additionally, a human rights approach helps to reduce the possibility that victims '*...will be seen purely as a witness for the prosecution.*'¹¹² This approach does not impinge on States' ability to prosecute traffickers and may in fact assist and improve the rate of successful prosecutions. If victims feel supported during their recovery, they may be more able to reach a decision to help the authorities. What a human rights approach may do is '*...put more pressure on States to address*

¹⁰⁹ B Anderson, (n65).

¹¹⁰ AD Jordan, (n62), 30.

¹¹¹ B Young, 'Trafficking of Human Beings Across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims' (1998) 13 Georgetown Immigration Law Journal 73, 75.

¹¹² B McSherry and S Kneebone, (n91) 83.

*the human rights issues pertinent to the phenomenon.*¹¹³ McSherry and Kneebone state that:

*'It should be viewed as a human rights issue because such conduct poses a serious threat to the promotion and protection of human rights. The benefit of a human rights approach is that it treats those trafficked as victims of human rights abuse rather than as victims of crime and persons who violate national immigration laws. It provides a framework for exploring the conditions that may give rise to trafficking such as poverty, unemployment, discrimination and persecution.'*¹¹⁴

The UK has committed itself to tackle human trafficking and is progressing towards fully implementing the UK Action Plan on human trafficking introduced in 2007 and last updated in 2009.¹¹⁵ There are four main objectives in the Action Plan:

1. Draw together all the work that is currently underway across government and other agencies on human trafficking
2. Identify gaps in existing work which require further consideration
3. Increase transparency and enable us to be held to account on delivery of our objectives

¹¹³ T Obokata, (n60) 34.

¹¹⁴ B McSherry and S Kneebone, (n91) 82.

¹¹⁵ Home Office, 'UK Action Plan (n72); Home Office 'Update to the UK Action Plan on Tackling Human Trafficking' (2009) available <<http://www.scotland.gov.uk/Topics/Justice/crimes/humantraffick/UKAPTrafficking2009>> [last accessed 27.10.2011].

4. Provide a platform for developing a more strategic and holistic approach to tackling human trafficking.

The UK's signature and ratification of the Council of Europe Convention against Trafficking in Human Beings (CoE Convention) in December 2008¹¹⁶ marked the legal recognition that not all trafficking of children necessarily involves organised criminal groups and not all children are moved across external borders and trafficked internationally.¹¹⁷ The CoE Convention explicitly recognises that individuals who do not form part of organised criminal groups can commit trafficking offences and trafficking may be either national or transnational in nature.¹¹⁸ The introduction of the CoE Convention filled the previous gap left by the Trafficking Protocol discussed above. Individuals who traffick children and exploit them in domestic work, without the involvement of organised criminal groups, will now commit an offence of child trafficking under the CoE Convention with prosecutions being brought in the UK under the Asylum and Immigration (Treatment of Claimants etc) Act 2004. The focus is therefore shifted onto individuals, rather than on criminal groups, who traffick children internationally from their country of origin into the UK.

There is an important emphasis within the CoE Convention on the need to provide, not only for the criminalisation of trafficking, but also for obligatory protection of victims' human rights. Although previous legislation had acknowledged that trafficking involved human rights abuses, there was a distinct lack of explicit binding obligations on States

¹¹⁶ CETS No. 197. The UK ratified the Convention on 17 December 2008 and it came into force in the UK on 1 April 2009.

¹¹⁷ This applies equally to adults.

¹¹⁸ Article 2, CoE Convention.

to provide comprehensive protection for victims.¹¹⁹ The CoE Convention was opened for signature 16 May 2005. As of 10th November 2011 there were 47 state parties, with 34 ratifications of the Convention. As the explanatory report to the Convention notes, the protection of victims' rights is a particular focus of the Convention and trafficking in human beings is viewed as a violation of human rights as well as a violation of human dignity and integrity.¹²⁰ It appears now that the EU are taking a more human rights approach to human trafficking with the adoption of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims.¹²¹

5.1 Institutional Developments

There is some evidence of awareness of the human rights abuses involved in trafficking within UK agencies dealing with trafficking in human beings and an acknowledgment that this needs to be addressed. Aside from SOCA (discussed above) the other main body in the UK whose mandate encompasses trafficking in human beings is the United Kingdom Human Trafficking Centre (UKHTC). This agency was established in October 2006 with three main objectives. First, the prevention of human trafficking by building knowledge and understanding of the harm it causes and to use that knowledge and understanding to direct and prioritise the UK law enforcement response; Second, to improve and co-ordinate the law enforcement response to human trafficking by raising awareness of the key issues and developing and delivering relevant training; Third, to develop and promote a victim-centred, human rights based approach to dealing with trafficking victims and working together with other agencies,

¹¹⁹ For example, the Trafficking Protocol.

¹²⁰ CoE Convention , explanatory report note 32.

¹²¹ [2011] OJ L 101/1. The Directive is discussed in more detail in *Chapter One*.

stakeholder organisations and NGOs.¹²² This is a positive step towards a more rounded approach to tackling human trafficking.

There were explicit attempts to widen the scope of the work undertaken by the UKHTC beyond organised crime and sexual exploitation of women. Research needs were identified and areas where there was a lack of knowledge were identified.¹²³ There was recognition of the need to focus on child victims as a distinct group and also positive signs of attention being given to those children who were trafficked and exploited in ways other than sexual exploitation, such as forced labour or domestic work. There was also some attempt to collate statistical information relating to the number of individuals trafficked, which was disaggregated to include details of the countries of origin, gender, age and type of exploitation.¹²⁴

From 1 April 2010 the UKHTC became part of SOCA. The reorganisation and change of status from an independent unit to one absorbed within SOCA is, in operational terms, likely to be of financial benefit with funding available to SOCA that may not have been available to UKHTC. However this arrangement does not necessarily improve the situation for trafficking victims. Currently there is little evidence of SOCA's mandate being particularly child centred or on addressing more informal types of trafficking arrangements since SOCA's primary remit is specifically to tackle organised crime. By reorganising the UKHTC under the umbrella of SOCA, it illustrates and reinforces the UK's focus on organised crime in the response to trafficking in human beings. Concerns were raised that the

¹²² UKHTC available< <http://www.ukhtc.org/objectives.htm>> [last accessed 21.09.2009].

¹²³ Ibid.

¹²⁴ This is considered in detail in *Chapter Five*.

UKHTC focus on a victim-centred strategy would be lost.¹²⁵ However, the Government stressed that this was not in fact a merger and the UKHTC was to retain its identity, character and functions. The reason for the reorganisation was due to the lack of independent legal status of the UKHTC which had been previously hosted by South Yorkshire Police.¹²⁶

There is the possibility that the association between UKHTC and SOCA may result in negative consequences. Currently SOCA is exempt from the Freedom of Information Act 2004 because it deals with security threats.¹²⁷ As the UKHTC is absorbed within SOCA, it will also fall within this exemption. This was not the case prior to the reorganisation. This could potentially reduce the transparency of the UKHTC and result in difficulties in obtaining information that has previously been accessible. As the UKHTC is one of the two ‘competent authorities’ who are responsible for the gathering of data and assessing potential victims referred to them, this could prove extremely important. The quarterly National Referral Statistics provide a detailed picture of those individuals (including children) referred to them and it is important that information continues to be available although currently this does not appear to be the case.¹²⁸

5.2 The ‘Individualisation’ of Children¹²⁹

This chapter has explored the three dominant theorisations of the trafficking discourse and their consequences for children. It is clear that the individualisation of children is necessary. This refers to the importance of

¹²⁵ Hansard, HC Deb, 20 January 2010, C124WH.

¹²⁶ Ibid.

¹²⁷ Hansard, (n107) C111WH.

¹²⁸ See *Chapter Five* for a detailed discussion of the available statistics.

¹²⁹ As defined in the *Introduction*.

considering children as a group separate from adults, as well as children exploited in domestic work as a distinct group of children due to their unique experiences. There have been some attempts to incorporate a child's rights approach into the trafficking legal framework. For example during the Trafficking Protocol negotiations the United Nations High Commissioner for Human Rights¹³⁰ attempted to stress the importance of special protection for children to the Ad-Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime. This was followed by a joint submission from the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM).¹³¹ The joint submission argued that an explicit acknowledgement of children's existing rights in international law was necessary.¹³² It was submitted that children's special needs of protection should also be recognised and it was recommended that a separate definition of child trafficking was required which made explicit mention of the UNCRC. This was seen as particularly relevant in relation to protection of children not only from sexual exploitation¹³³ but also economic exploitation.¹³⁴

These submissions during the negotiations were successful in raising awareness of the need to protect the human rights of trafficking victims. Conversely, they were limited by the fact that the resulting provisions

¹³⁰ Ad-hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Informal note, Fourth Session, Vienna (1999) UN Doc. A/AC.254/16 para 9.

¹³¹ Ad-hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Eighth Session, Vienna (2000) UN Doc. A/AC/254/27 para 6.

¹³² Such as those contained in the UNCRC.

¹³³ Article 34 UNCRC.

¹³⁴ Article 32 UNCRC.

contained in the Trafficking Protocol were not mandatory obligations on States. Instead, States have the discretion to decide under what circumstances and to what extent they would provide assistance to victims.¹³⁵ Had there been more time during the negotiations to discuss the issue of protection of victims (including children) and their human rights, the outcome may have been different. However, it was clear that sexual exploitation and organised crime remained the primary focus of the negotiations and dominated the discussions. Unfortunately, the suggestions put forward referencing the UNCRC and the particular attention required for the protection of children were not carried forward into the final document. There is some evidence of special protection being provided

6. CONCLUSIONS

This chapter has illustrated the complexity of trafficking and the impact the dominant theorisations of the trafficking discourse has on children in domestic work. By framing trafficking in terms of irregular migration and as an issue which is tightly bound up within the policies on smuggling, it has resulted in similar approaches being applied to two very different concepts.¹³⁶ In contrast to regular legal migration which is viewed as having positive outcomes and benefits for both the State and the individual, trafficking is unwanted irregular migration which is seen as damaging to the State.¹³⁷ Policies to deal with human trafficking are therefore primarily geared towards protecting the interests of the State through tightening of border controls and the prosecution of traffickers, rather than being aimed at protecting individual victim's interests.¹³⁸

¹³⁵ Article 6, Trafficking Protocol.

¹³⁶ The differences between trafficking and smuggling are discussed in detail in *Chapter Two*.

¹³⁷ A Geddes, (n36) 326.

¹³⁸ F Pickup, (n28) 47.

Within the migration discourse children are perceived as dependents on their family and there is a clear overarching aim of preserving the family unit. Where independent child migration is acknowledged, it is mainly in terms of unaccompanied asylum-seeking children or alternatively children who have been trafficked. Where trafficked children are discussed there is an emphasis on the involvement of organised criminal groups who intend to sexually exploit them.

These assumptions do not fully capture the experiences of children exploited in domestic work who sit uncomfortably within the migration discourse. These children are not migrating either as dependents of their family or as independent asylum seeking children. Furthermore, although they are trafficked children they do not sit comfortably within current trafficking discourse. There is no involvement of organised criminal groups and they are not being sexually exploited. These children may be accompanied on their arrival into the UK and are not claiming asylum.

The fact that the unquestioned assumptions about the nature of trafficking are shaping policy responses to child trafficking is problematic. This is particularly important as the *'adoption and enforcement of laws'* is considered essential in providing the solution to trafficking of human beings.¹³⁹ There was an obvious reluctance within the international community to adopt Argentina's original proposal regarding an additional protocol to the UNCRC concerning child trafficking. This was due to the fact that trafficking would be addressed solely from the perspective of children's rights. This was an opportunity to enable the individualisation of trafficked children and to recognise the diversity of their experiences and needs more explicitly. The dismissal of this proposal clearly illustrated the

¹³⁹ L Shelley, (n78) 118.

international community's primary concerns, that of transnational organised crime and the protection of State borders. Only through concerted efforts of non-governmental organisations, associated campaigns and pressure on governments has there been a gradual shift towards a more rounded human rights response.¹⁴⁰ Developments need to continue and more focus needs to be given to children as a distinct group with distinct needs to enable the true reality of children's experiences to be understood.

¹⁴⁰ See T Obokata, (n60).

Chapter Five

EXPLORING THE RESEARCH BASE

1. INTRODUCTION

This chapter considers the current research that exists relating to trafficking in human beings and looks at what is known about the extent of the problem, both globally and within the UK. The assumption that the occurrence of trafficking is increasing is also explored. This is achieved through an examination of the existing research base, including the statistical information currently available. This information is of vital importance as the legal and policy responses to child trafficking are shaped and informed in some part by the statistical and empirical evidence. This data has the potential to result in policies where there is little correlation between the perceived problem and the reality of trafficked children's circumstances.

The statistical data is considered in order to assess how this data is of value to the action taken to prevent child trafficking. Both the value and limitations of the statistical data are highlighted with discussion of the use and reliability of the available statistics. The difficulty in collecting statistics on this phenomenon is discussed, as are the generalisations made based on the available data. The advantages of an alternative approach to data collection are considered, as well as the possible added value of a method of data collection involving not only quantitative, but qualitative data.

As UK action and children are the particular focus of the thesis, the chapter specifically explores the extent that children are recognised as a distinct group within the research base and statistical evidence. The

individualisation of children is as important within the context of data collection as it is within the trafficking discourse more generally. This refers to the necessary disaggregation of the data to help in revealing specific characteristics that may be influencing the purpose for which children are trafficked. An examination of what is currently known about the trafficking of children into the UK is undertaken. This includes discussion of the number of children involved, the countries of origin of these children, the methods used for their entry into the UK and the type of exploitation they are subjected to on arrival.

The chapter questions whether assumptions, generalisations and policies can be based around the available data with any confidence and considers what responsibilities individual countries and the international community should have in relation to the improvement of data collection.

2. THE EXTENT OF THE GLOBAL PROBLEM OF CHILD TRAFFICKING: STATISTICAL EVIDENCE

There are reports that trafficking in human beings is a major global problem with the number of victims increasing at a rapid rate.¹ The precise global scale of human trafficking is however uncertain as the nature of the phenomenon makes it notoriously difficult to quantify. There are statistics from the US Department of State Annual Trafficking Reports that are often cited within academic literature in an attempt to demonstrate the extent of the problem.² These reports contain information gathered from US

¹ S Stoecker, 'The Rise in Human Trafficking and the Role of Organized Crime' (2000) 8(1) Demokratizatsiya: The Journal of Post-Soviet Democratization 129, 129.

² For example see N Ray, 'Looking at Trafficking Through a New Lens' [2005] Cardozo Journal of Law & Gender 909,909; F Bokhari, 'Falling Through the Gaps: Safeguarding Children Trafficked into the UK' [2008] Children and Society 201, 201; V Garrard, 'Sad Stories: Trafficking in Children – Unique Situations Requiring New Solutions' (2006) 35 Georgia Journal of International and Comparative Law 145,147.

embassies and consulates throughout the world. Each embassy report was compiled following discussions with the host government, local non-governmental organizations (NGOs), immigration officials, police, journalists, and victims, in addition to reviews of government, press, and NGO reports. Information is also gathered from the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), Human Rights Watch, Amnesty International, the Protection Project, and media reports.³

The first US human trafficking annual report in 2001 stated that at least 700,000 women and children were trafficked internationally each year.⁴ This figure was based on 'reliable estimates' but no further information regarding the source of the information was provided. In the 2004 report the figures quoted were between 600,000 and 800,000 people trafficked across international borders, in addition to an unknown number of people trafficked within their own country for the purpose of exploitation.⁵ These figures were restated in the 2008 report which also reported that out of the total number of people trafficked internationally 80% are female and up to 50% of the total are thought to be minors. The 2008 figures were based on US Government sponsored research which was published in 2006.⁶

³ US Department of State: Trafficking in Persons Report (2001) available <<http://www.state.gov/g/tip/rls/tiprpt/2001/index.htm>> [last accessed 05.10.2011] 4.

⁴ US Department of State (n3) 1.

⁵ US Department of State: Trafficking in Persons Report (2004) 6 available <<http://www.state.gov/g/tip/rls/tiprpt/2004/index.htm>> [last accessed 05.10.2011].

⁶ US Department of State, Trafficking in persons report (2008) 7 available <<http://www.state.gov/g/tip/rls/tiprpt/2008/index.htm>> [last accessed 05.10.2011] .

There are occasions where trafficking statistics are subsumed within figures of those who are in forced labour. For example, the recent US annual report of 2010 stated that globally there were 12.3 million adults and children in forced labour, bonded labour and prostitution. This figure was taken from the figures cited by the International Labour Organisation rather than being based on primary research.⁷ By dealing with the statistics in this way it hinders the assessment of the true extent of the trafficking problem due to the fact that not all forced labour is as a result of trafficking. This relates to the importance of providing clear legal definitions of the various terms.⁸ The 2010 US report also gave details of the number of victims of trafficking who were identified worldwide as well as the number of successful trafficking prosecutions although it is not entirely clear how these figures were arrived at.⁹

Apart from the US annual reports, the International Labour Organisation's (ILO) figures are the other statistics frequently cited. In relation to trafficking, the ILO has stated that a minimum of 2.45 million people are

⁷ 'The cost of coercion' Report of the Director-General, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 87th Session (2009) 1 and 65, available <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_106230.pdf> [last accessed 05.10.2011].

⁸ As discussed in *Chapter Two*.

⁹ The actual numbers stated in the report were as follows: Adults and children in forced labour, bonded labour, and forced prostitution around the world: 12.3 million; Successful trafficking prosecutions in 2009: 4,166; Successful prosecutions related to forced labour: 335; Victims identified: 49,105; Ratio of convicted offenders to victims identified, as a percentage: 8.5; Ratio of victims identified to estimated victims, as a percentage: 0.4; Countries that have yet to convict a trafficker under laws in compliance with the Palermo Protocol: 62; Countries without laws, policies, or regulations to prevent victims' deportation: 104; Prevalence of trafficking victims in the world: 1.8 per 1,000 inhabitants; Prevalence of trafficking victims in Asia and the Pacific: 3 per 1,000 inhabitants US Trafficking in Persons Report (2010) 7 available <<http://www.state.gov/documents/organization/142979.pdf>> [last accessed 05.10.2011].

trafficked each year.¹⁰ It has also been estimated by the United Nations, UNICEF that 1.2 million children are trafficked every year.¹¹

2.1 Examining the Data: Reliability, Methodologies and Mandates

At first glance these statistics suggest that trafficking in human beings is in fact an extensive global problem with the number of victims at alarmingly high levels. There is a general perception that trafficking in human beings has dramatically increased over the last 15 to 20 years as observed by Javate de Dios:

*'No one now disputes that trafficking today has reached alarming proportions, the magnitude of which affects many countries as countries of origin, transit and destination points.'*¹²

The creation of these perceptions is assisted by the media and their reporting of trafficking in human beings. Often the figures cited by the media are merely a reiteration of the statistics discussed above. The various concepts, such as trafficking, smuggling and migration are also often confused and inaccurately reported by the media which adds to the

¹⁰ The figure of 2.45 million is the number of those in forced labour as a result of trafficking as reported by the International Work Organisation A global alliance against forced labour, REPORT OF THE DIRECTOR-GENERAL, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2005) 14 available < http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_081882/lang--en/index.htm > [last accessed 05.10.2011].

¹¹ UNICEF UK 'Child Trafficking', Information Sheet, (2003) available <<http://www.blaenau-gwent-lscb.org.uk/documents/conference2009/c1.pdf>> [last accessed 05.10.2011].

¹² J O'Connell Davidson, 'Will the real sex slave please stand up?' (2006) 83 Feminist Review 4,5 citing Javate de Dios, A (2002) 'Revisiting the issue of trafficking in women: Comments on policy implications of a gender and rights framework'. Paper presented to ASEM Seminar, Promoting Gender Equality to Combat Trafficking in Women and Children, organised by the Swedish Ministry for Foreign Affairs. Bangkok, 7-9 October.

confusion of the number of victims involved.¹³ The media have been accused of sensationalising trafficking in their reports of various incidents:

*'In the field of human trafficking, sensationalism, stereotypes and assumptions on the profile of victims and circumstances of their exploitation unfortunately often prevail over in-depth investigative journalism. Journalists and editors often cannot tell the difference between illegal migration, prostitution and trafficking in women and are often not too concerned about accurate definitions. The linkages between issues such as globalization, migration policies, marginalization, discrimination as well as economic inequality and exploitation are rarely explored.'*¹⁴

On closer examination of the figures cited, there are actually no reliable, conclusive statistics, even in a single state context. Even if it is accepted that human trafficking is a phenomenon that is increasing as some suggest,¹⁵ the precise scale of the problem is still unclear with significant inconsistencies in the reported number of trafficking victims. There are reports of particular incidents of trafficking in human beings¹⁶ but, although these cases are extremely important, they can only provide an

¹³ R Dasgupta and L Murthy, 'Figure it out: Reporting on trafficking in women' (2009) available <http://infochangeindia.org/index2.php?option=com_content&do_pdf=1&id=7573> [last accessed 05.10.2011].

¹⁴ United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) 'The Role of the Media in Building Images' Background Paper (2008) 2 available <<http://www.unodc.org/documents/human.../2008/BP012TheRoleoftheMedia.pdf>> [last accessed 05.10.2011].

¹⁵ S Egan, 'Protecting the victims of trafficking: problems and prospects' (2008) 1 European Human Rights law Review 106,106.

¹⁶ LG Potts, 'Global Trafficking in Human Beings: Assessing The Success of The United Nations Protocol to Prevent Trafficking in Persons' [2003] George Washington International law Review 227, 232.

indication rather than indisputable evidence that trafficking is increasing. Askola views estimates of human trafficking as nothing more than ‘guesstimates’ due to the clandestine nature of trafficking which results in the lack of reliable data collected. For this same reason she also views claims of the increase in trafficking with caution.¹⁷

2.2 Gathering the Data

There are currently very few official statistics on the actual scale of human trafficking except for individual cases that have been investigated and prosecuted.¹⁸ The difficulty obtaining reliable statistics stems from the fact that human trafficking is predominantly a hidden phenomenon, coupled with the lack of central point for the collection of data nationally, regionally and internationally.¹⁹ Data is currently either unavailable or unreliable.²⁰ In each of the US annual reports the figures were said to be based on “reliable estimates”.²¹ However, the US Government Accountability Office viewed these figures as “questionable” because of the methodology adopted as the basis of the research.²² This was due to the fact that the figures were based on one piece of research that was undocumented and unlikely to be capable of being replicated. The

¹⁷ H Askola, ‘Violence against Women, Trafficking, and Migration in the European Union’ (2007) 13(2) *European Law Journal* 204, 205.

¹⁸ Ibid

¹⁹ Bokhari, (n2) 201.

²⁰ M Van Reisen and A Stefanovic, ‘Lost kids, Lost futures, The European Union’s response to Child Trafficking’ (2004) at 11, Terre des Hommes, available <http://www.childtrafficking.com/Docs/tdh_2005_lost_kids_lost_futures_7.pdf [last accessed 02.11.2011].

²¹ US Department of State n(3) 1.

²² United States Accountability office, ‘Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance US Anti-trafficking efforts abroad’ (2006) 14 available <<http://www.gao.gov/new.items/d06825.pdf> > [last accessed 05.10.2011].

discrepancy between the high number of estimated victims and the number of victims officially recorded was also queried.²³

The concern with this discrepancy is shared by O'Connell Davidson in relation to the perceived increase in human trafficking. She questions the scale of the problem and refers as an example to the number of women who were discovered following raids in 2003 by the London Metropolitan Police in massage parlours. Out of 295 women, only four or five were identified as victims of trafficking, whilst the rest were found to be in breach of UK immigration law.²⁴ This does not necessarily indicate that there is very little trafficking. It may instead be an indication that trafficking victims are not being discovered or incorrectly identified. The difficulty with small scale operations and research is the problem of extrapolating any generalisations from the findings. The discrepancies in the figures quoted can only serve to illustrate the inability to make generalisations based on such statistics, rather than signifying the true severity of the global problem. Another issue exacerbating the collection of reliable data is the inconsistent use of definitions of trafficking '*from country to country and scholar to scholar*'.²⁵ This results with incomparable data which does not assist in providing a true picture of the problem of trafficking.

2.3 The Process and Aim of Data Collection

Different bodies and organisations such as the US Government, the International Labour Organisation (ILO), the International Organisation for

²³ Ibid

²⁴ O'Connell Davidson, (n12) 6.

²⁵ K Aromaa, 'Trafficking in Human Beings: Uniform Definitions for Better Measuring and for Effective Counter-Measures' in E Savona and S Stegonizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer, 2007) at 19-20.

Migration (IOM) and the United Nations Office on Drugs and Crime (UNODC) all collect information and research trafficking. However, each has a different lens through which to view human trafficking as well as a different geographical interest and this undoubtedly affects the statistics available and the research undertaken. For example, both the US Government and the IOM focus on estimating the global number of victims, whilst the UNODC focuses on tracing the international trafficking routes and the country patterns of international trafficking.

The different mandates of international organisations and national bodies determine what information is collected by each of these bodies and the remit of any research undertaken. The ILO develops international labour standards which set out the minimum standards of basic labour rights through the use of Conventions and Recommendations.²⁶ Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues.²⁷ In relation to trafficking, the ILO has enacted numerous Conventions which are relevant to both trafficking and forced labour, for example the ILO Worst Forms of Child Labour Convention 1999²⁸ and The Forced Labour Convention 1930.²⁹ The ILO is also concerned with children's rights in the context of employment and labour relationships. The ILO's International Programme on the Elimination of Child Labour (IPEC) aims to eradicate child labour with a priority given to the worst

²⁶ See H Cullen, 'The Role of International Law in the Elimination of Child Labour' (Martinus Nijhoff, 2007).

²⁷ ILO <http://www.ilo.org/global/About_the_ILO/lang--en/index.htm> [last accessed 05.10.2011].

²⁸ The Worst Forms of Child Labour Convention 1999 (C182); Minimum Age Convention 1973 (C138) both concern child labour.

²⁹ Forced Labour Convention 1930 (C29).

forms of child labour, which includes trafficking of children.³⁰ There are several ways that IPEC aims to achieve this goal, including through the support of research, campaigning to raise awareness and change attitudes towards child labour. The IPEC also provides encouragement and support to States to enable them to ratify ILO Conventions.³¹ In relation to child domestic workers there has been a range of ILO national and regional studies and rapid assessments focussing on the particular issues of concern to children in domestic work, although none of these studies have focused on the UK.³² Monitoring and follow up mechanisms aimed at ensuring effective implementation of the Conventions is seen as vital and entails periodic reports being by governments to the Commission of Experts on the Application of Conventions and Recommendations.

The International Organisation for Migration focuses on the number of actual victims assisted by the organisation in the 26 countries where they have a presence and concerns itself with trafficking as an issue of migration and migrants' rights. A comprehensive approach is taken to trafficking within the wider context of managing migration and IOM's activities are implemented in partnership with governmental institutions, NGOs and international organizations.³³ Research has been funded by the IOM to examine different elements of trafficking in human beings. For example, research considering whether trafficking was being driven by demand in the sex and domestic work sectors was undertaken by Anderson

³⁰ Article 3 (a) Worst forms of Child Labour Convention 1999 (C182).

³¹ IPEC available <<http://www.ilo.org/ippecinfo/product/viewProduct.do?productId=3984>> [last accessed 05.10.2011].

³² For example these assessments/studies have taken place in Cambodia, Ho Chi Minh City and South East Asia.

³³ IOM Counter-Trafficking available <<http://www.iom.int/jahia/page748.html>> [last accessed 05.10.2011].

and O'Connell Davidson with pilot studies in Sweden, Italy, Thailand and India on behalf of the IOM.³⁴ The emphasis of IOM's work is on the prevention of trafficking and the protection of victims, and the research specifically considers children within the broader context of migration.³⁵

In contrast the United Nations Office on Drugs and Crime focuses on drugs, crime and terrorism and all transnational crime including trafficking in human beings. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, (the Trafficking Protocol)³⁶ is directly relevant to the work of the UNODC. The UNODC Global Programme against Trafficking in Human Beings (GPAT) was set up in March 2007 in conjunction with the United Nations Interregional Crime and Justice Research Institute (UNICRI). The overall aims of GPAT are to assist States in understanding the causes and methods of both smuggling and human trafficking and to encourage effective responses. It was also set up with a view to raising awareness, increasing knowledge about trafficking in human beings and it collects and analyses data for this purpose. GPAT aims to strengthen existing partnerships and establish new ones in order to coordinate efforts across Member States.³⁷ In conjunction with this assistance GPAT provides support to States in anti-trafficking

³⁴ B Anderson, and J O'Connell Davidson, 'Is Trafficking in Human Beings Demand Driven? *A Multi-Country Pilot Study*' (2003) IOM Migration Research Series, No. 15. Geneva: IOM, available <<http://www.compas.ox.ac.uk/fileadmin/files/Publications/.../Anderson04.pdf>> [last accessed 05.10.2011].

³⁵ K Touzenis, 'Human Rights of Migrant Children' (2008) International Migration Law, No 15 available at <http://publications.iom.int/bookstore/index.php?main_page=product_info&cPath=17_18&products_id=78> [last accessed 05.10.2011].

³⁶ 2000 A/RES/55/25 Annex II entered into force 25 December 2003.

³⁷ UNODC <http://www.unodc.org> [last accessed 05.10.2011].

efforts, training and provision of improved victim support. They also assist countries in their efforts to combat this crime.³⁸

In addition to the bodies and organisations discussed *above*, UNICEF is also relevant to the issue of child trafficking. This organisation was initially set up in 1945 to provide emergency food and healthcare to countries which were devastated by World War II. However, it became a permanent part of the UN system in 1953 with the overarching aim of providing long-term humanitarian and developmental support to children in developing countries. It is a voluntarily funded organisation and relies on contributions from governments and private donors. In relation to trafficking UNICEF has conducted and published several reports which relate to children's rights and protection,³⁹ child labour⁴⁰ and violence against children.⁴¹ In addition the Innocenti Research Centre in Florence, Italy was established in 1988 to research areas of UNICEF's work which includes child trafficking. The main aim of the Centre is to improve international understanding of issues relating to children's rights as well as assist with the full implementation of the United Nations Convention on the Rights of the Child in both developing and industrialised countries.⁴²

³⁸ UNODC 'Trafficking in Persons: Global Patterns' (2006) available <<http://www.unodc.org/documents/human-trafficking/HT-globalpatterns-en.pdf>> [last accessed 05.10.2011].

³⁹ UNICEF, 'Rights here, rights now: Recommendations for protecting trafficked children' (2007) available <<http://www.unicef.org.uk/Latest/Publications/Rights-here-rights-now-Recommendations-for-protecting-trafficked-children/>> [last accessed 05.10.2011].

⁴⁰ UNICEF, 'Child Labour Resource Guide: Executive Summary' (2009) available (<http://unicef-porthos-production.s3.amazonaws.com/child-labour-resource-guide-executive-summary_5b46b80.pdf> [last accessed 05.10.2011].

⁴¹ UNICEF, 'Violence Against Children in Europe: A Preliminary Review of Research' (2005) <http://www.unicef-irc.org/publications/pdf/violence_against.pdf> [last accessed 05.10.2011].

⁴² UNICEF available <<http://www.unicef-irc.org/>> [last accessed 05.10.2011].

Each of the organisations above gathers data according to their mandate which may possibly result in individuals being counted in more than one dataset. The extent of the data collected also varies according to the resources available to each organisation.⁴³ It is claimed that these varying approaches are hampering the collection of reliable statistics, as Munro states:

*'Statistics vary widely between the various agencies involved (police, immigration, sex workers and abolitionists, human rights activists and social service providers), reflecting both a pervasive lack of reliable intelligence and a potentially divisive conflict of interests among relevant stakeholders.'*⁴⁴

The available statistics are therefore held by various organisations that have collected them in different ways, at different times and for different purposes. This means that the statistics are not generally comparable, either within the country the statistics have been gathered from, or between countries.⁴⁵

It may be argued that the reliability of any of the statistics discussed above is therefore dubious, and should be viewed with a degree of caution. Although there has been an increase in the literature on human trafficking, many of the studies undertaken to date lack an extensive research base,

⁴³ F Laczko and MA Gramegna, 'Developing Better Indicators of Human Trafficking' (2003) 10 Brown Journal of World Affairs 179, 184.

⁴⁴ V Munro, 'A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia' (2005) 14 Social Legal Studies 91, 93.

⁴⁵ J Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) International Migration 31, 37.

both in terms of the type of exploitation researched, the selected group of people (male, female, girls or boys) and the geographical area of interest.⁴⁶ This could be due to the difficulty of researching human trafficking due to it being a largely hidden phenomenon. Conversely however, it could be argued that the broad range of perspectives actually provides a more realistic view of the phenomenon and assists in furthering current knowledge and understanding.

2.4 Statistical Information Relating to Children in Domestic Work

Statistical information on child labour is difficult to collect and this is a problem shared with statistics in relation specifically to children in domestic work. The ILO has estimated that there are 215 million children in child labour throughout the world with 115 million of these in hazardous work.⁴⁷ There is a distinct lack of statistics available which relate to children in domestic work, including those who are in this situation as a result of trafficking. There have been some assessments of child domestic work within some individual countries. The Statistical Information and Monitoring Programme on Child Labour (SIMPOC) which is the statistical branch of the ILO's International Programme on the Elimination of Child Labour (IPEC) have been responsible for collecting this data. For example, there are reports of 175,000 children under the age of 18 being employed in domestic work in Central America. In Indonesia it is claimed that there are more than 688,000 children in domestic work, whilst there 53,942

⁴⁶ Laczko and Gramegna, (n43) 180.

⁴⁷ Y Diallo and others, 'Global Child Labour Developments: Measuring trends from 2004 to 2008' SIMPOC, IPEC, ILO (2008) 7 available <<http://www.ilo.org/ipeinfo/product/viewProduct.do?productId=13313>> [last accessed 05.10.2011].

under 15's in South Africa and 38,000 children between the age of 5 and 7 years old in Guatemala in domestic work.⁴⁸

There are no clear statistics specifically attempting to identify the number of children trafficked into domestic work either globally or nationally. There is some evidence that children are trafficked into domestic work within the UK, however the true extent of the problem is unknown due to the hidden nature of both trafficking and domestic work.⁴⁹

2.5 Drawing Conclusions?

The statistical data collected by the US Government, ILO, UNODC and IOM reveal some shared characteristics. For example according to the data collected more women are trafficked than men and sexual exploitation is the primary reason for which women are trafficked. There are however, some significant variations, notably the percentage of trafficking victims who are children with figures ranging from 13% - 50%.⁵⁰

Some information can be drawn from these various pieces of research. The first is that countries throughout the world are affected by child trafficking either as countries of origin, transit or destination, or as a combination of these.⁵¹ Secondly, there is some indication that trafficking in human beings is increasing, with some countries reporting an increase in the numbers of

⁴⁸IPEC <http://www.ilo.org/ipecc/areas/Childdomesticlabour/lang--en/index.htm> [last accessed 05.10.2011].

⁴⁹ C Beddoe, 'Missing Out - A Study of Child Trafficking in the North-West, North-East and West Midlands' (2007) 26, ECPAT available <http://www.londonscb.gov.uk/files/resources/cpp/missing_out.pdf> [last accessed 05.10.2011].

⁵⁰ US Accountability office (n21) 15.

⁵¹ M Melrose and D Barrett, 'The Flesh Trade in Europe: Trafficking in Women and Children for the Purpose of Commercial Sexual Exploitation' (2006) 7(2) Police Practice and Research 111, 117.

suspected cases of trafficking.⁵² This does not mean that all trafficking in every country has necessarily increased or increased at the same rate and these reports are only statistically relevant for the individual country concerned. It may also mean that the effectiveness of reporting of trafficking has improved as awareness of the problem has increased. Even with the overall lack of reliable statistical information, it has been claimed that '*...there is sufficient evidence to indicate that, at an absolute minimum, hundreds of people are being trafficked into the country [UK] for sexual or labour exploitation each year.*'⁵³ This statement is not supported with reference to identifiable research and therefore its validity is still questionable.

The reported growth in trafficking in human beings has resulted in a higher priority on introducing policies for tackling the phenomenon.⁵⁴ The lack of reliable statistics is well-known. Often data relating to trafficking, smuggling and irregular migration are combined,⁵⁵ despite the fact that these are separate concepts which require different legal responses. This contributes to the distortion of the true extent of the trafficking problem.⁵⁶ It has been claimed that the difficulty in providing accurate reliable statistics has the potential to impact negatively on the policy response to trafficking in human beings. Dottridge argues that inaccurate estimates are

⁵² Laczko (n43) 182-183. The German Federal Criminal Office (*BundesKriminalamt*) in 2001 there were 987 victims of trafficking identified by police investigations of suspected cases of trafficking in contrast to 891 victims in 1999.

⁵³ K Skrivankova, 'Combating Trafficking in Human Beings' (2006) 20(1) International Review of Law Computers & Technology 229, 229.

⁵⁴ The development of these responses are discussed further in *Chapter Four*.

⁵⁵ Laczko and Gramegna, (n43) 181.

⁵⁶ The distinction between these concepts and the importance of their legal differences are discussed in *Chapter Two*.

likely to lead to the proposal of inappropriate remedies and responses.⁵⁷ Responding to trafficking of an estimated 10,000 people would require a very different response where the estimated number of victims is 100,000.⁵⁸ This is a view supported by Tyldum and Brunovskis who see the overestimation of the extent of the problem having equally negative consequences as the underestimation of it. They consider the uncritical use of research findings as potentially leading to misinformation which in turn would '*...hinder the creation of relevant policies and appropriate programmes.*'⁵⁹ Tyldum and Brunovskis argue for research to be based on clear conceptual and practical identification of the target group, accompanied by indications of the appropriate end users of the data. They also view misleading data as worse than no data at all.⁶⁰ Encouraging and supporting a more robust system of data collection which would result in more clearly defined and 'useable' data is understandable. It is however, questionable whether having no data at all would be preferable to misleading data. Human trafficking is such a complex phenomenon involving so many different elements and forms of exploitation that it is unrealistic to expect that statistics alone can ever completely and accurately inform policy responses. What is important is that data continues to be collected to assist in building the knowledge base and providing as detailed a picture as possible. It is also important for on-going research discussions to continue on how to best achieve this data collection. Data collection which gives insight into the global problem has to start with robust data

⁵⁷ Dottridge M, 'Deserving Trust: Issues of Accountability for Human Rights NGOs' (2003) International Council on Human Rights Policy, Switzerland available <<http://credo.md/arhiva/documente/HumanRightsNGOAccountability.doc>> [last accessed 07.06.2010].

⁵⁸ Ibid , 82

⁵⁹ G Tyldum and A Brunovskis, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human trafficking' (2005) 43 (1/2) International Migration 17, 18.

⁶⁰ Ibid, 30.

collection at national level. A consensus needs to be reached between countries as to the agreed parameters of data collection. Although it may take some time to reach this consensus and apply it in practice, it may eventually result in data which is internationally comparable which in turn would allow appropriate legal and policy responses to reflect the trends exposed within each country. If a system of data collection is implemented correctly this may reveal a more diverse set of trafficking situations and could include those children trafficked through more informal arrangements and exploited in domestic work.

3. AN ALTERNATIVE APPROACH TO INTERNATIONAL DATA COLLECTION

Rather than focusing purely on the collection of quantitative data to provide a numerical figure to present a picture of the extent of human trafficking, it has been recognised that it is just as important to supplement this information with qualitative data.⁶¹ The policy responses of individual countries and the international community as a whole, the introduction of new legislation or a higher political profile of trafficking will all influence the attention and resources given to child trafficking.⁶²

Small scale research which focuses on a group of trafficking victims, who have been exploited in a particular way within one geographical area, has value in adding to the knowledge on human trafficking. These smaller

⁶¹ K Kangaspunta, 'Collecting Data on Human Trafficking: Availability, Reliability and Comparability of Trafficking Data' in E Savona and S Stegonizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer, 2007) at 34.

⁶² For discussion of the importance of data collection relating to children, see J Ennew 'Has Research Improved the Human Rights of Children? Or Have the Information Needs of the CRC Improved Data about Children?' in A Invernizzi and J Williams (eds) *The Human Rights of Children: From Visions to Implementation* (Ashgate Publishing, 2011). This is discussed within the context of reporting requirements of the Committee on the Rights of the Child.

scale trafficking research projects tend to go beyond purely quantitative data and collect qualitative data which details the experiences of the individuals who have been trafficked. What can be taken from this research is an increased knowledge and understanding of the victims in specific circumstances forming the focus of the research. Quantitative statistical evidence collected during these small case studies cannot be translated into statistics of 800,000 trafficked worldwide each year,⁶³ or illustrate the extent of the trafficking problem nationally. This research can however, provide some more detailed qualitative data which provides insight into potential causes behind trafficking, and an understanding of methods of recruitment and may assist in identifying those individuals who may be more vulnerable to trafficking. The collection of qualitative data allows an examination of countries of origin, transit and destination as well as identification of gaps in support for trafficking victims.⁶⁴

The nature of the trafficking problem in each country will be different both in terms of numbers and the role of the country and domestic circumstances should not be generalised in an attempt to provide a global picture. Small scale research projects are arguably of more benefit for individual countries to help them build a more complete picture of the extent of that country's problem. This will, in time, provide a more detailed and realistic picture of the extent of the global problem of trafficking in human beings. Disaggregation and qualitative research may provide a more detailed picture of child trafficking. Disaggregation of the data collected has the advantage of extending the knowledge base beyond mere numerical

⁶³ B Anderson, 'Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates' (2007) Centre on Migration, Policy and Society, Working Paper -07-48, available <<http://www.compas.ox.ac.uk/people/staff/bridget-anderson/publications/>> [last accessed 28.10.2011].

⁶⁴ Kangaspunta, (n61) 34.

to more extensive information. Having the knowledge of where children are being trafficked from and for what purpose will permit more targeted preventative responses. Similarly, identifying emerging patterns in relation to methods of recruitment or types of exploitation for individual countries or geographical areas is potentially an extremely important benefit. More focused international co-operation will be possible when more information is available about countries of origin of trafficking victims. Coordinated responses can be developed between countries of origin and destination which would be based on national primary empirical research.

4. DATA COLLECTION IN THE UK

Within the UK, there has been a combination of police operations and an attempt at data collection in order to increase the knowledge of trafficking into and within the UK. The United Kingdom Human Trafficking Centre (UKHTC), established in October 2006, is central to this aim and has been involved with police operations such as Pentameter 1 and 2 in 2006 and 2007 respectively. These were nationwide operations involving 55 police forces across the UK aimed at assessing the extent of trafficking, rescuing and protecting victims, and prosecuting traffickers. The ultimate aim was to tackle the problem of trafficking for the purpose of sexual exploitation. Pentameter 1 resulted in 84 victims of trafficking being discovered who had been sexually exploited, including 12 children, with victims originating from 20 different countries. This operation involved visits to approximately 10% of the estimated number of sex establishments in the UK. As a result of this operation there were a total of 232 arrests, which led to 134 people being charged with a variety of offences.⁶⁵ The following year Pentameter 2 resulted in 528 criminals being arrested with 164 victims

⁶⁵ CPS: Pentameter available
<http://www.cps.gov.uk/Publications/docs/pentameter_0706.pdf>[last accessed 05.10.2011].

of trafficking for sexual exploitation reportedly discovered, which again included 13 children. Assets of over £500,000 were confiscated and over 822 premises were visited.⁶⁶ Although both these operations appear to be very successful in the number of criminals arrested and victims discovered, there has been some criticism of the reported success of the operations, compared with their actual success. For example, Gilbert identifies that out of the initial reported 528 arrested during Pentameter 2, only 93 were arrested on suspicion of trafficking and, of those, only 67 were charged, resulting in 15 individuals (10 males, 5 females) being convicted.⁶⁷ The initial reports present the results of the operations in extremely positive terms which do not actually mirror the reality of the actual conviction rates for trafficking offences and are misleading.⁶⁸

In addition to their involvement in the police operations, the UKHTC has produced Statistical Quarterly Reports covering the period from 1st April 2008 to 31st March 2009.⁶⁹ The aim of this data collection is to assist in extending the existing knowledge of human trafficking that takes place into and within the UK. The data provided on the number of identified victims is disaggregated, detailing victims' nationality, gender, age, number of victims of EU or non-EU origin and the type of exploitation for which they were trafficked. There is similar, but not as extensive disaggregation in relation to the defendants. Details include the number of defendants dealt

⁶⁶ Police Oracle, July 2008 'Pentameter facts and figures' available <http://www.policeoracle.com/news/Pentameter-Facts-and-Figures_16691.html> [last accessed 05.10.2011].

⁶⁷ UKHTC Pentameter Statistics, <http://www.soca.gov.uk/about-soca/library/doc_download/122-uk-pentameter-2-statistics.pdf> [last accessed 18.04.2012].

⁶⁸ A Gilbert and C Moore, C, 'Human trafficking in the United Kingdom: the journey so far and the road ahead' (2010)194 Criminal Lawyer 2, 3.

⁶⁹ UKHTC available <<http://www.soca.gov.uk/about-soca/about-the-ukhtc>> [last accessed 05.10.2011]; Also see appendix A.

with under sections 57-59 Sexual Offences Act 2003, which concerns the trafficking of individuals for the purpose of sexual exploitation, on the gender of the defendants and the subsequent outcome of the cases. Due to the nature of the phenomenon, coupled with the newly developed data gathering mechanism, the collection of this data from a number of different sources occurred in a fairly unsystematic manner.⁷⁰

The UK ratified the Council of Europe Convention against Trafficking in Human Beings 2005 and one of the practical effects of the UK's ratification was the introduction of a national referral mechanism for the identification of victims in the UK with effect from 1st April 2009.⁷¹ Each party to the Convention are required to have a 'competent authority'. In the UK this responsibility is shared between the UKHTC and the UK Border Agency. They each have the responsibility for the identification of trafficking victims and all information of confirmed victims of trafficking is reported to UKHTC which has resulted in a central point where more robust and systematic data is collected.

From April 2009 this data was reported in National Referral Mechanism Reports (NRM) rather than the previous Statistical Quarterly Reports.⁷² During the first year of data collection under the new NRM system there was more than a 200% increase in the number of potential victims identified when compared with the Statistical Quarterly Reports for the previous year.⁷³ Of these 520 were female, compared to 186 males, and

⁷⁰ Data was collected from the police, SOCA, details of convictions, the Poppy project, NGOs, UKBA.

⁷¹ Article 10 of the Council of Europe Convention which came into force for the UK on 1st April 2009 following ratification by the UK on 17 December 2008.

⁷² See Appendix B.

⁷³ 706 April 2009-2010 when compared to 227 April 2008-2009. See appendix C.

over three times as many individuals from non-EU countries as EU countries. The first annual NRM report in March 2010 also saw more than a four-fold increase in the number of referrals made for those exploited in domestic servitude (106) as compared to the total number for 2008-2009 (23).

The apparent increases in the number of victims could be explained by the introduction of a more effective and robust referral system, with referrals being received from key bodies and agencies.⁷⁴ Clarity over the responsibility for referrals and data collection will undoubtedly lead to increased reporting. It could therefore be argued that this is a fairly rapid practical effect of the ratification of the Council of Europe Convention, rather than an indisputable rise in trafficking into and within the UK. Longitudinal data collection should provide a more detailed picture, although it must be remembered that these are still only the cases where victims have been identified. There are undoubtedly many more adults and children who remain undetected. This is particularly true of children who are accompanied into the UK by an adult claiming to be the child's relative⁷⁵ and are then concealed in a private household with little or no contact with agencies or authorities who may potentially identify them as trafficking victims.

Data collected by the UKHTC specifically relating to child victims revealed some significant information. Child referrals increased from 18 in 2008-2009 to 179 in 2009-2010 with children representing 25.4% of the

⁷⁴ Police services, Local Authorities, UKBA and NGOs.

⁷⁵ See Local Safeguarding Children Board: Coventry, para 9.7
<http://coventryscb.proceduresonline.com/chapters/p_ch_traf_exploit.html#howbrought>
[last accessed 21.04.2012.]

total number of referrals.⁷⁶ This increase may once again be the result of a clearer reporting and referral mechanism. Alternatively it may be due to an increased awareness of the various forms of child trafficking rather than an actual rise in the number of child victims.

Prior to May 2009 child victims were grouped into one category, of children aged between 10 and 17, with a total of 18 children being recorded as victims of trafficking for the year April 2008 to March 2009. In contrast in the first year under the NRM (April 2009 to March 2010) the age categories of children were disaggregated into sub-categories. There were 95 children identified aged 16-17, whilst 61 were aged between 12 and 15. There were six children aged between 10 and 11 and 17 under the age of 10. Of these children, 107 were female and 72 were male. This split between male and female children is not necessarily the norm and a period of time must pass to allow for the collection of more data before any patterns can be identified. In terms of the exploitation of the children identified, 55 were trafficked for the purpose of sexual exploitation, 27 for domestic servitude, 56 for forced labour, whilst 20 were for reasons that could not be determined.⁷⁷ The unknown type of exploitation at the time of the referral of the child is perhaps due to the first point of contact being with the UK Border Agency upon entry the UK, before the nature of the exploitation has become clear. Enough indications may have been present to suggest that the child was trafficked causing the chain of events to be disrupted and therefore the intended form of exploitation could not always be determined.⁷⁸

⁷⁶ See Appendix C for a more detailed breakdown of the ages of these children.

⁷⁷ Appendix C.

⁷⁸ Information obtained during telephone conversation with UKHTC 27th July 2009.

In relation to the implementation of UK trafficking legislation, the statistics reveal that the Sexual Offences Act 2003 is used on a much more frequent basis than section 4, Asylum and Immigration (Treatment of Claimants etc) Act 2004 with more prosecutions for trafficking which results in individuals being sexually exploited than in forced labour. This is apparent when comparing the total number of victims exploited in forced labour and domestic servitude with the same information relating to victims of sexual exploitation. During the period of April 2008 and March 2009 UKHTC quarterly statistical reports recorded a total of 137 people as victims of forced labour and domestic servitude with only 4 convictions under section 4 Asylum and Immigration Act 2004.⁷⁹ In contrast the total number of victims recorded for sexual exploitation for the same period was 82 with a total of 80 defendants dealt with under sections 57-59 Sexual Offences Act 2003.

This difference may be an indication that more attention is given to the prosecution of those involved in sexually exploiting victims. Alternatively it may be as a result of a lack of sufficient evidence or it being more difficult to prove that trafficking has taken place where the type of exploitation involves forced labour offences under section 4, Asylum and Immigration Act 2004 such as child domestic work. In these circumstances defendants may be charged with other offences, such as assisting unlawful immigration, which may not involve the same difficulty in establishing the necessary proof.⁸⁰ As of 31 March 2009, there had been 110 convictions for trafficking for sexual exploitation, in comparison to only 5 for labour exploitation.⁸¹ It should be noted that since the introduction of section 71,

⁷⁹ See Appendix A.

⁸⁰ A suggestion raised during telephone conversation with UKHTC on 27.07.09. An individual may be charged under s.25 of the Immigration Act 1971.

⁸¹ Information received via email 12.08.09 from UKHTC.

Coroners and Justice Act 2010 there is now an offence of holding someone in forced labour which does not require it to have been the result of trafficking and therefore it resolves any difficulties that may be experienced in prosecuting someone for subjecting another in forced labour.⁸²

Although there is a clear disparity between the convictions for sexual exploitation and labour exploitation, there is some indication that more attention is now being given to trafficking which results in exploitation of an individual's labour. In November 2008, Operation Ruby took place which involved the East Midlands Foreign National Crime Team, Northamptonshire Police, the UK Human Trafficking Centre, the UK Border Agency, the Serious Organised Crime Agency and the Gangmasters Licensing Authority. This operation resulted in over 60 people aged 15-67 being found picking leeks in a field in Holbeach, Lincolnshire and eight people were subsequently arrested on suspicion of trafficking.⁸³ More recently a husband and wife were charged with trafficking adult workers into the UK and exploiting their labour working in two care homes in Worthing. They were charged under section 4, Asylum and Immigration Act 2004 and sentenced in July 2009 to two years' imprisonment and ordered to pay £25,000 in legal costs.⁸⁴ An application under the Proceeds of Crime Act 2002 by police permits

⁸² Section 71 came into force April 2010.

⁸³ R Williams, 'Police raid farms in human trafficking inquiry' *The Guardian* (London, 19 November 2008) available <<http://www.guardian.co.uk/world/2008/nov/19/human-trafficking-lincolnshire>> [last accessed 05.10.2011].

⁸⁴ 'Worthing human-traffickers' two-year sentence' *Chichester Observer* (Chichester, 23 July 2009) available <http://www.chichester.co.uk/news/local/worthing_human_traffickers_two_year_sentence_1_245312> [last accessed 05.10.2011]; 'Worthing care home couple's trial for human trafficking' *Worthing Herald* (Worthing, 21 May 2009) available <http://www.worthingherald.co.uk/news/local/worthing_care_home_couple_s_trial_for_human_trafficking_1_244508> [last accessed 10.10.2011].

seizure of the couple's profits from their criminal activities. The individuals exploited in the care homes were not permitted to see a doctor and their illegal status in the UK was employed as a deterrent for them to go to the police to report their exploitative situation.

Operation Ruby was clearly focused on organised crime. Similarly, the trafficking and exploitation of individuals in care homes involved an element of organised crime due to the involvement of employment agencies that made the referrals. Although there is some progress being made in tackling labour exploitation, the focus still remains primarily on organised crime. This is not only evident through Operation Ruby, but other Police Operations such as Operation Maxim, Golf, Glover, Acumen, and Pentameter 1 and 2.⁸⁵ This results in the neglect of more informal trafficking arrangements, where individuals who are not part of organised criminal groups are responsible for trafficking such as the children in domestic work being discussed in this thesis.⁸⁶ The situations described above involved exploitation of individuals in public settings rather than private households which, although still carried out in a clandestine way,

⁸⁵ Operation MAXIM was a Metropolitan Police Service partnership with the UK Border Agency (UKBA) and the Crown Prosecution Service (CPS) targeting organised immigration crime across London, including human trafficking. see <http://www.met.police.uk/op_maxim/> [last accessed 19.04.2012]; Operation Golf was a joint investigation involving the UK and Romania with the aim of disrupting organised criminal groups responsible for trafficking children see <http://www.met.police.uk/foi/pdfs/disclosure_2010/november/20101000002635.pdf> [last accessed 19.04.2012]; Operation glover focused on sexual exploitation and organised crime see HC Deb 31 Mar 2009 : Column 1076W and the update to the UK Action Plan on tackling human trafficking (July 2008) 34, available <<http://www.atlep.org.uk/wp-content/uploads/2011/02/Update-to-Action-Plan-2008.pdf>> [last accessed 19.04.2012]; Operation Maxim focused on organised immigration crime including human trafficking see <http://www.met.police.uk/op_maxim/> [last accessed 19.04.2012]; Operation Acumen focused on prostitution resulting from organised crime see <<http://www.acpo.police.uk/documents/crime/2010/201008CRITMW01.pdf>> [last accessed 19.04.2012].

⁸⁶ It is not suggested that all trafficking of children for domestic work is as a result of the more informal arrangements that are the focus of this thesis and there will be occasions where organised criminal groups are involved.

did require individuals to be in public view whilst being exploited. This is not the case for children in domestic work that can be hidden within a private household which does not necessitate any contact with public settings.

The collection of data by the UKHTC has provided some insight into the various forms of trafficking. The National Referral Mechanism appears to be having a positive effect on the collection of data relating to trafficking victims within the UK. There are some elements that could further improve the data. The current categories of exploitation could benefit from further disaggregation. For example the forced labour category could detail the specific exploitation experienced such as agricultural, factory work or cannabis cultivation. Details of locations within the UK where victims are discovered would assist in targeting particular forms of trafficking in specific geographical areas. Data detailing the nationality of defendants could be collected in order to assess whether there is a direct link between nationalities of victims and traffickers. This in turn may provide opportunities to identify particular countries of origin and more effective co-operation could take place with countries of destination. If given time to develop, the National Referral Mechanism and the corresponding reports have the potential to provide a much more detailed picture of the current trafficking problem in the UK and eventually identify trends over time.

5. THE EMERGING PICTURE FROM RESEARCH IN THE UK

Trafficking of children into the UK has been the subject of limited research. Between 1998 and 2003, the number of actual confirmed cases of child victims of trafficking into the UK amounted to 250.⁸⁷ However, these

⁸⁷ C Somerset and others, 'Stop the Traffic!' (2003) ECPAT UK End Child Exploitation Campaign <http://www.londonscb.gov.uk/files/.../cpp/unicef__stop_the_traffick.pdf> [last accessed 05.10.11].

figures were seen as a significant underestimate and the known cases as the 'tip of the iceberg'.⁸⁸ It has been estimated that, at any one time, there are approximately 5,000 child sex workers in the UK, most of them trafficked into the UK, and 75% of them girls.⁸⁹ During the Child Exploitation and Online Protection Centre's (CEOP) research, which focused on London Social Services⁹⁰ over an 18 month period, 330 children were found who satisfied a 'profile' for identifying potential child victims of trafficking created by the London Area Child Protection Committee. Not all of the 330 children were actually confirmed as having been trafficked.⁹¹ The researchers found that 85% (276) of the children were aged 15 to 17, a total of 24 were aged 13-14 and 14 were under 12 years of age with the youngest being just nine months old. Those children with a high or very high probability of having been trafficked amounted to 190 children out of the 330 with 87% of those being girls.⁹² Similar numbers of children were identified as suspected victims of trafficking in CEOP's most recent research.⁹³ The discovery by CEOP of 325 suspected child victims during the period 2007-2008 did not confirm the true extent child victims of trafficking into the UK, and this remains unknown, as acknowledged in

⁸⁸C Somerset, 'Cause for concern? London social services and child trafficking' (2004) 11, ECPAT UK available <<http://www.ecpat.org.uk/content/ecpat-uk-reports>> [last accessed 05.10.11].

⁸⁹ UNICEF '*Commercial sexual exploitation*' London: UNICEF UK available <http://www.unicef.org.uk/publications/pdf/sexual_exploitation06.pdf> [last accessed 04.10.10].

⁹⁰ Somerset, (n88) 20.

⁹¹ A, Kapoor 'A Scoping Project on Child Trafficking in the UK' (2007) 16 CEOP On behalf of the Home Office and the Border and Immigration Agency available <<http://www.homeoffice.gov.uk/documents/ceop-child-traffick-report-0607>> [last accessed 05.10.11].

⁹² Ibid, 6.

⁹³ CEOP 'Strategic Threat Assessment: Child Trafficking in the UK', (2009) 9 available <http://www.ceop.gov.uk/downloads/documents/child_trafficking_report0409.pdf> [last accessed 31.05.09].

research conducted by the non-governmental organisation, End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (ECPAT)⁹⁴ in 2004 and by CEOP⁹⁵ in 2007.

There has been some research which illustrates the relationship between trafficking and private fostering arrangements where it is recognised that the privately fostered population in the UK includes trafficked children.⁹⁶ There have been concerns raised about children trafficked into domestic work in the UK where it is seen that *'technically, such children are privately fostered.'*⁹⁷ There is also some evidence suggesting children are being brought to the UK by African families to work in domestic work. It has been stated:

*'... that professional African families who go out to work and need access to childcare are using children brought into the UK as domestic workers. Children are brought in either by individuals or syndicates using false travel documents or are put on other people's travel documents as their children. The children work long hours, are rarely remunerated and are denied the chance of going to school. They are also prone to emotional, mental and physical abuse'*⁹⁸

⁹⁴ Somerset, (n88) 20.

⁹⁵ Kapoor, (n91) 16.

⁹⁶ C Shaw et al, 'Research into private fostering' National Children's Bureau (2010) 2, available <<https://www.education.gov.uk/publications/Search/List>> [last accessed 28.04.2012].

⁹⁷ L Bostock, 'Effectiveness of childminding registration and its implications for private fostering' (2003) 17, Social Care Institute for Excellence, available <<http://www.scie.org.uk/publications/positionpapers/pp01.asp>> [last accessed 28.04.2012].

⁹⁸ Ibid.

UK law requires that the local authority must be informed where any child is to be cared for by a non-relative for longer than 28 days.⁹⁹ However it has been suggested that the '*28-day threshold...inadvertently assists those involved in the trafficking of children*'¹⁰⁰ and provides '*a convenient legal cloak for traffickers to help evade official detection.*'¹⁰¹ The fact that traffickers and those exploiting the child are not going to be notifying local authorities of the child's presence in the UK indicated that this group of children '*...constituted one of the most vulnerable groups of children most likely to fall beneath the radar of local authorities.*'¹⁰² Traffickers could take advantage of the 28-day threshold and children could easily be hidden within this timescale.¹⁰³

ECPAT found that labour exploitation, including domestic servitude was the highest recorded type of exploitation for children referred to the UKHTC as suspected victims of trafficking with 35 of the 97 children referred being under the age of 13.¹⁰⁴ Dottridge also found in his research that children were trafficked to the UK to work as unpaid domestics.¹⁰⁵

⁹⁹ Section 66, Children Act 1989.

¹⁰⁰ C Shaw et al, (n96), 33.

¹⁰¹ Ibid, 73.

¹⁰² C Shaw et al, (n96), 45.

¹⁰³ C Shaw et al, (n96), 81.

¹⁰⁴ ECPAT UK, 'Child Trafficking in the UK: A Snapshot' (2010) 3, available <<http://www.ecpat.org.uk/content/ecpat-uk-reports>> [last accessed 28.04.2012].

¹⁰⁵ M Dottridge, 'Kids as Commodities? Child trafficking and what to do about it' (2004), 20 *Terre des Hommes*, available <<http://www.terredeshommes.org/pdf/commodities.pdf>> [last accessed 25.11.2011].

Domestic servitude is seen as a much larger problem than sexual exploitation, but one that received less attention.¹⁰⁶

Baroness Elizabeth Butler-Sloss commented on trafficking of children into the UK in the foreword of the ECPAT report and stated:

*'The idea that children are abused in this way, sexually exploited in brothels and private homes, forced to work as slaves in houses, restaurants or in drug cultivation and made to work as criminals on the street, seems hard to believe in the modern world and yet it does happen and is happening in the UK.'*¹⁰⁷

Identification of a child who is privately fostered is not the same as identifying a child who has been trafficked, however in practice the difficulty of this task has been recognised. In order to safeguard children from trafficking it is important '*...to consider whether a carer, whether or not they present as a relative, is maintaining a private fostering arrangement in order to exploit a child for their own gain*'¹⁰⁸

The following provides an example of the situation of these children exploited in domestic work:

'A young girl, now 17, entered the UK in October 1997 when she was 9 years old. She was trafficked to the UK as a domestic worker for an affluent Nigerian family in London. She received abuse at the

¹⁰⁶ C Shaw et al, (n96), 72.

¹⁰⁷ ECPAT UK, (n104), 2.

¹⁰⁸ Home Office 'Safeguarding children who may have been trafficked' (2008) 13, available <www.teachernet.gov.uk/publications> [last accessed 28.04.2012].

*hands of the family who exploited her for free domestic labour. She was forced to do hours of house work, childcare and cooking seven days a week for the family. She was kept a virtual prisoner in their house for the first two years, and after that only allowed to go to school and to have no other social or personal life. She was subjected to frequent physical abuse by the mother and to sexual abuse by a cousin of the family. Her time held captive in the UK has meant that she has lost contact with her own family. She has little idea of where they lived in Nigeria or where they might be now. She remains highly vulnerable as a result of her experiences.*¹⁰⁹

A clear relationship between trafficking, domestic work and private fostering in the UK has been exposed and it is an issue that needs to be explored further.

5.1 Countries of Origin of Children Trafficked into the UK

Acknowledging that statistics cannot at present provide an accurate picture of how many children are trafficked into the UK each year still leaves the question of the origin of the children identified as trafficked. According to the UNICEF report '*End Child Exploitation: Child work today*'¹¹⁰ children from different countries are trafficked into the UK for different reasons.¹¹¹ Chinese children enter the UK illegally, do not apply for asylum status and remain undiscovered within close-knit Chinese communities. They are

¹⁰⁹ Home Office, 'UK Action Plan on Tackling Human Trafficking' (2007) 67, available <<http://webarchive.nationalarchives.gov.uk/+http://www.homeoffice.gov.uk/documents/human-traffick-action-plan.html>> [last accessed 28.04.2012].

¹¹⁰ M Dottridge and L Stuart, '*End Child Exploitation: Child work today*' (2005) UNICEF available <http://www.unicef.org.uk/Documents/Publications/ecechild2_a4.pdf> [last accessed 20.10.2011].

¹¹¹ See *Chapter Six* for discussion of the difficulties associated with identifying a child in domestic work as a trafficked child due to the method used to bring them into the country.

subsequently exploited by means of forced labour in restaurants¹¹² or factories (particularly the garment industry) and they are very often subjected to debt-bondage¹¹³ which forces them to remain with the traffickers. People around the world are said to be affected by debt bondage, often working long hours for little or no pay and receiving basic food and shelter as a form of 'payment'. The inability to repay the original loan often means that the debt is transferred through generations of the same family.¹¹⁴

West African children are trafficked into a life of domestic slavery, benefit fraud or prostitution.¹¹⁵ Children from Eastern Europe are often trafficked for the purpose of begging on the streets or exploitation within the sex industry.¹¹⁶ Whilst research indicates that children are not trafficked for the sole purpose of involvement in criminal activities, there is evidence of children's involvement in crime once in the UK including assisting adults in benefit fraud and claiming upgrades in housing, as well as cigarette or drug smuggling.¹¹⁷

¹¹² This was also found to apply to Vietnamese boys by Somerset, (n88) 9.

¹¹³ This involves a debt that cannot be repaid and therefore the individual is then tied to the trafficker. Sometimes children are told that they must work to repay their fare and the amounts are often inflated which results in the child never being free from the debt.

¹¹⁴ Antislavery

<http://www.antislavery.org.uk/english/slavery_today/bonded_labour.aspx> [last accessed 23.10.2011]

¹¹⁵ Ariyo, D, 'Trafficking of African Children' AFRUCA, paper presented at conference 'Modern Day Slavery of African Children in the UK: Addressing the Demand and Supply Nexus' (July 2007) 49, available

<<http://www.afruca.org/images/stories/reports/modern%20day%20slavery%20report.pdf>> [last accessed 19.04.2012].

¹¹⁶ Dottridge and Stuart, (n110) 35-52.

¹¹⁷ Ibid.

The social circumstances in the country of origin may therefore mean that the motivation behind the trafficking of children may vary significantly. The culture in each particular country may have a bearing on how children are perceived and valued and therefore may affect the purpose that they are trafficked.¹¹⁸ Social issues such as poverty and lack of education and employment opportunities are also factors involved in the trafficking of children.¹¹⁹

5.2 Modes of Entry into the UK

There are numerous ways and routes used for trafficking children into the UK which requires a multi-faceted legal and policy response to acknowledge and tackle the various methods used by traffickers to facilitate entry. Trafficking routes are complex. In the UK, research by the children's rights organisation 'End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes'¹²⁰ found that children entered the UK either as unaccompanied minors who claimed asylum, or alternatively they were accompanied by an adult who claimed they were a relative and the child then disappeared. Younger children were more likely to be accompanied.¹²¹ Some children arrived by air whilst others stowed away on ferries or in cars and lorries. The children arrived using fraudulent passports or would enter on student visas as language students or on tourist visas.¹²² Children would sometimes be taken through a transit country

¹¹⁸ See *Chapter Seven*

¹¹⁹ C Somerset, 'What the Professionals know: The trafficking of children into, and through, the UK for sexual purposes (2001) 21 available <<http://www.ecpat.org.uk/content/ecpat-uk-reports> [last accessed 05.10.11].

¹²⁰ *Ibid*, 25-27.

¹²¹ Kapoor, (n91) 25.

¹²² Somerset, (n119) 22.

before their arrival in the country of destination, whilst others would travel directly from their country of origin.¹²³

During CEOP's research in 2007,¹²⁴ out of the 330 children who were trafficked or suspected of being trafficked, more girls arrived by air whilst more boys arrived by sea, and often children were brought through a third country on route to the UK. This varied route to the UK assists traffickers in their aim to remain undetected. On arrival, the number of children who arrived from China made up the largest group who were unaccompanied (78% of the Chinese children found) whilst those children arriving from Africa were in contrast the largest group of children arriving who were accompanied by an adult (54% of the African children found).

5.3 The Disappearance of Children from Local Authority Care

Social workers in the UK first became aware of child trafficking following the disappearance of a child from West Sussex Social Services who was later discovered to be involved in prostitution in Italy. Patterns began to emerge and it was discovered that many children, mainly Nigerian girls, were taken from the UK to Europe to be prostituted.¹²⁵ The police carried out 'Operation Newbridge' which aimed to investigate the rising numbers of children from West Africa that were disappearing from West Sussex Social Services.¹²⁶ This operation revealed an increasing number of

¹²³ UN.GIFT 'Human Trafficking: An Overview' (2008) 13 United Nations Office On Drugs and Crime, available <
<http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>> [last accessed 25.10.2011].

¹²⁴ Kapoor, (n91) 7-8.

¹²⁵ Somerset (n88) 9.

¹²⁶ Somerset and others, (n87) 12.

unaccompanied children arriving via Gatwick airport and subsequently disappearing from West Sussex Social Services.¹²⁷

It was found that some African children, who arrived in the UK as unaccompanied minors claiming asylum, would often be taken into care due to their age and would subsequently disappear from care.¹²⁸ Children disappearing from care are not confined to only African children arriving in the UK. In April 2009, there were reports of 77 Chinese children placed in a social services assessment centre near to Heathrow airport, going missing from care since 2006¹²⁹ resulting in assurances from the then Prime Minister Gordon Brown that these incidents would be investigated although this is a problem which is still occurring despite these assurances.¹³⁰ It has been known since 1995 that children have been disappearing from Local Authority care in this way and it is questionable what action may be taken to stop this. This problem is not confined to West Sussex LA and affects other Local Authorities within the UK.¹³¹ The difficulty for the assessment centre is that they cannot lock in or restrict the

¹²⁷ 66 Children were reported to have gone missing from 1995-2000. See C Somerset, (n119) 25-27.

¹²⁸ Somerset (n88) 10-11.

¹²⁹ R Booth, 'People trafficking: a phone call, a car door opens – and another child vanishes' *The Guardian* (London, 5 May 2009) available <<http://www.guardian.co.uk/society/2009/may/05/china-child-trafficking-heathrow>> [last accessed 28.10.2011]

¹³⁰ R Booth, 'Brown pledges to investigate trafficking of children through Heathrow care home' *The Guardian* (London, 6 May 2009) available <<http://www.guardian.co.uk/politics/2009/may/06/gordon-brown-heathrow-child-trafficking>> [last accessed 28.10.2011].

¹³¹ Twenty Sixth Report from the Joint Committee on Human Rights; Human Trafficking (Session 2005-06, Vol II EV207:28) TSO:London .

movements of the children unless they obtain a court order, which would only be granted if it could be shown that the child was in danger.¹³²

The Heathrow assessment centre has attempted to stem the number of children missing from their care by removing mobile phones from the children on their arrival at the centre.¹³³ It is believed to be the method that children have been instructed to use to re-establish contact with their traffickers prior to their disappearance. The disappearance of these children from Local Authority care was revealed when details from a secret intelligence report from the Border and Immigration Agency was published in the Guardian newspaper.¹³⁴ Despite awareness of this issue, the more recent reports of children going missing from local authority care illustrates that any action taken so far has been ineffective in adequately preventing the disappearance and facilitating the protection of children vulnerable to exploitation on their arrival in the UK.

6. CONCLUSIONS

This chapter has illustrated that the generalisations made about the extent of human trafficking are unconvincing. There is no clear evidence that determines the extent of the problem, but this is unsurprising given the inherently hidden nature of trafficking in human beings. Each country should be required to set up a central monitoring unit which would record all incidences of trafficking in human beings in the country. Collection of data at regional, national and international level needs to be systematically collected with one centralised body at

¹³² R Booth, (n130).

¹³³ R Booth, (n130).

¹³⁴ RBooth, (n130) .

each level taking responsibility.¹³⁵ Standardised procedures and processes need to be adopted by all countries to ensure that uniform definitions are used which will undoubtedly improve the reliability and comparability of the data collected.¹³⁶ Without accurate statistics, disaggregated by age, gender, country of origin, nationality etc, policies are formed which are not necessarily going to effectively deal with this problem. Children in domestic work will continue to be ‘invisible’ to a great extent unless more attention is given to the detail of children’s experiences.

If managed effectively and sufficient disaggregation of the information is undertaken, this is an opportunity to provide in the longer-term, a more accurate picture of human trafficking in the UK. At UK level, the activities of the National Referral Mechanism and its data collection role has the potential to develop understanding of the phenomenon at a national level, identifying trends and patterns over time to assist informed policy-making. There remains a need to understand the limits on these figures because only the actual victims discovered are included and this is likely to be an under-representation of the true number of trafficked people.¹³⁷ Despite this limitation there are still many benefits to data collection. Child trafficking is a diverse phenomenon involving many different actors and methods of exploitation. Currently there is limited information and evidence of the individualisation of children contained within the research base. The true extent of the number of children exploited in domestic work is unknown and there is a need for an improved method of statistical and research data collection to help to fill this gap.

¹³⁵ Laczko and Gramegna, (n43) 184.

¹³⁶ Aromaa, (n25) 14.

¹³⁷ Tyldum and Brunovskis, (n59) 23.

Currently the enforcement of UK law is primarily focused on sexual exploitation, as discussed earlier; this is despite the fact that the law itself encompasses all types of exploitative practices. The current research base and the lack of detailed information available regarding children in domestic work may partly explain this focus. Despite the lack of information on children exploited in domestic work, the UK is making attempts to include these children in the statistical information provided through the NRMs.¹³⁸ This may potentially make a difference and provide more focused practical responses to the situation of these children.

Although this chapter has considered the extent of the problem of child trafficking, unless children can be identified as trafficked children none of the improvements in the protection available¹³⁹ will be of benefit to them. It is to this issue that the thesis now turns in the following chapter.

¹³⁸ As discussed in detail earlier.

¹³⁹ As discussed in *Chapter One*.

Chapter Six

THE CHALLENGES ASSOCIATED WITH IDENTIFYING AND RECONCEPTUALISING CHILD VICTIMS OF TRAFFICKING

1. INTRODUCTION

This chapter continues to consider the legal responses to child trafficking, but specifically in relation to the identification of victims. Identification of victims of trafficking is essential in order to provide the protection and assistance necessary for victims to escape and recover from their experiences. Unless these children are found, none of the legislation in force will be of any benefit to them. Therefore identifying and locating these children is crucial. Due to the clandestine nature of trafficking the identification of victims is not an easy or straightforward task. This chapter discusses the importance of identifying victims, the obligations on States aimed at achieving this and the challenges faced by the authorities.

The trafficking framework presents an image of the trafficked child and this is explored and applied to children in domestic work to illustrate that children in domestic work do not necessarily conform to the image presented. Children's experiences of trafficking are diverse and are dependent on the form of exploitation. Children in domestic work are in a unique situation compared to children trafficked and exploited in other ways since there are particular obstacles for identifying a child in domestic work as a trafficked child. The involvement of the child's own family in facilitating the arrangements and the abuse of a tradition of private fostering create obstacles to identification which are exacerbated by the fact that the exploitation takes place in a private household. These factors create difficulties and challenges for the trafficking framework in developing appropriate responses for the identification of children as

trafficking victims. This chapter aims to explore these difficulties by illustrating the effects of the interaction between domestic work, private fostering, the private sphere and child trafficking.

2. THE IMPORTANCE OF IDENTIFYING THE TRAFFICKED CHILD

The identification of victims of trafficking is essential to provide an appropriate response and protection for victims.¹ This is particularly important where victims are children, as they are significantly more vulnerable in situations where they have been trafficked. This vulnerability derives from their age, their dependence on adults and the lack of opportunities to escape situations where they are being exploited.²

The CoE Convention contains obligations which require States to develop a system which assists in the identification of victims of trafficking.³ Directive 2011/36/EU explicitly acknowledges that trafficking in human beings involves ‘serious violations of fundamental human rights and human dignity’⁴ and unlike its predecessor,⁵ also requires Member States to ‘establish appropriate mechanisms aimed at the early identification of

¹ B Anderson, ‘Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates’ (2007) Centre on Migration, Policy and Society, Working Paper -07-48, available <<http://www.compas.ox.ac.uk/people/staff/bridget-anderson/publications/>> [last accessed 28.10.2011].

² EU Expert Group on Human Trafficking, Report of 22 December 2004, paragraph 3.5 available <<http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=2LkCNZ8Tq1DKvfJ59SzK2724pTQXvQQyGQGrtyNnjG1PTsp6SVJl!1145937442?id=37a79d51-e316-424a-b869-6e1c941f5231>> [last accessed 01.11.2011].

³ Article 10(2) CoE Convention.

⁴ Preamble of Directive 2011/36/EU.

⁵ EU Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1.

*assistance to and support for victims...*⁶ Gallagher argues that the obligations regarding identification of victims introduced by the CoE Convention are *'a landmark development for the international legal framework related to trafficking'*⁷ because the Convention explicitly acknowledges that:

*'...correct identification of victims is essential to the provision of protection and assistance and that failure to correctly identify a victim will likely lead to a denial of that person's rights as well as problems in the prosecution process.'*⁸

The CoE Convention requires States to train people who will be involved in the identification process and in the provision of assistance of victims⁹ and EU Directive 2011/36 has similar requirements for the provision of regular training, including for front-line police officers.¹⁰ This demonstrates that the EU approach to human trafficking is developing to include specific provisions aimed at the identification of victims. The protection of these individuals and their rights are becoming a greater priority within the EU than previously thought necessary.

In the UK the responsibility to identify individuals as trafficking victims falls within the remit of the UK Human Trafficking Centre and the UK

⁶ Article 11(4), Directive 2011/36/EU.

⁷ A Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 European Journal of Migration and Law 163, 176

⁸ Ibid; Explanatory Report Council of Europe Convention on Action against Trafficking in Human Beings, para 127.

⁹ Article 10(1), CoE Convention.

¹⁰ Article 18(3) Directive 2011/36/EU.

Border Agency as they have been designated the ‘competent authority’.¹¹ International collaboration between States and internal cooperation between different authorities is required to assist in the identification process.¹² The CoE Convention and Directive 2011/36/EU do not detail the exact procedure for the identification of victims of trafficking which will vary within each State. This may lead to variations between States in the effectiveness of the procedures employed. In order to increase the identification rate and ensure consistency, States could share and adopt best practices within the international community which will hopefully be encouraged by the GRETA reporting system and is something which is recognised by Directive 2011/36/EU as an important element of the response to human trafficking.¹³

Victims of trafficking may not have a legal immigration status in the country of destination. The CoE Convention and Directive 2011/36/EU both require that, if there are reasonable grounds for believing that someone is a victim, protection must be provided as if they were a victim and they must not be removed from the country until the identification process is complete, even if they are illegally in the country.¹⁴ Without this provision, trafficking victims could be removed and returned to their country of origin without being identified as victims. Rights to protection would be rendered ‘...*purely theoretical and illusory if such people were removed from the country before identification as victims was possible*’.¹⁵

¹¹ As discussed in *Chapter Five*.

¹² Article 10, CoE Convention.

¹³ Recital 4 Directive 2011/36/EU.

¹⁴ Article 10(2) and Article 12(1) and 12(2) CoE Convention; Article 11(2) Directive 2011/36/EU.

¹⁵ Explanatory report, (n4), paragraph 131.

It would also result in a great number of trafficking victims being left without protection and assistance to aid their recovery from the exploitation experienced.¹⁶

Although the Trafficking Protocol recognises that there is a need to protect victims of trafficking and their human rights,¹⁷ the lack of tangible obligations in relation to victim identification demonstrates that the overriding aim is not one of protecting the human rights of victims. The focus is predominantly on the control of borders and the prevention of organised crime.¹⁸

Focusing primarily on the criminal prosecution of traffickers rather than on identification procedures is problematic for both victims and States. If victims are not identified they will be deprived of protective measures designed to remove them from exploitative situations and assist in their recovery. From the perspective of the State and the prosecution of perpetrators, failing to identify victims of human trafficking result in lost opportunities for States to tackle trafficking in human beings more effectively. Ensuring that there are rigorous identification procedures in place would result in States not only protecting more victims through increased rates of identification, but would also potentially increase the number of witnesses available and willing to cooperate in criminal proceedings.

¹⁶ Explanatory report, (n4), paragraph 131.

¹⁷ Recital Trafficking Protocol.

¹⁸ As discussed in *Chapter Four*.

The CoE Convention and Directive 2011/36/EU contain important provisions specifically for the identification of child victims¹⁹ and in this way are to some degree child-sensitive. Where there may be doubt as to the age of a victim and there are reasons to believe the victim is a child the Convention requires that:

'...he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age'.²⁰

These provisions aim to ensure that the identification process does not result in a child victim being treated as an adult and not receiving additional support that is available to children.²¹

Although the Asylum and Immigration Act 2004 and the Sexual Offences Act 2003 do not contain provisions relating to the identification of trafficking victims, the UK has responded to its obligations under the CoE Convention by introducing the National Referral Mechanism. This involves any suspected trafficking victims being referred to the UKHTC for assessment and possible identification as a trafficking victim. It is important that the UK has a system in place to help with the identification of potential trafficking victims, including children, as without this there would be a lack of consistency in the identification process which could result in trafficking victims not benefitting from the protection and assistance needed.

¹⁹ Article 10 CoE Convention and Article 13(2) Directive 2011/36/EU.

²⁰ Article 10(3), CoE Convention.

²¹ As discussed in *Chapter One*.

3. THE CREATION OF AN IMAGE OF THE TRAFFICKED CHILD

Although the law encompasses all trafficking, regardless of the methods used to secure entry into the UK or the subsequent exploitation, the way the law has been implemented and the policy surrounding trafficking has resulted in the creation of a particular image of the trafficked child.²² This child is presented as part of a homogenous group, who is a passive victim of organised criminal activity and is most often sexually exploited. This child is the ‘child of trafficking discourse’. Askola used the concept of the ‘woman of trafficking discourse’ to describe the creation of a category of women who were ‘innocent victims’, portrayed as a group separate from prostitutes and illegal immigrants who were perceived as criminals. The ‘woman of trafficking discourse’ within the trafficking framework was, Askola argues, much more closely linked to these two groups of ‘criminal’ women in reality than is acknowledged. The ‘woman of trafficking discourse’ would work as a prostitute and had also in some way breached immigration laws, but despite this criminal behaviour she would be categorised as the ‘innocent victim’. Askola regards the separation between these groups as an artificial one. She argued that many ‘trafficked’ women cannot ‘fit’ into the category of the woman of trafficking discourse because the category is determined on her status as an ‘innocent victim’.²³

In a similar way to the ‘woman of trafficking discourse’, the child exploited in domestic work does not ‘fit’ into the ‘child of trafficking’ discourse. Children and women are aggregated into one artificially homogenous group requiring particular attention due to the perception that

²² Similar ideas of an “iconic victim” or a “pro-typical victim” have previously been explored, see J Srikantiah, ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 *Boston University Law Review* 157, 187.

²³ H Askola, ‘Awkward Aliens: Female Migrants, Exploitation and the Trafficking Framework’ in H Stalford and S Currie and S Velluti (eds), *Gender and Migration in 21st Century Europe*, (Ashgate Publishers, 2009), 170-172 .

they are vulnerable to trafficking.²⁴ This homogeneous group of children and women are presented as victims of trafficking which indirectly implies that perpetrators of this crime are male adults. This representation of children and of women is problematic. Although many victims of trafficking are women, exploited particularly in prostitution, not all women are victims. Many women are involved in the trafficking and exploitation of children, particularly within the context of exploiting children in domestic work within a household in the UK. Children and women may share some similar experiences as victims of trafficking, however, due to a child's unique vulnerabilities in such exploitative circumstances they have varying needs once discovered and identified as a victim of trafficking.

The association created between children and women in the trafficking discourse shifts the focus of law enforcement towards trafficking which involves sexual exploitation of the child. This stems from the preoccupation with women and prostitution evident in the trafficking framework. Not only are children exploited in other ways beyond sexual exploitation, children themselves are not one homogeneous group, although they are presented as such. There is a hierarchy of homogeneity evident within the trafficking framework. First, women and children are grouped together as a homogenous group of vulnerable victims in need of special protection. Second, even where children are recognised and accorded special protective provisions, they are dealt with as a homogenous group of children with the same needs and vulnerabilities regardless of their individual experience or type of exploitation experienced. This does not reflect the reality and the diverse nature of children's experiences.

²⁴ For discussion of similar aggregation of women and children in relation to asylum claims see J Bhabha, 'Demography and rights: women, children and access to asylum' (2004) 16(2) International Journal of Refugee Law 227.

Examining the ‘child of trafficking discourse’ in the context of the child trafficked and exploited in domestic work, it is apparent that this child challenges the image presented of the trafficked child in many ways. The representation of trafficked children as a homogenous group fails to recognise the characteristics of children in domestic work. The child’s characteristics influence the purpose for which a child is trafficked from their country of origin. Two particularly relevant characteristics are gender and age.²⁵ The gender of children is an important factor since a disproportionate number of girls are exploited in domestic work.²⁶ The International Labour Organisation has stated that domestic work is the largest employment category for girls under the age of 16.²⁷ Research has shown that boys and girls are trafficked from different countries for different forms of exploitation.²⁸ Age is also an important factor in the context of trafficking for domestic work, with varying degrees of vulnerability and specific issues dependant on the age of the child at the point of exploitation affecting the experience of the individual child of trafficking.

Trafficked children are often presented as a group of children who are exploited by organised criminal groups, focusing predominantly on children who have been sexually exploited.²⁹ In fact there are various

²⁵ It is recognised that other characteristics, such as race are also relevant, but within this thesis gender and age are the focus. These characteristics are discussed in detail in *Chapter Seven*.

²⁶ J Blagbrough , ‘Child Labour: A Modern Form of Slavery’, (2008) 22 *Children & Society*, 179, 180.

²⁷ ILO available <http://www.ilo.org/ipecc/areas/Childdomesticlabour/lang--en/index.htm> [last accessed 23.10.2011].

²⁸ As discussed in *Chapter Five*.

²⁹ As discussed in *Chapter Four*.

methods of recruitment dependant on the intended method of exploitation. These recruitment methods include the use of marriage agencies or media advertisements to facilitate the sexual exploitation of trafficking victims.³⁰ Shelley recognised that: *'The trade in human beings is not a uniform business and operates very differently in diverse cultural and political contexts.'*³¹ Children who are exploited through domestic work are often removed from their family with the parents' consent. Individuals and more informal arrangements are involved in these circumstances rather than organised criminal groups.³²

The trafficking framework also presents the child as a passive victim in need of protection rather than considering the possibility that the child in domestic work is an economic actor and their decision to migrate for work is an empowering choice they have made themselves. Children who are exploited need protection but there is little recognition that children are capable of making an autonomous decision in seeking work and providing an economic benefit to either themselves or their family.³³

4. THE UNIQUE SITUATION OF CHILDREN IN DOMESTIC WORK

When child trafficking occurs there are similarities between the experiences of victims exploited in various different ways. However, the unique situation of children in domestic work raises particular issues and challenges for the responses to this problem. There are three main features

³⁰ DM Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (2000) 53(2) Journal of International Affairs 625, 634.

³¹ L Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10 Brown Journal of World Affairs 119, 122.

³² As discussed in *Chapter Six*.

³³ Child migration, child labour and child autonomy is considered in detail in *Chapter Eight*.

to be considered; first, the abuse of private fostering arrangements, second, the involvement of the child's own parents in organising these arrangements, and finally the setting of exploitation within the private sphere. These elements combined result in a unique and complex picture and create particular difficulties in the identification of children as trafficked children.

4.1 Child Fostering

Fostering is a tradition that is prominent in West Africa and involves a child who is sent from their home by their parents to live within a household with someone other than their parents. West Africa is used as an example due to the prevalence of this practice in this area. In the African countries of Ghana, Senegal and Mali several research projects found that between 28.5% and 51.8% of children between the ages of 0 and 14 were living apart from their mothers.³⁴ These figures include children who were fostered. Jacquemin researched child domestic workers in Adidjan, Ivory Coast and described the shift from kinship fostering arrangements where 'little nieces' worked within a household of a family member to those children who were in domestic work in a non-relatives household as:

'Even if some employers continue to pay heed to a fictitious kin relation, the inclusion in the intimacy of the home of the 'stranger' that the unrelated girl really is represents a significant symbolic

³⁴ A Whitehead and IM Hashim and V Iversen, 'Child Migration, Child Agency and Intergenerational Relations in Africa and South Asia' (2007), Working Paper T24, Development Research Centre on Migration, Globalisation and Poverty at 10-11 available <http://www.migrationdrc.org/publications/working_papers/WP-T24.pdf> [last accessed 1.11.2011].

*break with the prevailing ideology of solidarity based on kinship that justified the presence of 'little nieces'.*³⁵

When fostering occurs, the adult of the receiving household may be a relative of the child or alternatively an adult who is a non-relative. The most common types of fostering used by parents in West Africa are kinship fostering, crisis fostering, apprentice fostering, domestic fostering and educational fostering.³⁶ Kinship fostering involves the child living with relatives, whereas the other categories of fostering may involve either relatives or non-relatives. The shared rationale behind each of these different fostering arrangements is to enable the child to have opportunities which would be otherwise unavailable to them if they were to remain within their family home. These arrangements have been referred to as 'cultural placements' often involving child labour being exchanged for an education or training.³⁷ Bass regards these arrangements as 'fostering work relationships' which she sees as not inherently exploitative.³⁸ Kinship fostering enables a child to be cared for by relatives who are usually in a better financial situation than the child's own family, whilst crisis fostering is used to assist families in time of need and is more temporary in nature. Both apprentice and domestic fostering aim to provide children with training and skills seen as necessary for later life. Educational fostering aims to enable the child to take advantage of educational opportunities that would otherwise not be available to them.

³⁵ M Jacquemin, 'Can the Language of Rights Get Hold of the Complex Realities of Child Domestic Work? The case of young domestic workers in Abidjan, Ivory Coast' (2006) 13 *Childhood* 389, 395.

³⁶ A Kielland and M Tovo, *Children at Work: Child Labor Practices in Africa*, (Lynne Rienner Publishers, 2006), 31.

³⁷ K Manzo, 'Exploiting West Africa's children: trafficking, slavery and uneven development' (2003) 37 (4) *Area* 393, 397.

³⁸ LE Bass, *Child Labor in Sub-Saharan Africa*, (Lynne Rienner Publishers, 2004), 23.

In the context of the children considered within this thesis, the apprentice and domestic fostering are of particular concern. Both categories are discussed within the thesis under the umbrella of private fostering arrangements where the adult ‘looking after’ the child is not a relative.³⁹ The term ‘private fostering’ as defined in UK law only applies to non-relatives and therefore it is necessary to make a distinction and exclude arrangements where relatives care for a child from further examination.⁴⁰

4.2 The Potential for Abuse of Private Fostering Arrangements

The potential for traditional private fostering arrangements originating in Africa to be abused through trafficking is a central issue in this thesis. There is evidence that children from West Africa make up a substantial number of the total of known privately fostered children in the UK.⁴¹ There are reportedly between 15,000 and 20,000 children in private fostering arrangements within the UK and the majority of these children are girls from West Africa.⁴² It is not suggested that all of these children have been trafficked, but it is known that traffickers are abusing the cultural tradition of fostering in certain circumstances.

³⁹ As defined by section 105, Children Act 1989 a “relative”, in relation to a child, means a grandparent, brother, sister, uncle or aunt (whether of the full blood or half blood or by affinity) or step-parent.

⁴⁰ Section 105, Children Act 1989.

⁴¹ B Holman, ‘Private fostering: Old problems, new urgency’ (2003) 27(1) Adoption & Fostering 8, 10.

⁴² M Dottridge and L Stuart, ‘End Child Exploitation: Child work today’ (2005) at 35-52 UNICEF available <http://www.unicef.org.uk/Documents/Publications/ecechild2_a4.pdf> last accessed 20.10.2011].

Trafficking through private fostering arrangements has been called an *'abuse of Africa's extended family tradition'*⁴³ with false promises regarded as turning a cultural practice into a *'relationship of exploitation.'*⁴⁴ West African governments have sought to clarify and distinguish between a trafficked child who has been "exported" to exploit their labour and a child who was "placed" in a traditional private fostering arrangement. During discussions between governments and the International Labour Organization (ILO) and the United Nations Children's Fund (UNICEF) in 2000, a definition was developed to provide a regional definition of child trafficking. It stated:

*'For the transfer of children to qualify as trafficking, there should be: 1. the conclusion of a transaction'⁴⁵ 2. the intervention of an intermediary; 3. the motive to exploit.'*⁴⁶

This regional definition fails to recognise the reality of the situation of children sent from their homes. The fact that exploitation is not defined is problematic since exploitation of the child may differ between the different cultural contexts of West Africa and the UK. The regional definition does nothing to protect children from exploitation; rather it limits the possibility of parents being accused of being involved in the trafficking of their own children. The requirement of an intermediary in order for these agreements

⁴³ J Astill, 'The Terrible Truth about the Ship of Slaves', *The Guardian*, (London 21 April 2001) available < <http://www.guardian.co.uk/world/2001/apr/21/jamesastill>> [last accessed 01.11.2011].

⁴⁴ K Manzo , (n37), 397-398.

⁴⁵ A Kielland and M Tovo (n36) 165: The term "transaction" refers to "any institution or practice through which young people, below 18 years of age, are handed over by either or both parents, or by a guardian to a third person, whether for a fee or not, with the intention of exploiting the person or the work of the young person".

⁴⁶ A Kielland and M Tovo, (n36) at 35.

to qualify as trafficking will exclude the circumstances where the parents make the arrangements with the person who will take their child from their home to the UK, and receive the child into their home from falling within the regional definition of trafficking, despite the subsequent exploitation of the child. The child has not been passed on to a third party once in the UK, but remains with the adult who made the agreement with her parents,⁴⁷ which is often the case where children are exploited in domestic work. There needs to be comparable definitions of trafficking in both countries of origin and countries of destination to provide a comprehensive protective framework. Without consistency, cultural traditions are effectively given government sanction to be abused and will fail to protect children from exploitation.

4.3 Private fostering under UK Law

Under UK law private fostering involves a situation when a child of up to sixteen years of age (eighteen if disabled) is in the care of someone who is not his or her parent or relative for a period exceeding 28 days.⁴⁸ On arrival in the UK, a child who is accompanied or met by an adult who does not have parental responsibility for the child must be reported to social services if they are going to be in the adult's care for longer than 28 days.⁴⁹ This arrangement would be categorised as private fostering and would be subject to supervision by social services. However, this requirement, will fail to protect children who are brought into the UK on visitor permits, allegedly for less than 28 days, but are kept for longer within the UK.

⁴⁷ UK Department for Education Consultation, 'Working together to safeguard children: Safeguarding children who may have been trafficked' 9 para 3.2.1.
<<http://www.education.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1497&menu=3>> [last accessed 18.04.2012]

⁴⁸ Section 66, Children Act 1989.

⁴⁹ Section 66(2) Children Act 1989.

A privately fostered child is dealt with differently than a child placed by a local authority under the duties imposed by the Children Act 1989.⁵⁰ They are also distinct from kinship or family fostering placements. The local authority does not 'place' the child or find the potential foster carer; instead the arrangement is made by the child's parents or person with parental responsibility. The Children Act 1989 places obligations on local authorities to ensure that children placed within someone else's home by their parents are properly looked after and to check that the arrangement is suitable.⁵¹ Following the Children Act 2004, guidance and regulations have strengthened the obligations of local authorities.⁵² Once the local authority has been notified that a child is or will be privately fostered they have a duty to visit and assess the suitability of the placement in order to safeguard the welfare of the child.⁵³ Additionally, they now have a duty to promote awareness of the requirement of notification of private fostering arrangements,⁵⁴ but the onus is on the parent and the foster carer to notify the local authority of this arrangement.⁵⁵ Failing to notify the local authority is an offence and a person found guilty on summary conviction would be liable to a fine.⁵⁶ The reliance on parents and the receiving adult to inform local authorities of the arrangement means that children are left

⁵⁰ See Schedule 2, Part II Children Act 1989.

⁵¹ Section 67 Children Act 1989.

⁵² Section 44 Children Act 2004 amended section 67 Children Act 1989.

⁵³ Section 67 Children Act 1989.

⁵⁴ Section 44, Children Act 2004 inserted Schedule 8, para 7A, Children Act 1989.

⁵⁵ Notification must occur at least six weeks prior to the arrangement commencing or immediately if the arrangement has already commenced or will do so within six weeks. Regulation 3, Children (Private Arrangements for Fostering) Regulations 2005.

⁵⁶ Section 70, Children Act 1989.

vulnerable and the systems in place for notification of private fostering arrangements are inadequate. There has been suggestion that private fosterers should be registered and supervised in the same way as child minders where much more formal obligations exist.⁵⁷

Holman argues that the notification process fails privately fostered children with vast disparities between the reported figures of these children and the actual number who are privately fostered.⁵⁸ Notification is unlikely to happen when the child's parents are in West Africa and unaware of the requirements of UK law or, if the child is being exploited in domestic work, the receiving adult is not going to report that they have a child within their household under the age of 16. The fact that there are no provisions permitting children enter the UK in order to be privately fostered, coupled with the local authority duty to check the child's immigration status as part of their duties of checking the welfare of a privately fostered child, act as a disincentive to adults who have secured the child's illegal entry into the UK from notifying the local authority of the private fostering arrangement.⁵⁹ Children in this situation are therefore vulnerable to abuse and powerless to change their circumstances.⁶⁰ It has been claimed that the number of children in private fostering arrangements is much greater than the number formally recorded.⁶¹ It has been suggested that a significant

⁵⁷ L Bostock, 'Effectiveness of childminding registration and its implications for private fostering' (2003), 5 Position paper 1, Social Care Institute for Excellence (SCIE), London. available <<http://www.scie.org.uk/publications/positionpapers/pp01.asp>> [last accessed 01.11.2011].

⁵⁸ B Holman, (n41), 14.

⁵⁹ Submission of Evidence to the Home Affairs Committee, British Association for Adoption and Fostering p2 at paragraph 4.1 and 4.5

⁶⁰ B Holman, (n41), 13.

⁶¹ T Philpot, '*A very private practice: An investigation into private fostering*', (British Association for Adoption and Fostering, 2001), 4-7.

proportion of privately fostered children would come under the Children Act 1989 definition of being 'in need'.⁶²

4.4 Fostering and Entry into the UK

Parents in West Africa who want to provide greater opportunities for their children often use private fostering arrangements to enable their children access to education that would otherwise be unavailable to them if they remained within the family home. The child may be moved within their own country or internationally. For children entering the UK from West Africa there are no specific provisions in the immigration rules allowing for their admission for the purpose of being privately fostered.⁶³ Children may however, accompany their parents into the UK when their parent(s) have been given temporary right to enter, for example on a student, work or a visitor's permit. During their stay parents are able to make a private fostering arrangement for their child, but this right only exists for the period of time that the parent has been permitted to be legally present in the UK. When the parent is due to leave the UK, the fostering arrangement will come to an end and the child needs to leave the UK with their parent.⁶⁴ If the child does not leave the UK by the expected date stamped on their passport on entry, they will automatically become an 'overstayer', and any child who is over the age of ten will have committed an offence under UK immigration law.⁶⁵

⁶² J Morris, 'Children on the edge of care: Human rights and the Children Act' (2005) at 20, Joseph Rowntree Foundation, available <http://www.jrf.org.uk/publications/children-edge-care-human-rights-and-children-act> [last accessed 01.11.2011].

⁶³ Department for Education and Skills, 'Replacement Children Act 1989 Guidance on Private Fostering; Every Child Matters', 48, para 8.1 <http://media.education.gov.uk/assets/files/pdf/c/children%20act%201989%20%20%20guidance%20on%20private%20fostering.pdf> [last accessed 20.04.2012].

⁶⁴ *Ibid.*

⁶⁵ Department for Education and Skills, (n63), 49, Para 8.2

Where parents are not in the UK, but still wish to seek other avenues for their child to have greater educational opportunities than they themselves can provide, they may use private fostering arrangements for this purpose. Since the UK immigration rules do not provide for children to be brought into the UK in order to be placed with foster carers, the adults concerned have to find alternative ways of securing the child's entry. This may involve the parents turning to a third-party who assures them that they can secure the child's entry into the UK. Methods used to bring children into the UK for these private fostering arrangements are often very similar to those used where children are trafficked into domestic work in the UK.⁶⁶

It should be noted that not all private fostering arrangements will involve subsequent exploitation of the child and some may actually work for the benefit of the child. However, this is not always the case and some children may be exploited despite the original intention of the adult to privately foster them. In addition, a legitimate concept such as private fostering may be purposefully manipulated by traffickers in an attempt to hide the intended abuse, exploitation and trafficking of children.

This results in the possibility that a child discovered in a house in the UK that is not a member of the family, may in fact be in a genuinely beneficial private fostering arrangement; a child who is in a private fostering arrangement who is being abused and exploited; or a child who has been trafficked under the guise of a private fostering arrangement. Although each of these are easily distinguishable in theory with different legal

⁶⁶ These similarities are illustrated by the case of Victoria Climbié. She was brought from West Africa to the UK via France by her great aunt. She had a false passport which stated that she was her daughter and gained entry to the UK. Victoria's parents agreed to a private fostering arrangement; however Victoria was subsequently abused and killed by her great aunt and her husband.

responses, this is more difficult in practice, particularly the latter two, if they are all being presented in terms of a privately fostered child.

The shared similarities between the methods used in bringing children into the UK for private fostering and child trafficking complicate the issue of identifying children as trafficked children. The child will be within a household in the UK with an adult who is not a relative and they are expected to undertake domestic work. Both trafficking and private fostering are hidden phenomena which creates extreme difficulties in accurately ascertaining the number of foreign children who are in the UK in private fostering arrangements and those children in domestic work who have been trafficked.

If parents are unaware of the exploitation their child may subsequently experience, and think that they are agreeing to a genuine private fostering arrangement, then legally they cannot be prosecuted for their involvement in the child's trafficking as they would not have the required intention to exploit the child or believe that others would be doing so.⁶⁷ However, some parents may be aware that their child will be entering domestic work on their arrival and have some awareness of what awaits their child. They may receive some payment or other benefit which ensures their agreement to this arrangement which would be presented to the outside world as a private fostering arrangement. In these circumstances parents have been complicit in the trafficking of their own child and it may be possible for them to be held legally responsible for their role.

⁶⁷ As required under Article 3 Trafficking Protocol.

4.5 The relationship between Adult and Child

Although, as already stated, private fostering under UK law only applies to non-relatives, the relationship between the adult (trafficker) and the child who is trafficked is presented in different ways at the various stages of the trafficking process. Initially, in the country of origin, the relationship is one of non-relatives, with the adult entering a private fostering arrangement with the consent of the child's parents. At the point of entry into the UK however, the adult will often present themselves as a relative of the child.⁶⁸ This is in order to avoid the difficulties in securing the child's entry into the UK. Once the entry of the child into the UK has been secured the true relationship between adult and child as non-relatives would exist. If the child is subsequently discovered the relationship is likely to be presented as a private fostering arrangement where the adult would claim they were 'looking after' the child. Private fostering arrangements would then be manipulated in an attempt to hide the trafficking and exploitation experienced by the child. In these circumstances identifying a child as a trafficked child rather than privately fostered is problematic.

Similarly an adult accompanying the child entering the UK to be privately fostered will also claim that they are a relative of the child, often providing false documents with which substantiate this claim. This was the situation which Victoria Climbié was involved in, a young girl who was taken from her home in West Africa by her great-aunt. Victoria initially travelled to France in November 1998 when she was only 7 years old and subsequently to the UK. Victoria's parents had consented to her migration with her great-aunt, believing they were agreeing to her being privately fostered and taken to France in order to benefit from an education and a better life than

⁶⁸ Home Office, 'Safeguarding Children who may have been trafficked: Practice Guidance' (2011) 8 available <<http://cscb.org.uk/news.php>> [last accessed 23.04.2012].

she would have if she remained with them.⁶⁹ Victoria travelled on a passport which stated she was her great-aunt's daughter when entering France and the UK.⁷⁰ Victoria was neglected, abused, and beaten over a prolonged period of time whilst in the 'care' of her great-aunt and died on 25 February 2000 at the age of 8 years and 3 months old.⁷¹ The close relationship between private fostering and trafficking complicates the identification of children as belonging to either of these categories.

4.6 Children's entry into domestic work

As can be seen from the discussion above, a child's entry into domestic work may result from an initially genuine private fostering arrangement which subsequently turns into an exploitative situation, they may be trafficked with the intention that their labour despite their parents consenting to what they believe to be a private fostering arrangement or it may be possible that an adolescent claims to have made their own voluntarily decision to migrate⁷² with their parents' consent, knowing that they will be undertaking domestic work and viewing this as an employment relationship which subsequently leads to an exploitative situation.

Despite the distinctive route into domestic work taken by these children, each child is in the care of an adult who is not a relative and is

⁶⁹ The Victoria Climbié Inquiry: Report of an Inquiry by Lord Laming (2003) CM 5730, paragraph 3.3-3.5 available <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008654> [last accessed 01.11.2011].

⁷⁰ Ibid, paragraph 3.4.

⁷¹ The Victoria Climbié Inquiry (n69), paragraph 6.508.

⁷² J Kane, 'Helping hands or shackled lives?: Understanding child domestic labour and responses to it' (2004) at 37, ILO at VII available <http://www.ilo.org/public/libdoc/ilo/2004/104B09_138_eng1.pdf> [last accessed 01.09.2010].

subsequently exploited in domestic work. There are also different legal responses under UK law to protect children within each of these three factual situations. The child in a genuine private fostering arrangement would fall under the Children Act 1989 (as discussed above), and the trafficked and exploited second child would fall within section 4, Asylum and Immigration Act 2004 and the child should be provided with the appropriate protection as a trafficked child.⁷³ The third child, if discovered, would initially be cared for as a child in need under the Children Act 1989 pending clarification of their immigration status and probable return to their country of origin. Although it is theoretically possible to make clear factual and legal distinctions between these three situations, it is significantly more difficult in practice.

Kielland and Tovo's research focused on child labour in Africa and found some evidence that the work of privately fostered children 'frees' children within the receiving household from household work, allowing the children within the receiving household to attend school and obtain an education. They also found that the woman of the receiving household benefits from the labour of the fostered child in managing the household work and thereby allowing the woman of the receiving household to undertake paid employment.⁷⁴ Although there is limited evidence to date, it is likely that the same benefits accrue to the receiving households within the UK.⁷⁵ In Africa it has been reported that around 14 per cent of children under the age of 14 live apart from their parents in private fostering arrangements

⁷³ As discussed in *Chapter One*.

⁷⁴ A Kielland and M Tovo, (n36), 31-32.

⁷⁵ See the example of African families bringing children to the UK for domestic work in L Bostock, 'Effectiveness of childminding registration and its implications for private fostering' (2003) 17, *Social Care Institute for Excellence*, available <<http://www.scie.org.uk/publications/positionpapers/pp01.asp>> [last accessed 28.04.2012].

even though 73 per cent of these children have both parents who are alive.⁷⁶ This raises the problem of separating fostered children from trafficked children if the work carried out and the resulting benefits to the household are so similar.

5. PARENTAL COMPLICITY

Child trafficking for domestic work and private fostering share several common features, including the fact that parents are involved in both situations, and they are both, to varying degrees, hidden phenomena. The involvement of parents exacerbates the problem of the identification of children as either privately fostered or trafficked, but also subsequently affects any possible return of the child to their family. This raises particular difficulties for the legal response and protection provided for children in these circumstances. A child who is discovered in a private household in the UK and identified as a trafficked child exploited in domestic work may lack protection from within their own family. Re-trafficking of individuals is a concern which has been raised in relation to women who are sexually exploited.⁷⁷ The risk of re-trafficking is undoubtedly greater for a child who is returned to their family and country of origin when it is the family themselves who originally consented to the child leaving home. The CoE Convention explicitly recognises this difficulty and requires all decisions concerning the return of the child to be determined in line with the child's best interests.⁷⁸ The involvement of parents in facilitating trafficking of their own children needs to be addressed as without which the future care and safety of the child is questionable. Risk assessments must be carried

⁷⁶ A Kielland and M Tovo, (n36), 31.

⁷⁷ H Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing, 2007), 90.

⁷⁸ Article 10(c), CoE Convention and Explanatory Report, para 137.

out to ascertain the risk of the child being re-trafficked following any reintegration process and return should only occur if it is also in the best interests of the child.⁷⁹

Separating those parents who have been deceived and genuinely believed that their child was leaving to be privately fostered and those parents who knew of the work element of the arrangement is problematic. It is often expected that children in West African communities will undertake some form of work which is regarded as training for later life. For girls, domestic work is seen as an appropriate environment. Parents who receive any payment may be categorised as trafficking their own children. Even if parents do not receive any payment or benefit on conclusion of the arrangement, they may still have been involved in the trafficking of their own child. The effect of labelling parents as 'good' or 'bad' parents, in a similar way to labels applied to women in prostitution, creates standards of those parties 'deserving' or 'undeserving' of protection and victims as 'innocent' or 'complicit' in illegal migration practices.⁸⁰ There are many factors which are relevant to the decisions taken by parents and the parents' motivation is a key element for consideration..

5.1 Motivations

Parents' motivation in agreeing to a private fostering arrangement for their child may vary and will be, to some extent, dependent on available alternatives for the child.. Sometimes the child's welfare may be the central concern for the parents who may hope that their child will enjoy a better standard of living, with opportunities such as access to education that

⁷⁹ R Surtees, 'Child Trafficking in Southeastern Europe: Different Forms of trafficking and Alternative Interventions' (2005) 14 Tulane Journal of International & Comparative Law 455, 487.

⁸⁰ A Gallagher, (n7), 166.

they would not experience if they stay in the family home. Robson questions why parents would agree to their child being taken by 'slave traders' and argues that many parents do not in fact consent. He found that parents are not agreeing to enslavement, but to a '*...valuable heritage and traditional ways of educating a child.*'⁸¹

Traffickers may not need to use coercion, instead preferring to focus on geographical areas where both parents and children are willing to agree to the child leaving their home. Parents may believe the stories traffickers tell them of opportunities for their child to have a more prosperous future. Manzo identified that '*Coercion is not the key element behind trafficking in the sense that trafficking thrives better on willingness.*'⁸² If child's family is under extreme financial pressure with no opportunity for the child's education and few prospects of future employment, parents may take the view that seeking 'to "expand" the child's horizons by temporarily "limiting" them may provide some potential future prosperity. In this situation, even if parents realise that their child would experience some degree of exploitation, they may identify longer term benefits in opportunities that they themselves cannot provide.'⁸³ The possibility of the child having a better life is often a motivation for the parents with the family hoping for a better standard of living, improved healthcare, possibly the removal of their child from a situation of conflict or danger, and an opportunity for an education for their child. Parents may feel that they are acting in their child's best interests in these circumstances.

⁸¹ K Manzo , (n37), 397 quoting E Robson, 'Portraying West Africa's children: moral panics, imagined geographies and globalisation' in R Cline-Cole and E Robson (eds), *West African worlds: paths through socio-economic change, livelihoods and development*, (Pearson Education Ltd, 2005).

⁸² K Manzo ,(n37), 398.

⁸³ TC Janak, 'Haiti's "Restavec" slave children: Difficult chores, difficult lives...yet...Lespwa fe Viv' (2000) 8 [International Journal of Children's Rights](#) 321, 326.

In some circumstances the immediate economic motivation may be more evident if the parents providing their consent on the understanding that money will be remitted to them on a regular basis in return for the work undertaken by their daughter. Alternatively the parents may effectively 'sell' their child and receive payment in return for their consent.⁸⁴ Parents may view this process as a 'coping strategy' which alleviates the family's immediate financial difficulties and, by sending their child away, some pressure on the family's finances is eased because there is one less mouth to feed.⁸⁵ Any ongoing remuneration would help towards supporting the other children remaining within the family, while at the same time providing, what they believe to be, a better life for their child.⁸⁶ However, this arrangement can turn into exploitation of the child's labour rather than a better life.⁸⁷

Akresh found that households were significantly more likely to foster a child out from the family if there were negative economic events, or the family had several female children within the same age bracket who were regarded as an additional child beyond those needed to achieve financial survival for the family.⁸⁸ Parents may be influenced and provide their

⁸⁴ C Somerset, 'Cause for concern? London social services and child trafficking' (2004), 9, ECPAT UK available <<http://www.ecpat.org.uk/content/ecpat-uk-reports>> [last accessed 05.10.11].

⁸⁵ L Shelley, 'Human trafficking as a form of transnational crime' in Maggy Lee (ed) *Human Trafficking* (Willian Publishing 2007), 128.

⁸⁶ R Surtees, (n79), 481; *Ibid*.

⁸⁷ M Black, 'Child Domestic Workers: Finding a Voice' (2002) at 8-9 Anti-Slavery International available <http://www.antislavery.org/english/resources/reports/download_antislavery_publications/child_labour_reports.aspx> [last accessed 01.11.2011].

⁸⁸ R Akresh, 'Risk, Network Quality, and Family Structure: Child Fostering Decisions in Burkina Faso' (2005) at 1-2, Institute for the Study of Labour (IZA), Bonn, available <<ftp://repec.iza.org/RePEc/Discussionpaper/dp1471.pdf>> [last accessed 01.11.2011].

consent when either they themselves or the child is promised money.⁸⁹ The parents may need to repay loans, buy more expensive items or meet emergency costs such as healthcare.⁹⁰

It has been suggested that parents who facilitate child work are '*...parents abandoning their parental responsibilities and duties, and hiring their children away to complete strangers.*'⁹¹ The following extract from Anderson illustrates some of these motivations and the consequences that ensue for the child:

*'Roseline from Southern Nigeria was bought for £2 from her impoverished father, who was led to believe he would be paid that sum regularly every month to help feed his other five children. Roseline, he was told by the couple, was to stay as their guest and be taught domestic science. They brought her to Sheffield, where the husband worked as a doctor. She was not allowed out, had to sleep on the floor, and was made to kneel on the floor for two hours if she fell asleep before being allowed to go to bed. Her working day started at 5.30am and lasted 18 hours. She cleaned and washed for her employers and their five children. She was beaten and starved. On one occasion, in desperation, she wrote a note intended for the next-door neighbour offering sex for a sandwich.'*⁹²

⁸⁹ S Raghavan and S Chatterjee, 'A taste of slavery: Lured by a promise of money' (2001) *Knight Ridder Newspapers*, (Washington Bureau 24 June) available <<http://vision.ucsd.edu/~kbranson/stopchocolateslavery/atasteofslavery.html>> [last accessed 17.09.09].

⁹⁰ MA Clark, 'Trafficking in Persons: an issue of human security' (2003) 4(2) *Journal of Human Development* 247, 255.

⁹¹ SM Degirmencioglu and H Acar and YB Acar, 'Extreme Forms of Child Labour in Turkey' (2008) 22 *Children & Society* 191,192.

⁹² B Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books, 2000), 133.

Unfortunately, this is not an isolated or extreme case but it clearly illustrates one of the motivations of parents for sending their children to another household as well as the experiences of the victim of these arrangements.

The receiving household will also be motivated by the potential benefits of the child's labour to the receiving household.⁹³ These motives are important in relation to the potential impact for the child. If the receiving household regards the placement as providing a better life for the child then there is a greater likelihood that the welfare of the child will be of more importance to the receiving household. In contrast, the placement may be viewed as an opportunity to supply someone to undertake the domestic work, freeing both the woman and children in the receiving household from labour, and the child's welfare is unlikely to be a prominent feature of the arrangement.

Parents may not be aware that private fostering may involve foster mothers taking the child and subsequently passing the child onto someone else.⁹⁴ This was the situation in the case of *Siliadin v France*.⁹⁵ Mrs D 'lent' Siwa-Akofa to Mr and Mrs B who decided to 'keep' her, and although the parents were subsequently made aware of the change, this was not the original private fostering arrangement made between Mrs D and Siwa-Akofa's parents. Children trafficked for one form of exploitation, such as domestic work, are often subsequently exploited in other ways.⁹⁶

⁹³ A Kielland and M Tovo (n36), 33-34.

⁹⁴ T Philpot, (n61), 20.

⁹⁵ [2005] 20 BHRC 654; This case is discussed in detail in *Chapter Three*.

⁹⁶ Y Rafferty, 'The Impact of Trafficking on Children: Psychological and Social Policy Perspectives', (2008) 2(1) Child Development Perspectives, 13, 13.

It is also questionable whether communities within countries of origin would accept the classification of work within a household as an example of trafficking. Traditions may have evolved which mean that sending children to work within another household is a normal practice within the particular community concerned and may even be regarded as an important part of a girl's training for later life.⁹⁷ However, it may also mean that the level of work and the demands subsequently placed on the child are also seen as normal.⁹⁸ Regardless of cultural traditions, children need to be provided with a minimum right to protection from abuse, neglect, exploitation and trafficking as provided for in Articles 19 and 35 of the United Nations Convention on the Rights of the Child.⁹⁹

6. A HIDDEN PHENOMENON: THE PRIVATE SPHERE

Private fostering arrangements are often considered as an aspect of informal care arrangements made by the family within the private sphere with little state intervention in these decisions.¹⁰⁰ The welfare of the children placed within private fostering arrangements remains the responsibility of the birth parents, even when the child is taken abroad and is at a great distance from their parents.¹⁰¹

⁹⁷ J Blagbrough, (n26), 180.

⁹⁸ R Surtees, (n79), 491.

⁹⁹ 1989, A/55/25.

¹⁰⁰ H Land, 'Spheres of care in the UK: separate and unequal' (2002) 22(1) Critical Social Policy 13, 29.

¹⁰¹ L Bostock, 'By Private Arrangement? Safeguarding the Welfare of Private Foster Children' (2004) 18 Children & Society 66-73, 67 citing C Woollard and B Clarke in A Wheal (ed.), *Private Fostering. In the Companion to Foster care*, (Russell House Publishing, 1999).

Human trafficking is a hidden phenomenon which creates difficulties in accurately assessing the extent of the problem.¹⁰² Individuals who are part of this hidden population may be reluctant to approach authorities for assistance due to fear of reprisal which helps to conceal the true extent of the problem. Heckathorn states that a 'hidden population is:

'...a group of individuals for whom the size and boundaries are unknown and for whom no sampling frame exists. Furthermore, membership in hidden populations often involves stigmatized or illegal behaviour, leading individuals to refuse to cooperate, or give unreliable answers to protect their privacy''¹⁰³

Where a child is trafficked into domestic work and is part of a hidden population, the invisibility of these children is compounded by the child's existence within a private household. This setting is problematic. The child is physically hidden from authorities such as doctors, schools and social services, and this is made easier by the fact that the home is a private setting. State intervention in the private sphere is significantly less than in the public sphere where other forms of exploitation take place but may be more easily identified. It has been suggested that there is a correlation between gaps in the literature relating to child exploitation and the hidden nature of these children's lives. Effective invisibility results in less focus on 'hard-to reach' children and children in domestic work could fall within this category.¹⁰⁴ Less regulation in an informal economy leaves children

¹⁰² As discussed in detail in *Chapter Five*.

¹⁰³ DD Heckathorn, 'Respondent-driven sampling: a new approach to the study of hidden populations' (1997) 44(2) *Social Problems* 174, 174.

¹⁰⁴ SM Degirmencioglu and H Acar and YB Acar,(n91) 191.

vulnerable to abuse and the private setting of the home means that regulation at national level is also lacking.¹⁰⁵

Private fostering arrangements are permitted by UK law. These arrangements share an additional characteristic with children trafficked in that both these situations take place in the private sphere. Both private fostering and trafficking for domestic work share this hidden quality. The true number of privately fostered children in the UK is just as difficult to ascertain as the actual number of children trafficked and exploited within a household in the UK.

A child who is discovered in sexual exploitation or found working within a more institutional setting such as factories, or in illegal activities such as cannabis cultivation, is generally more easily identified as a victim of trafficking. A child exploited through domestic work in a private household under the pretence of a private fostering arrangement is more difficult to identify as a 'trafficked' child since their existence is within the private sphere and shares characteristics with legal arrangements. The interaction between private fostering, parental involvement and the private sphere in the country of destination leads to difficulties for the identification of children in domestic work as trafficked children. Children forced into domestic work in the UK as a result of trafficking may not benefit from legal protection from abuse available to all children within the territory unless they are discovered and identified as victims of trafficking. Private fostering currently involves minimal state intervention.¹⁰⁶ With services stretched and financial constraints on local authority budgets, proactively seeking out children in private fostering arrangements may be

¹⁰⁵ J Blagbrough , (n26), 188.

¹⁰⁶ E Peart, 'The experience of being privately fostered', (2005) 29(3) Adoption & Fostering 57,57.

low on the list of local authorities' priorities. Due to the private nature of the arrangement, children in private fostering are particularly vulnerable to abuse without protective state involvement.¹⁰⁷ This is an element of private fostering which is equally applicable to children trafficked and exploited in domestic work.

7. THE STATE'S ROLE IN THE IDENTIFICATION OF TRAFFICKED CHILDREN

It is seen as natural for the State to regulate the more formal public sector, for example by providing employment protection within established workplaces. However, intervention with the family or private sphere is not as straightforward. Instead the issues and incidences where State intervention occurs or is appropriate are often blurred. There are numerous ways in which the State already intervenes in the family or private sphere such as through the regulation of domestic violence within the family home and the issuing of anti-social behaviour orders for children who are viewed by the State as 'out of control'. The State also intervenes with the family to regulate and set the legal boundaries of parents' rights to physically chastise their child or to require parents to attending parenting classes under court order. Beyond these punitive measures, State intervention includes child benefit or child tax credits and national insurance contributions. Despite these points of intervention, even with State involvement specifically to identify the child exploited in domestic work, the child would still remain easily hidden within the family structure. Instead, direct opportunities of contact with the child are needed.

The State has the opportunity to provide protection to children exploited in domestic work only if contact with the child is achieved. The State has

¹⁰⁷ Ibid, 62.

three main opportunities for contact. First, at the border when the child is initially brought into the UK, second, if the police come into contact with the child, or finally if social services or the medical profession have contact.¹⁰⁸ Even when contact is made through any one of these three opportunities it is necessary for appropriately trained staff to be available who have experience and are aware of the signs which may possibly indicate that the child is being exploited. Improvements to the systems and procedures in place at the border have the greatest chance of identifying child trafficking victims.¹⁰⁹ Contact with the child through police or medical involvement is more a matter of chance than procedural effectiveness, but once contact is established, procedures, training and expertise are crucial. The Home Office has stated that:

*'As part of our continued work to combat trafficking, our emphasis will be upon developing robust pre-entry procedures, including appropriate safeguards, such as the identification of cases of possible abuse at the pre-entry stage to minimise the risk of subsequent exploitation.'*¹¹⁰

As the child in domestic work does not fall within the stereotypical image of the trafficked child and is often accompanied on their journey into the UK by an adult often of the same ethnicity,¹¹¹ this makes the contact with

¹⁰⁸ MN Bump and J Duncan, 'Conference on Identifying and Serving Child Victims of Trafficking' (2003) 41(5) International Migration 201, 208.

¹⁰⁹ Ibid.

¹¹⁰ HOME OFFICE, 'UK Action Plan on Tackling Human Trafficking' (2007) 15 available <<http://www.homeoffice.gov.uk/documents/human-traffick-action-plan?view=Binary>> [last accessed 27.07.2009].

¹¹¹ CEOP 'Strategic Threat Assessment: Child Trafficking in the UK', (2009) at 54, paragraph 22.4 available <http://www.ceop.gov.uk/downloads/documents/child_trafficking_report0409.pdf> [last accessed 31.05.09].

the child potentially more difficult. The fact that the adult may claim that they are a member of the child's family helps them to avoid detection of the child as a trafficked child.¹¹² These children, although formally accompanied, are still separated children. A separated child is one separated from her/his parents or primary guardian, who is under the age of 18 and is not in their country of origin.¹¹³ The definition of separated children recognises that not all trafficked children who seek asylum are unaccompanied on arrival and not all trafficked children apply for asylum.¹¹⁴ It also includes those children who are accompanied on arrival into the UK.

Children arriving at the UK border have often been rehearsed to provide specific responses to questions asked of them.¹¹⁵ Many children taken for exploitation in domestic work will not have experienced abuse at the point of border crossing and unlikely to have any awareness of the exploitation that lies ahead of them¹¹⁶ and, if asked about their treatment, there would be no negative feedback to give. Since the child is often presented as the child of the person bringing them into the country, such awkward questions are unlikely to be asked unless there is a suspicion that the relationship between adult and child is not as presented.

¹¹² F Bokhari, 'Falling Through the Gaps: Safeguarding Children Trafficked into the UK' (2008) 22 *Children & Society* 201, 205.

¹¹³ As defined in The Separated Children in Europe Programme, Save the Children Annual Report 2007 available <http://www.separated-children-europe-programme.org/separated_children/publications/reports/index.html> [last accessed 28.10.2011].

¹¹⁴ F Bokhari, (n112), 201.

¹¹⁵ Home Office, (n68), 19 para 5.2.

¹¹⁶ MN Bump and J Duncan, (n108), 209.

For a child in domestic work the most likely point of identification as a trafficking victim is still at the point of entry into the UK, despite these difficulties. The UK Border Agency (UKBA) is the one authority that will definitely come into contact with the child. Once the child has entered the UK, the child is often hidden within a private household where their labour is exploited in domestic work. The child would be unlikely to have contact with other authorities who may be able to identify or even suspect that she is being exploited. When a child is hidden within a private household the child will not attend school, is unlikely to visit doctors or hospitals and will not have any contact with social services or NGOs. If a child is not identified as a suspected trafficked child at the border, the only other avenue for discovery is likely to be if neighbours or other people unrelated to the authorities report any suspicions they may have.

8. ASSISTING IN IDENTIFICATION OF VICTIMS: INDICATORS

In order to assist in the identification of children who have been trafficked for the purpose of labour exploitation, operational indicators have been developed by the ILO-Special Action Programme to combat forced labour. The indicators aim to assess the situation of potential victims of trafficking and are framed around six key elements found within the definition of human trafficking contained within Article 3, Trafficking Protocol. These six elements are described as:

*'...deceptive recruitment (including transfer and transport), coercive recruitment, recruitment by abuse of vulnerability, exploitation, coercion at destination and abuse of vulnerability at destination.'*¹¹⁷

¹¹⁷ ILO-SAP-FL, 'Operational Indicators of trafficking in human beings, (available <http://www.ilo.org/sapfl/Informationresources/Factsheetsandbrochures/lang--en/docName--WCMS_105023/index.htm> [last accessed 22.09.09].

Each of these elements contains two levels of indicators, medium and strong. Strong indicators prior to departure from the country of origin include deception about access to education opportunities, selling of victims and debt bondage. It is particularly interesting these six key elements chosen are explicitly based around the definition of trafficking within the Trafficking Protocol. The indicators for both children and adults follow these six elements, despite the fact that under this definition of trafficking there is no need for deception, coercion or abuse of vulnerability for a child to be a victim of trafficking. This element is removed when a child is concerned. This is acknowledged by the ILO and the decision to retain these categories was made in order to provide indicators which enabled analysis of trafficking in children using harmonised tools within Europe.¹¹⁸

The indicators aim to provide some clarity and guidance to the meaning of key terms within the Trafficking Protocol definition¹¹⁹ for consistent interpretation within different countries. They provide guidance to practitioners and researchers to assist in the identification of children who are victims of trafficking. As stated:

*'For qualitative research, better indicators will provide guidance to researchers and practitioners on the evidence that should be gathered when interviewing possible victims.'*¹²⁰

¹¹⁸ Ibid.

¹¹⁹ Such as 'coercion', 'deception', 'fraud' 'abuse of power or of a position of vulnerability' 'control over another person' and 'exploitation'.

¹²⁰ ILO 'Operational Indicators of Human Trafficking' (2009) available <http://ec.europa.eu/anti-trafficking/download.action;jsessionid=YqMmNgYFtNhqvzCsn6lWLswcLsv64nd8ITph634VKNYTp7H2tJf!855818409?nodeId=cf07e74-a2eb-46cf-a235-457cd59c7b04&fileName=ILO+EU+Brochure_Operational_indicators_en.pdf> [last accessed 23.04.2012].

The final set of indicators '*...can be easily translated into a practical assessment guide for organisations that have contact with potential victims or questionnaires for researchers or people in charge of designing surveys on trafficking. One indicator can be translated into one or more questions, the answers to which can be used to determine the presence or absence of the indicator.*'¹²¹

Although exploitation is the main operational indicator for establishing whether a child is a trafficking victim, the other indicators may potentially identify the context within which the child was trafficked. If information about child trafficking is collected on the basis of these operational indicators child victims may be identified and qualitative data will be available which may ultimately assist in targeted preventative programmes in countries of origin and more effective awareness campaigns in countries of destination.

These indicators are not meant to be conclusive evidence that a child is a victim of trafficking, but an indication that they may be and should prompt further investigation into the child's status. However where children arrive in the UK accompanied by an adult claiming to be a relative,¹²² these indicators are unlikely to assist in the identification of these children as trafficked children.

¹²¹ Ibid.

¹²² See London Child Protection Committee, 'London Procedure for Safeguarding Trafficked and Exploited Children' 5 para 7 available <<http://www.londonscb.gov.uk>> [last accessed 23.04.2012].

9. CONCLUSIONS

This chapter has illustrated that identification of children who are victims of trafficking is not a straightforward process and is particularly complicated where children are exploited in domestic work. The CoE Convention has the protection of victims' human rights as its primary purpose and consequently takes a more holistic approach to trafficking in human beings. In order to improve the identification of victims of trafficking it is necessary to include further binding obligations on States. Since the UK ratified the CoE Convention and opted-in to Directive 2011/36/EU the obligations regarding identification apply to the UK and there have already been improvements in the identification rate of victims. This improvement is apparent in the increase in the number of trafficking victims recorded by the UK Human Trafficking Centre since the introduction of the National Referral Mechanism discussed in *Chapter Five*, including children, although this is not specific to children exploited in domestic work.

The child trafficked and exploited in domestic work goes against every assumption and perception of trafficked children and they are therefore even less visible than other groups of trafficked children. Children trafficked into domestic work are brought into the UK through an ostensibly legitimate mechanism because they are accompanied by an adult on their journey when entering the UK, and are subsequently hidden within the private sphere. The 'child of trafficking discourse' created by the legal framework arrives in the UK unaccompanied, is often exploited within a public setting such as in prostitution, cannabis cultivation, factory or restaurant work which does not involve the abuse of a legitimate concept such as private fostering.

The abuse of private fostering arrangements creates particularly troublesome problems for the identification of children discovered in domestic work. The same methods for securing children's entry into the UK for a genuine private fostering arrangement are used when a child is trafficked into the UK for the purposes of exploitation in domestic work. The fact that children are exploited in the private sphere creates an environment where these children can be hidden which facilitates the child's exploitation with very little state intervention. However, State intervention in the private sphere would be unlikely to result in children being discovered and identified as trafficked children unless recognition of the relationship with private fostering arrangements is made. The clearest opportunity for the State to identify these children as trafficking victims is when the child first enters the UK. Current indicators are aimed predominantly at identifying unaccompanied minors who may be victims of trafficking and therefore children accompanied by an adult are not the primary focus. Specific indicators need to be developed which recognise explicitly the potential for an accompanied child to be a trafficked child.

Due to the difficulties associated with identifying children exploited in domestic work as either trafficked or privately fostered, it potentially creates a situation where either all children who are exploited through domestic work are identified as trafficked children, or alternatively children exploited in domestic work under what appears to be a private fostering arrangement are not considered as trafficked children and therefore fail to benefit from the legal protection afforded to trafficked children. Classifying all children in domestic work as trafficked children potentially weakens the effect of legal framework in providing the most appropriate assistance to children in these circumstances and distorts the true picture of the phenomenon.

The identification of trafficked children is an obligation that exists for the UK and in order for UK trafficking laws to be implemented effectively, there is a need for the relationship between private fostering, domestic work and trafficking to be acknowledged. Without this happening, the identification of these children remains problematic. Additionally, recognition of the likely characteristics of children trafficked for domestic work will enable more effective and targeted prevention campaigns and processes and this is discussed further in *Chapter Seven*. Increased recognition may enable successful identification of trafficked children with a clearer understanding of the impact of particular characteristics on vulnerability to trafficking. This requires broader indicators which include more specific signs indicating that children who are in domestic work are victims of trafficking. The following chapter therefore examines the characteristics of the child in domestic work, particularly gender, age and culture and considers what influence these characteristics have on child trafficking and the nature of the exploitation experienced.

Chapter Seven

RECONCEPTUALISING THE TRAFFICKED CHILD: THE IMPACT OF GENDER, AGE AND CULTURE¹

1. INTRODUCTION

Chapter Six focused on the importance of identifying the child in domestic work as a trafficked child and the associated difficulties arising because of the involvement of parents and private fostering arrangements. This chapter considers the importance of recognising the role that a child's characteristics can play in the context of child trafficking.

Discussion of child trafficking predominantly focuses on the particular form of exploitation without explicit acknowledgement of the important role of a child's characteristics. The child in domestic work illustrates the impact of particular characteristics, gender, age and culture on the likelihood and experience of trafficking. The main purpose of this chapter is to introduce a gender perspective into the analysis and debate on child trafficking, but the chapter also demonstrates the influence of the other characteristics.

The gendered nature of child trafficking is rarely acknowledged. Trafficking for sexual exploitation of the child is the main exception because it is often presumed to be one form of exploitation experienced predominately by females. The impact of gender is not as prominent in existing literature or research which discusses trafficking of children for other non-sexual forms of exploitation.

¹ A version of this chapter has been published, see D Scullion, 'Gender Perspectives on Child Trafficking: A Case Study of Child Domestic Workers' in H Stalford and S Currie and S Velluti (eds), *Gender and Migration in 21st Century Europe*, (Ashgate Publishers, 2009).

This chapter focuses on girls trafficked for domestic work. To illustrate the gendered nature of domestic work, a comparison is made between migrant women who have voluntarily migrated to undertake paid domestic work and female children who have been trafficked for this purpose, in order to highlight the similarities between them. Migration for domestic work has been viewed through the lens of 'gender and women' and the aim of this comparison is to illustrate that domestic work undertaken by children who have been trafficked is equally gendered. For this purpose the concept of the 'global care chain' is considered and applied to children trafficked for domestic work.

The age of children in domestic work is also discussed to illustrate the importance that this characteristic has on the recruitment and exploitation of children. The chapter looks at these characteristics from two perspectives, the child's perspective, and from the perspective of the adult exploiting the child. This allows the impact that these characteristics have throughout all stages of the trafficking process to be exposed.

Child domestic work is discussed as part of the broader category of forced labour and an overview of the legal definition of trafficking in human beings will draw out the gender-insensitive nature of the responses and the lack of an integrated approach engaged with children's rights and gender. The family's role in the trafficking of their daughters will be assessed, as will the active role women play in the various stages of trafficking: recruitment, transfer of the child and the subsequent exploitation. The consequences for female children who have been trafficked for domestic work will be considered and this chapter will conclude by drawing together the gendered elements involved in this form of trafficking.

2. GENDER AND EXPLOITATION

Discussing trafficking from a gender perspective has often resulted in a focus on trafficking of women for the purpose of prostitution or sexual exploitation.² However, trafficking of children into domestic work is strongly influenced by issues of gender. Women are actively reinforcing gender roles and are also participating in the exploitation of children. The legal response to trafficking in human beings recognises that special consideration of women and children is of importance; however in practice the view is often taken where the woman or child is viewed as 'a victim'. Recognition of the impact that women themselves have in shaping the gendered nature of domestic work and trafficking is mainly absent.

Within the UK gender roles are evident with many caring roles and domestic work often regarded as the responsibility of females. These perceived gender roles will undoubtedly have an impact on the acceptability of girls carrying out these roles within households. A comparison can be made between child domestic work and paid domestic work undertaken by adult women who have voluntarily migrated by considering the concept of the 'global care chain'. Where domestic workers are employed within a private household the *'the housework and childcare, or 'reproductive labour' remain 'women's work' but it is transferred to a female migrant worker.*³ This is arguably the same as the situation where children are trafficked into domestic work. This global care chain has previously been examined in terms of the relationships between women and the gendered nature of domestic work, and applying it to

² See B Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books, 2000).

³ S Currie, 'De-Skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement' (2007)23 (1) International Journal of Comparative Labour Law and Industrial Relations 83, 110.

female children who have been trafficked for the purpose of domestic work allows the equally gendered nature of child trafficking to be exposed.

3. CHILD TRAFFICKING, DOMESTIC WORK AND THE GLOBAL CARE CHAIN

The concept of the global care chain was introduced by Hochschild to refer to '*a series of personal links between people across the globe based on the paid or unpaid work of caring*'.⁴ In order to consider the relationship between child trafficking, domestic work and the global care chain, it is necessary to consider the current application of the concept. This requires a focus on women who have migrated and entered paid domestic work which will provide a general understanding of the origin of the concept and also the necessary comparison in relation to children who are forced into domestic work in a household within the UK as a result of trafficking. All of the research and literature on this issue has focused on migrant women with little attention paid to the situation of younger females, but similar critiques reveal new tensions and significantly more controversy when applied to female children. The similarities between the global chain and child domestic work are great and these are exposed in the following discussion.

Women have for many years migrated into Europe for the purpose of work.⁵ Domestic work has been one of the occupations that women migrating to Europe have undertaken, sometimes with very few other work

⁴ AR Hochschild, 'Global Care Chains and Emotional Surplus Value' in Hutton W and Giddens, A (eds), (2001) *On the Edge: Living with Global Capitalism* (Vintage, 2001), 131.

⁵ H Zlotnik, 'Migration and The Female: The Family Perspective' (1995) 4 (2) Asian and Pacific Migration Journal 253, 259.

opportunities available to them.⁶ This may be due to the difficulties associated with entering Europe legally which results in many women working with an undocumented status.⁷ Women's undocumented status and work within a private household may often result in low wages, excessive hours and an imbalance of power between the migrating woman and the woman of the household.⁸

There are obvious advantages for 'employers' to have undocumented workers within their household as it enables them to avoid many issues that a contractual employment relationship entails. There is no necessity for formal legally enforceable contracts of employment which stipulate working hours, rights to holidays, pay and rest periods. This may lead to undocumented domestic workers being exploited and abused and also enables the employer to control the woman by threatening to report her to the authorities which would result in her deportation.⁹ Many women 'live-in' and are susceptible to abuse and exploitation, as they are available within the household twenty-four hours a day, often without clear distinctions between work and private life.¹⁰ Although migrant women have been reported to have some degree of free time, it often proved necessary for them to often have to leave the house during that time to avoid being called upon to help within the household.¹¹

⁶ B Anderson, 'Servants and Slaves: Europe's domestic workers' (1997) 39 Race and Class 37, 37.

⁷ H Zlotnik, (n5), 266.

⁸ M Friese, 'East European Women As Domestic in Western Europe -- New Social Inequality And Division of Labour Among Women' (1995) 6 Journal of Area Studies 194, 197.

⁹ B Anderson, (n6), 45.

¹⁰ B Anderson, (n6) 38.

¹¹ S Hess and A Puckhaber, "'big sisters' are better domestic servants?! Comments on the booming au pair business' (2004) 77 Feminist Review 65-78.

The undocumented status is equally important for trafficked children in domestic work. Children's passports and documents are often confiscated by the woman of the household and the threat of reporting their illegal status has been used as a method of controlling them.¹² Child domestic workers' situation is further compounded by the fact that they are children, often without networks of friends or other child domestic workers. Children are in a similar, if not more restrictive situation than migrant women. Children are often 'hidden' away and the only opportunity to leave the house is under the direction and supervision of the woman of the household, for example for the purpose of taking the other children in the household to educational or sports activities.¹³

4. EXTENDING THE GLOBAL CARE CHAIN TO CHILDREN

Migrating women often leave their children behind in their country of origin and send regular remittances home to their family.¹⁴ The care of their own children is often passed onto either a female relative, or alternatively a female domestic worker is employed to facilitate the mother's migration by caring for the children.¹⁵ This reveals a pattern whereby women in Europe would rely on the paid employment of migrating women to provide the necessary domestic labour, while the migrating women would often rely on the unpaid labour of her female family members where possible.¹⁶

¹² *Siliadin v France*, ((2006) 43 E.H.R.R. 16, paragraph 94.

¹³ *Siliadin v France* (2006) 43 E.H.R.R. 16, paragraph 44.

¹⁴ H Zlotnik, (n5) 264.

¹⁵ H Zlotnik, (n5), 263.

¹⁶ DJ Mattingly, 'The Home and the World: Domestic Service and International Networks of Caring Labor' (2001) 91 (2) *Annals of the Association of American Geographers* 370, 370.

Hochschild suggested that the global care chain consisted of varying lengths of 'chains' which involved 'a shift' of care from poorer to wealthier areas or countries and viewed these chains as usually involving women, sometimes both women and some men, and, very rarely, chains consisting of only men.¹⁷ Following Hochschild's focus on domestic care work and female migration, Yeates acknowledged and affirmed the legitimacy of the concept and suggested further development and broadening of the concept to include not only care workers within private households, but also care workers within institutionalised settings such as hospitals, thereby distinguishing between State and non-State settings. She viewed the global care chain concept as '*a major innovation in the way the relationship between globalization, care and migration are analysed*'.¹⁸ However, in both Hochschild's and Yeate's approach, one further link in the chain was not addressed, that of female children who have been trafficked for the purpose of domestic work. Rather than the mother migrating in order to undertake domestic work to provide for her family, the child effectively takes her place allowing the mother to remain within the household with any remaining children.

Within their own family homes, female children are often expected to care for younger siblings to enable their mother to migrate for work and in doing so the child forms part of the 'care chain'. However, when it is the girl herself who is sent to another household in another country she replaces her mother in the chain and provides benefits to her family, either directly through remuneration received by the parents or alternatively by reducing financial pressure on the family as they have one less child to

¹⁷AR Hochschild, (n4), 131.

¹⁸ N Yeates, 'A dialogue with 'global care chain' analysis: nurse migration in the Irish Context' (2004) 77 Feminist Review 79, 81.

provide for. The child is in a sense working 'by proxy' for their mother. By broadening the global care chain concept in this way, the role of children who are forced into domestic work as a result of trafficking is acknowledged and the children who are trafficked for domestic work are viewed as a 'replacement link' in the global care chain.

In the approach taken by Hochschild, domestic care work relates to women migrating for the purpose of caring for another family's child.¹⁹ However domestic care work includes not only childcare, but other work within the household, such as cleaning, cooking, ironing and other household tasks that were traditionally seen as the responsibility of the woman of the household. Hochschild also describes domestic care work in terms of emotional care of the children. However, a distinction can be made between care in terms of emotional care and care as in physical labour. As Anderson states:

'The labour of care is work that anyone can do, as opposed to care as emotion which is ultimately dependent on some genetic relationship. This constructs paid domestic labour, then, as simply that: labour'.²⁰

Children who have been trafficked are often responsible for care of the children in the receiving household. This does not always require an emotional connection between the child domestic worker and the other children, but can exist as a purely physical role. Importantly the child is not presented to the outside world as a provider of care; instead they are considered as the ones being cared for.

¹⁹ AR Hochschild, (n4), 131.

²⁰ B Anderson, (n2), 119.

One of the main differences between migrant women undertaking domestic work and child domestic workers who have been trafficked is that women are paid and children are very often not.²¹ Children are undertaking the same work as migrant women and if they were not, there would be a need to employ someone else (usually a woman) to do so. The possible reasons for the use of children as domestic workers include the fact that children in this situation are not only cheap labour, but free labour. This may affect the demand by women for child domestic workers and therefore potentially increase the demand of trafficking children for this purpose. Children are also not in a position to leave and find alternative work and have no opportunities to demand payment for their work. Due to their age, isolation, and fear of the authorities they are often completely dependent upon the women within the receiving household. This may also be an additional factor which appeals to the 'employer' as it permits much greater control over a child than a migrant woman. Therefore the child is in a much more exploitative situation with little or no opportunity to leave.

5. GENDER, CHILDREN AND THE LEGAL DEFINITION OF TRAFFICKING

Trafficking of children for domestic work is strongly influenced by issues of gender. Children's life experiences are diverse and factors such as place, time, age and gender influence these experiences, as does the culture in which they live.²² A complex array of factors influences the incidence of child trafficking, of which gender and age are significant variables.²³

²¹ J Blagbrough, 'Child Labour: A Modern Form of Slavery' (2008) 22 Children & Society 179, 189.

²² B White, 'Defining the Intolerable: Child Work, Global Standards and Cultural Relativism' (1999) 6 Childhood 133, 134.

²³ SL Bachman, 'A New Economics of Child Labor: Searching for Answers Behind the Headlines' (2000) 53(2) Journal of International Affairs 545-572.

The social circumstances in the country of origin may influence the motivations behind the trafficking of children. The culture in each particular country or community may have a bearing on how children, particularly girls, are perceived and valued.²⁴ The existence of gender-based discrimination within cultures with girls sometimes regarded as expendable or less valued than boys leads to an increased vulnerability of girls to trafficking.²⁵ Societies where there is a widespread failure to respect the human rights of females are more often the countries of origin of many of the trafficked female population.²⁶

This discrimination may explain the disproportionate number of girls who are exploited in domestic work as a result of trafficking. The approach to gender and the recognition that children have particular needs due to the fact that they are children fails to acknowledge that children's rights and gender are not mutually exclusive concepts and a children's rights approach needs to be integrated into a gender approach. The factors which affect girls will potentially differ to the factors affecting women, although they may both be gendered in both cause and effect.

The particular aim of the Council of Europe Convention is to improve the protection of victims' human rights and includes both gender equality and

²⁴ K Beevers, 'Intercountry adoption of unaccompanied refugee children' (1997) 9(2) Child and family Law Quarterly 131, 132.

²⁵ C Somerset and others, 'Stop the Traffic!' (2003) at 9 ECPAT UK End Child Exploitation Campaign
<http://www.londonscb.gov.uk/files/.../cpp/unicef__stop_the_traffick.pdf> [last accessed 05.10.11].

²⁶ H Askola, 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13(2) European Law Journal 204, 207.

a children's rights approach.²⁷ The overall aim of the Convention is to extend the minimum standards agreed in other international instruments.²⁸ It was seen as essential to include gender equality in the Convention as women were more likely to be exposed to practices which would qualify as torture or inhuman or degrading treatment.²⁹ The impetus for its inclusion derived from the Council of Europe Parliamentary Assembly Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution. The Convention approaches gender equality not simply as a matter of non-discrimination³⁰ but requires gender equality to be promoted through the support of specific policies for women.³¹ What is in fact required is for issues of gender need to be considered within the context of children's rights when they are trafficking victims.

6. A PROTECTIVE ENVIRONMENT

A children's rights approach requires State parties to take specific preventative measures to provide a 'protective environment' in the child's country of origin in order to render them less vulnerable to trafficking. The concept of a protective environment is promoted by UNICEF as a strategy for protecting children from harm and abuse.³² This 'protective

²⁷ Council of Europe Convention on Action against Trafficking in Human Beings Preamble, 2000, CETS 197 "Victim" is defined by the Convention as any natural person who is subject to trafficking in human beings as defined in Article 4 of the Convention.

²⁸ Note 51, Explanatory report Council of Europe Convention on Action against Trafficking in Human Beings 2000, CETS 197.

²⁹ Ibid, Note 54.

³⁰ Article 3 Council of Europe Convention on Action against Trafficking in Human Beings, 2000, CETS 197.

³¹ Explanatory Report (n28) Note 54 and 55.

³² Article 5 Council of Europe Convention on Action against Trafficking in Human Beings, 2000, CETS 197.

environment' is composed of three pillars: caregiver, community and governance and consists of:

*'the ability, knowledge, practices and resources of the parents, family or other immediate caregiver who is responsible for the child; the norms, practices, values and support of the community and society where the child lives; and specific elements of the governance system such as the legal and policy framework, standards and mandates that guide social services, as well as the competency, behaviour and accountability of professionals in contact with children.'*³³

In order to make an environment a protective one for children UNICEF sees it as necessary for child protection to permeate each of the caregiver, community and governance pillars. Trafficking for the purpose of domestic work raises issues that challenge this concept due to the involvement of both the family (caregiver) and the community in the recruitment and transfer of the child. The fact that two of the three pillars (the caregiver and the community) are influencing the number of girls being trafficked for domestic work and playing a role in shaping the gendered nature of child domestic work makes the task even more difficult. UNICEF views a society that fails to protect children as one that denies children the chance to reach their full potential and undermines the society's own chance to develop.³⁴

³³ UNICEF available <http://www.ceecis.org/child_protection/prot-environment.htm> [last accessed 10.12.2011].

³⁴ UNICEF, '*Child Protection Strategy*', E/ICEF/2008/5/Rev.1 available <[http://www.unicef.org/protection/files/CP_Strategy_English\(2\).pdf](http://www.unicef.org/protection/files/CP_Strategy_English(2).pdf)> [last accessed 01.11.2011].

UNICEF aims to raise awareness within families, societies and governments in order for everyone to recognise and meet their responsibilities to enable children to live in a protective environment. This involves an understanding of the attitudes, traditions, customs, behaviour and practices of both caregivers and communities, supporting those that are protective and challenging those which are of harm to children.³⁵ Creating a protective environment also requires governmental commitment to fulfilling protection rights. A protective environment ensures that children are receiving an education, with laws in existence to provide sanctions for those who exploit children and an environment where children are safe and protected from harm and abuse.

By including a child-rights approach, with specific provisions relating solely to children, the Council of Europe Convention recognises that there are particular vulnerabilities that children alone are subject to. This is an important development as although the Convention applies equally to men, women and boy and girl children, there are not only different vulnerabilities, but also different needs and protection that are required where children are the victims of trafficking.

The trafficking framework treats children as a homogenous group. Despite the fact that the law has an overarching definition of human trafficking and the term “children” contained within the definition is broad enough to include a variety of characteristics, the implementation and enforcement of the law does not adequately reflect this. Instead a particular conceptualisation of trafficked children is being favoured.³⁶ Although the law is gender neutral in the sense that it applies equally to both men and

³⁵ Ibid.

³⁶ This conceptualisation is the stereotypical image of the trafficked child discussed in the *Introduction*.

women, the law is often being implemented in terms of gender from the homogenous perspective of the woman or child as 'a victim'. This is not always the case. Women's influence and involvement in trafficking may also range from reinforcing the gender roles within the home or alternatively being responsible for the recruitment, transfer and exploitation of the child. There needs to be an enforcement mechanism which applies to varying situations and recognises the multiple characteristics that impact on a child's experience rather than favouring a particular conceptualisation of child trafficking.

7. WOMEN'S ROLES IN CHILD TRAFFICKING

The approach adopted by the trafficking framework fails to recognise the impact that women themselves have in shaping the gendered nature of domestic work and trafficking. Women are actively reinforcing gender roles and are also participating in the exploitation of children in domestic work as a result of trafficking. Issues of gender are visible throughout each stage of the trafficking process, that of recruitment, transfer and exploitation of female children and to varying degrees women are taking an active role in each of these stages. Girls are disproportionately represented within the group of children trafficked for the purpose of domestic work.³⁷ There is a combination of reasons for this, including the fact that domestic work is often mistakenly viewed by parents as one of the safer and more protected environments for children to work in.³⁸

There is a double gender dimension, first the fact that more girls are trafficked for domestic work and secondly the role that women are playing in the trafficking of female children. The child's mother is taking a role in

³⁷J Blagbrough, (n21), 22.

³⁸ Ibid.

reinforcing the traditional gender roles within the family household.³⁹ She is also arguably facilitating the trafficking of their daughter for the purpose of domestic work and thereby, it is suggested, furthering stereotypical ideas of ‘women’s work’ or in this case ‘female work’ which includes female children.⁴⁰ Women more generally are also potentially taking an active role in the trafficking of children for domestic work by accompanying and transferring the child from their home and country of origin into the UK. Alternatively, women receiving the child into their homes are often responsible for the subsequent exploitation and control of the child.⁴¹

The Council of Europe Convention⁴² explicitly recognises that families can be at the root of trafficking.⁴³ This point is further supported by Derby’s research of child domestic servitude in Ghana which identified three distinct approaches to recruitment; that of formal recruiters, non-formal and informal. The informal recruiters included family members.⁴⁴ Not only were parents actively seeking ‘employment’ for their child, but they also played a decisive role in their child moving to live within another household. This included both children who were currently attending school and those who were not.⁴⁵

³⁹ Diduck A, and O’Donovan K, (Ed.) *‘Feminist Perspectives on Family Law’*, (Routledge-Cavendish, 2006), 5-6.

⁴⁰ J Blagbrough, (n21), 181.

⁴¹ B Anderson, (n2), 23.

⁴² CETS No. 197.

⁴³ (n28), Note 137.

⁴⁴ C Derby, ‘Rural Poverty and the Gendered Terrain of Household Responsibilities – The Role of Child Domestic Servitude in Ghana’ (2005) at 1-2, Conference Paper/Unpublished Manuscript, American Sociological Association Conference, available <http://research.allacademic.com/meta/p_mla_apa_research_citation/0/2/2/7/0/p22703_in dex.html?phpsessid=ac54ace7c22d1cbdc61524d832333685> [last accessed 01.11.2011].

⁴⁵ *Ibid*, 2-3.

7.1 Recruitment, Transfer and Exploitation

There is a common perception that trafficking involves men who are part of organised criminal groups, but women are also involved in trafficking in many different contexts.⁴⁶ Women play a significant role in some criminal groups involved in trafficking of human beings. This is illustrated, for example, by the fact that over 20 per cent of suspects in German human trafficking cases are women (as reported by the German Criminal Police (BKA)).⁴⁷ The role women play is also illustrated by the International Organization for Migration's Counter-Trafficking Database which contains information based on projects in 78 countries that were aimed at assisting trafficking victims. It was found that 42 per cent of recruiters were women, with 6 per cent of recruitments involving both men and women together.⁴⁸ Although this information is not exclusively relating to trafficked children, it does provide an indication that women are actively involved in trafficking of human beings and it must be recognised that the person responsible for taking the child from their home and bringing them into the UK may be a woman.

In relation to the exploitation of children within the receiving household, it is often the woman of the household who controls the child and instructs her in her duties.⁴⁹ In this situation gender inequalities and traditional gender roles are being further reinforced by these women. Women are

⁴⁶ L Kelly, 'A conducive context: Trafficking of persons in Central Asia' in Lee M (ed), *Human Trafficking* (Willan Publishing, 2007), 75-77.

⁴⁷ UN.GIFT, 'Human Trafficking: An Overview', (2008) at 22 United Nations Office On Drugs and Crime, available <<http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>> [last accessed 25.10.2011].

⁴⁸ *Ibid*, 12.

⁴⁹ J Blagbrough and E Glynn, 'Child Domestic Workers: Characteristics of the Modern Slave and Approaches to Ending Such Exploitation' (1999) 6 *Childhood* 51, 51.

viewed as being responsible for household work⁵⁰ and women view girls as the most appropriate sex to carry out such work. In employing young girls within the household context these women are adopting a gendered view of domestic work and reinforcing that perspective to the child and others within the household. It reinforces the division of caring roles by managing this traditional feminine role within the family structure through gendered labour, rather than challenging the legitimacy of that division. In doing so, women are in turn adopting a traditional 'feminine' role of providing care and domestic work within the family structure, although it is done through the medium of the child domestic worker.

An example of women's control over child domestic workers was clearly seen in the case of *Siliadin v France*.⁵¹ A young girl, who was a minor on her arrival in France from Togo, was obliged to follow the woman's instructions regarding her working hours and the work she had to undertake, working excessively long hours with little or no free time. This was not an isolated case of women controlling and exploiting children in their household. Similar cases have been reported, for example by the Committee Against Modern Slavery in France, where children have been found abused; beaten by women with fists and sticks, burnt with cigarettes and irons and, in one particular case, a child's hands were burnt on an electric hot plate.⁵² The exploitation and abuse potentially suffered by children in this situation are often gendered. Males within the household may inflict sexual abuse, while women are more often responsible for

⁵⁰ B Anderson, (n6), 40.

⁵¹ (2006) 43 E.H.R.R. 16.

⁵² The decision of the Cour d'appel de Versailles, *De Souza*, 19th October 2006; and the decision of the Cour d'assises d'appel de Versailles, *Mensah*, 20th December 2006.

perpetration of other forms of physical abuse and may actively encourage other children within the household to participate.⁵³

8. CONSEQUENCES FOR FEMALE CHILDREN

Girls are disadvantaged on several levels when trafficked for the purpose of domestic work in a household in the UK. The impact of trafficking on the child takes various forms including emotional, physical and psychological which have consequences for not only her present but future well-being.⁵⁴ In this particular context, unlike female adult migrants, children are not voluntarily migrating to find work, they have not consented to their migration, their parent(s) have and as a result they are separated from their family. This separation is often with little or no subsequent contact. A child who is sent by her mother to undertake domestic work in order to provide financial support for her family is potentially deprived of direct contact with her family and is removed from kinship networks, and her cultural, social and linguistic environment. Although it is still possible for parents to show love to their child from a distance, this is not possible where contact is not maintained. The child therefore may lose the emotional care normally provide by parents which is unlikely to be replaced by the woman in the receiving household as the welfare of the child is quite often not the paramount concern of these women.⁵⁵

Hochschild described the existence of global links between the children of service-providers and those of service-recipients. The children of the

⁵³ B Anderson, (n6), 46.

⁵⁴ TC Janak, 'Haiti's "Restavec" slave children: Difficult chores, difficult lives...yet...Lespwa fe Viv' (2000) 8 International Journal of Children's Rights 321, 325.

⁵⁵ B Anderson, (n2), 23.

recipient household were benefiting at the expense of those left behind.⁵⁶ These links are more direct when dealing with a child trafficked into domestic work. The trafficked child's childhood is lost when they are exploited for the benefit of the service-recipient's child either via direct childcare or the improved wealth of the other child's parents by facilitating the woman's working life. Children who have been trafficked for the purpose of domestic work are forced to endure one of the worst forms of child labour, as defined by the International Labour Organisation,⁵⁷ to provide for children further down the global care chain.

Hochschild stated that: '*Each person along the chain feels he or she is doing the right thing for good reasons*'.⁵⁸ However, the question needs to be asked whether this is the right thing for family, the receiving household or the child who has been trafficked. Parent(s) may have other children within the household that they need to care for and by sending their daughter to live in another household they may view this as helping the remaining children by lessening existing financial pressures.⁵⁹ The receiving women may regard the 'opportunity' as providing the child with a 'better life' than they would have experienced if they had remained within their own family household and country of origin and may refer to the child as '*one of the family*'.⁶⁰ However, being described as a child who

⁵⁶ AR Hochschild, (n4) 132; E Newcombe, 'Temporary migration to the UK as an 'Au Pair': Cultural exchange or reproductive labour?' (2004) at 8 Sussex Centre for Migration Research Working Paper no.21, COMPAS, University of Oxford, available <<http://www.sussex.ac.uk/migration/documents/mwp21.pdf>> [last accessed 01.11.2011].

⁵⁷ ILO, 1999, C182 Worst Forms of Child Labour Convention.

⁵⁸ AR Hochschild, (n4), 136.

⁵⁹ C Derby, (n44), 11.

⁶⁰ M Black, 'Child domestic workers: slaves, foster children or under-age employees?' in Fottrell, D. (ed.) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (Leiden, 2002), 164.

is being ‘looked after’ or being provided with a ‘better life’ through private fostering arrangements attempts to hide the domestic work and trafficking. Women are portraying the relationship between themselves and the child as a positive experience for the child and attempting to hide the true exploitative nature of the relationship.⁶¹

The distinct vulnerabilities that children forced into domestic work experience or are potentially exposed to are of concern.⁶² Where a child is within a household, they are often deprived of the opportunity to experience the normal experiences of childhood such as social interaction with peers, rest and playtime, a right provided for in Article 31, UNCRC.⁶³ Girls in these circumstances suffer from a lack of imagination, opportunities for education and a lack of vision of future success.⁶⁴ Children are separated from their parents and are often deprived of love, support and contact with their family.⁶⁵ From Derby’s research, discussed above, it can be seen that parents accept employment and the perceived benefits derived from the child migration to live within another household as taking precedence over the child’s emotional, cultural and educational needs.⁶⁶

9. THE INFLUENCE OF A CHILD’S AGE AND CULTURE

A child’s age is also a characteristic which impacts on the child’s experience. It has the potential to influence whether they are trafficked and,

⁶¹TC Janak, (n54), 324.

⁶² M Black, (n60).

⁶³ 1989, A/55/25.

⁶⁴ TC Janak, (n54), 326.

⁶⁵ B Anderson, (n2), 23.

⁶⁶ C Derby, (n44).

if so, for what particular type of exploitation.⁶⁷ It has been found that ‘...age and gender are the primary variables in identifying individuals at risk of being trafficked.’⁶⁸ Children are particularly vulnerable due to their age. The younger the child is, the higher the level of their dependency on adults.

9.1 Traffickers’ Preference for Younger Children

Traffickers will often prefer younger children as they do not need to employ the same levels of coercion in order to make the child do as they are told as they would need to with adults. Some ‘employers’ actively seek younger children as they are viewed as easier to control and are more compliant than older children or adolescents.⁶⁹ Younger children may also be preferred as they are less likely to be capable of escaping the exploitation to which they are subjected. Children trafficked away from their home often represent the cheapest and most malleable workforce available.⁷⁰ This preference for younger children is clear from the following statement from one trafficker:

*‘A little child knows nothing...Older children know how to escape, but the little ones don’t run away, they don’t know their way home. They just stay there working, working, working.’*⁷¹

⁶⁷ M Dottridge, ‘Kids as Commodities? Child trafficking and what to do about it’ (2004) *Terre des Hommes*, available <<http://www.terredeshommes.org/pdf/commodities.pdf>> [last accessed 25.11.2011], 16.

⁶⁸ MA Clark, ‘Trafficking in Persons: an issue of human security’ (2003) 4 *Journal of Human Development* 247, 249.

⁶⁹ A Kielland and M Tovo, ‘*Children at Work: Child Labor Practices in Africa*’ (Lynne Rienner Publishers, 2006), 97.

⁷⁰ M Dottridge (n67), 18.

⁷¹ O Frenkiel, ‘Children of the Etireno’ *The Guardian* (London, October 2001) available <<http://www.guardian.co.uk/theguardian/2001/oct/04/features11.g22/print>> [last accessed 17.03.09].

A young child has less capacity to *'...assess risk, to articulate and voice their worries (about being exposed to danger) and to look after themselves (both in the sense of being able to meet their own needs to find food and shelter and to take action in self-defence).*'⁷²

9.2 Parents' Expectations and Cultural Influences

Within some cultures it may be expected that children will enter work or training. Parents will often decide what type of work the child will enter and at what age. The younger the child, the less input (if any) the child themselves will have to the decision made.⁷³ Despite their children being young, parents may regard the child leaving home to work as a natural stage in their development and a necessary element in their socialisation rather than as their child being trafficked.⁷⁴ The culture in which the child is raised plays an important role in the perception of children in relation to work and the value placed on that work.⁷⁵ Parents' expectations, as well as the child's culture, can all add to increasing the possibility that parents will facilitate the trafficking of their own child or be more susceptible to believing traffickers claims that they can provide safe work for their child.

Parents may arrange for their child to enter an apprenticeship involving training which they believe the child can benefit from in later life. In these circumstances children are not always expected to receive any payment for

⁷² M Dottridge (n67),19.

⁷³ IM Hashim, 'The Positives and Negatives of Children's Independent Migration: Assessing the Evidence and the Debates' (2006) at 10, Working Paper T16, Sussex Centre for Migration Research, available <http://www.migrationdrc.org/publications/working_papers/WP-T16.pdf>[last accessed 01.11.2011].

⁷⁴ J Blagbrough and E Glynn, (n49), 52.

⁷⁵ See J Blagbrough and E Glynn (n49).

the work they undertake and instead the training they receive is the overall long-term aim. Parents may favour their child leaving home for employment or training where there are very few available alternatives. This is particularly relevant where parents are unable or unwilling to send their child to school.⁷⁶ Within the child's culture this apprenticeship approach may become the norm, with educational opportunities beyond the family's reach. The child trafficked and exploited in domestic work will not attend school or receive an education which is in complete contrast to the children of the receiving household.⁷⁷ The trafficked child will receive no formal education in this setting and will work for the benefit of the host household.

As discussed previously in *Chapter Six*, within the context of private fostering there are many different motivations that may encourage the practice of young children leaving home and working. Culture is one of these, as is poverty. Poverty may influence parents' decision for their child, however young, to enter work. There is evidence that children from poorer families are at a higher risk of parents giving them up '*...in return for a relatively small amount of money even though there are no guarantees regarding the child's well-being.*'⁷⁸ If men cannot find employment, then women and children often end up bearing the responsibility to earn some income and become part of the paid labour force. Children may be

⁷⁶ Whitehead, A., Hashim, IM and Iversen V 'Child Migration, Child Agency and Inter-generational Relations in Africa and South Asia', (2007) Working Paper Migration, Globalisation & Poverty at 7 available <http://www.migrationdrc.org/publications/working_papers/WP-T24.pdf>[last accessed 12.07.10].

⁷⁷ M Jacquemin, 'Can the Language of Rights Get Hold of the Complex Realities of Child Domestic Work? The case of young domestic workers in Abidjan, Ivory Coast' (2006) 13 Childhood 389, 392.

⁷⁸ Degirmencioglu SM and Acar H and Acar YB, 'Extreme Forms of Child Labour in Turkey' (2008) 22 Children & Society 191, 196.

expected to work if their parents cannot find employment and, if they were attending school, they may drop out in order to obtain work.⁷⁹

The influence of the child's culture is evident when considering the purposes for which children are trafficked into the UK. According to the UNICEF report '*End Child Exploitation: Child work today*',⁸⁰ children from different countries are trafficked into the UK for different reasons.⁸¹

The social circumstances in the country of origin may therefore mean that the motivation behind the trafficking of children may vary significantly. The culture in each particular country may have a bearing on how children are perceived and valued, affecting the purpose for which they are trafficked. Social issues such as poverty and lack of education and employment opportunities are also factors involved in the trafficking of children.⁸² The younger the child, the more likely they are to comply with parents instructions to leave their family home with an adult, even where this adult is a stranger to them.⁸³

Adolescents may choose to work and want to leave home to obtain employment or to work to save the money to attend school.⁸⁴ Under these circumstances the young person may need no persuasion to go with adults

⁷⁹ Ibid, 197.

⁸⁰ M Dottridge and L Stuart, '*End Child Exploitation: Child work today*' (2005) UNICEF available <http://www.unicef.org.uk/Documents/Publications/ecechild2_a4.pdf> last accessed 20.10.2011].

⁸¹ As discussed in *Chapter Five*.

⁸² C Somerset, (n25).

⁸³ M Dottridge (n67), 16.

⁸⁴ This issue is examined in detail in *Chapter Eight*.

who claim they can provide work for them. This occurrence may be part of the culture the child has grown up in. The main differences between adolescents and younger children are the level of input they have in the decision to leave the family home to work, and the level of vulnerability of these children. Generally a child's vulnerability decreases the older the child becomes and the capacity to make reasoned decisions increases. It has been recognised that adolescents have different needs to younger children and the protection of their rights need particular consideration.⁸⁵ In many societies adolescents are often working and contributing to the family income, often reaching their own decisions aimed at gaining a better life for their families and themselves. They are however still vulnerable to trafficking and still require protection appropriate to their age.⁸⁶

9.3 The Age of Children in Domestic Work

The age that children enter domestic work has been found to differ depending on whether this occurs in a rural or urban setting. In Camacho's research into child domestic workers in Metro Manila, Philippines children in rural areas were found to be younger when they started work, whereas children who migrated were older, between 15 and 17 years old.⁸⁷ Age also affected the involvement children had in the decision for them to enter work. The younger the child the less involvement they had. Hashim found that children who were aged between 13 and 17 years old were more likely to have played a major role in the decision and often had to negotiate with

⁸⁵ Committee on the Rights of the Child, General Comment No. 4(2003) 'Adolescent health and development in the context of the Convention on the Rights of the Child' CRC/GC/2003/4.

⁸⁶ M Dottridge (n67), 19.

⁸⁷ AZV Camacho, 'Family, Child Labour and Migration: Child Domestic Workers in Metro Manila' (1999) 6 (1) *Childhood* 57, 63.

their parents in order to obtain their agreement.⁸⁸ In Degirmencioglu's research, which focussed on children working on the streets of Istanbul, the age of children starting work varied with a minority of the children interviewed being between the age of 11 and 12 (8%) and the majority starting work at between the age of 13 and 14 (44%) with nearly the same number starting between the age of 15 and 16 (40%).

The research illustrates that the current international standard minimum legal age for children to enter employment is not being enforced within all countries. This is not only the case within developing countries since there is evidence that a considerable number of underage children are working illegally in the UK.⁸⁹ Globally, a significant number of children do not benefit from any employment rights or protection and the law is failing to protect them in this situation. There are many reasons why children under the legal minimum age work, but what matters is that children below the minimum age do work and therefore law and practice do not correspond.

10. CONCLUSIONS

Having considered the various characteristics of the child such as gender, age and culture, it is apparent that these characteristics have a great influence within the context of child trafficking. The age of trafficked children affects the child's capacity to take an active role in the decisions made for them to leave their family home. Young children are removed from their family, friends and community, losing their support network in the process. They are exposed to physical and psychological harm and are subjected to poor conditions within the host household. They are isolated

⁸⁸ IM Hashim,(n73) 10.

⁸⁹ C Hamilton and B Watt, 'The Employment of Children' (2004) 16(2) Child and Family Law Quarterly 135.

and prevented from socialising with their peers and are expected to be available to work at any given time. These children are highly dependent on the adult exploiting them for things such as their food and conditions of work and the possibility of them being able to escape from the situation is slim. Younger children are generally easier to control and more compliant and their young age therefore increases the child's vulnerability to abuse and exploitation.

This chapter has demonstrated that the gendered nature of trafficking is often recognised in terms of women and children as victims of sexual exploitation. However, there is clearly another gendered side to this phenomenon which is evident in the context of trafficking for the purposes of domestic work. Women are reinforcing the gendered nature of trafficking for domestic work by perpetuating the stereotypical ideas of women's' roles in the family and household. Domestic work is still accepted as 'female work' and this is reflected in the high number of girls being trafficked for this purpose. The gendering of roles by women themselves exacerbates the discrimination experienced by girls. Women's roles as recruiters and perpetrators of exploitation of the child are not sufficiently acknowledged. The multi-dimensional gender issues of child trafficking need to be recognised by those making the policies responding to the problem.

Culture and social values play an important role in influencing the entry of girls in to domestic work both in motivating the family to send a female child abroad, and in creating demand for female domestic workers in European family structures. The concept of the global care chain exposes the effects of these global cultural factors. The global care chain has previously been considered as gendered purely from the perspective of migrant adult women. Children are obscured in this situation, as is the

reality of the gendering impact of women's behaviour in creating demand for female child labour. Child domestic workers could be seen as part of the global care chain, effectively taking the place of the adult migrant woman, the mother, but with more limited opportunity to make any personal financial gain from the arrangement.

Perceptions and assumptions concerning trafficking for domestic work need to be challenged and the role that parents, and particularly women, play in such arrangements acknowledged. There is a need for a multi-faceted approach, including education for families and communities as well as more effective responses which recognise the complexity of child trafficking arrangements, and specifically the role that families can play in perpetuating such practices.

Recognising that a child's individual characteristics are relevant at all stages of the trafficking process would enable better enforcement and preventative action which would accommodate these differences. The failure to recognise the influence a child's characteristics play in the process trafficking children into domestic work, and to effectively individualise children's experiences means that children experience additional gender inequalities, discrimination and increased vulnerabilities due to their age.

The following chapter takes a slightly different approach to children in domestic work by focusing, not on parents' decisions for their child to leave home, but children who have made the decision themselves. The relevance of a child's age is clearly illustrated in the following chapter when considering under what circumstances a child's decision to work should be respected, and where a more paternalistic approach to protect the

child is appropriate. The chapter highlights the influence a child's age has on the various elements involved in children ending up in domestic work.

Chapter Eight

RECONCEPTUALISING THE TRAFFICKED CHILD: PASSIVE VICTIMS OR EMPOWERED ACTORS

1. INTRODUCTION

Chapter Six considered the child who was exploited in domestic work as a consequence of being trafficked and the involvement of private fostering arrangements. The issue of child trafficking in the context of migration was considered in *Chapter Four* whilst the gendered nature of child trafficking and the influence of a child's age and culture were explored in *Chapter Seven*. This chapter now focuses on the question of whether a child discovered in domestic work within a private household can ever be in this situation as a result of their own autonomous decision to migrate in order to work. This chapter challenges the assumption that all children discovered in this situation have been coerced into undertaking domestic work.

The chapter examines the legal regulation of children entering employment both nationally within the UK and under International law. Although the chapter ultimately considers how children within the UK would be treated if discovered undertaking domestic work, it is necessary to consider children of other countries working and migrating to do so. Within the context of child migration and child employment the chapter explores children's capacity to be self-determining individuals, with consideration of a child's right to be heard and to express their opinion under Article 12 UNCRC. Consideration is also given to a child's right to protection from economic exploitation under Article 32 UNCRC and the requirement that decisions be made in the best interests of the child under Article 3. The aim is to examine the interplay between these particular rights in the specific

context of children migrating to work. Children's position within the migration discourse is also questioned to consider whether current conceptions are appropriate in the context of children entering employment. This involves discussion of cultural attitudes towards children, migration and work.

A key issue is whether children's decisions to migrate to work are truly voluntary ones. This involves exploration of what exactly the concept of 'choice' involves in this particular context. The influence of external factors on decisions made by children in these circumstances is important and the extent to which these factors affect the child's ultimate decision is of equal importance.

The idea of children choosing to migrate to enter domestic work is applied to the trafficking legal framework, specifically the definition of trafficking contained within Article 3, Trafficking Protocol. The reference to consent within the definition and the removal of the necessity for the '*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*' where a child is involved potentially impacts on a child's ability to make a decision to enter employment in domestic work which subsequently turns exploitative.

In conclusion, the overall perception of children is addressed to identify whether the trafficking legal framework acknowledges children as self-determining individuals or whether a paternalistic approach is taken and children are viewed only as victims. If the approach is geared toward protection of the child at the expense of the child's autonomy, it is considered whether this approach is necessary as an either/or choice or

whether a more balanced response to child trafficking could be developed which accounts for both concerns.

2. THE LEGAL REGULATION OF CHILD EMPLOYMENT

The children who are the concern of this chapter are those who voluntarily migrate to enter employment in domestic work. Although there are no confirmed occurrences of this happening in the UK, it is known that children work and that at times they migrate internationally in order to do so.¹ It is acknowledged that the age of a child is an important characteristic which has the potential to change the nature of the work undertaken by a child in domestic work.² The decision to migrate and the subsequent employment arrangement do not necessarily involve exploitative conditions in the receiving household. However, when there is exploitation and the child is discovered in domestic work in a household in the UK there appears to be an assumption that they have been trafficked, regardless of the age of the child. This assumption fails to consider the possibility that the child may have made an autonomous decision to migrate to enter employment even where there may be no legal right for them to do so.

2.1 The International Perspective

The International Labour Organisation (ILO) has sought to regulate the circumstances of children's employment and adopted the Minimum Age Convention 1973 which sets a minimum age at which children can legally work.³ The Convention requires State parties to set a minimum age for children to undertake any form of employment with a requirement that it

¹ UNICEF, 'Adolescents, Youth and International Migration: Figures and Facts' available <http://www.unicef.org/socialpolicy/files/GMG_-_Factsheet_UNICEF-FINAL.pdf> [last accessed 28.04.2012].

² See *Introduction* and *Chapter Two* for a distinction between child labour and child work.

³ C138.

shall not be before the age of completion of compulsory education and not less than 15 years old.⁴ However, where a State's economy and educational facilities are insufficiently developed they may be permitted to specify a minimum age of 14 years.⁵ No child under the age of 18 years may be permitted to undertake any type of employment which is likely to jeopardise their health, safety or morals.⁶ There are further exceptions to the minimum age of admission to employment, with the Convention stating that children between the age of 13 and 15 may undertake light work,⁷ although the term "light work" is not fully defined within the Convention and national laws decide the circumstances in which this is permitted.⁸ The aim of the Convention is to protect children from abuse and exploitation and this is considered in terms of their health, safety and morals and includes their right to an education and protection. Adolescents aged 16 and 17 years satisfy the requirements of the Convention as they are above the minimum age stipulated. Employment in domestic work may be prohibited for these particular children under this Convention only if it can be shown that this type of employment would be likely to jeopardise their health, safety or morals. If this is the case then States may deem domestic work as a type of employment that is not suitable for children.

In contrast to the Minimum Age Convention, the Worst Forms of Child Labour Convention 1999 focuses on the prohibition and elimination of four main categories of child labour, rather than setting a minimum age at

⁴ Article 3, Minimum Age Convention 1973.

⁵ Article 2(4), Minimum Age Convention.

⁶ Article 3, Minimum Age Convention.

⁷ Age 12 and 14 if Article 2(4) applies. Article 7, Minimum Age Convention.

⁸ H Cullen, *The Role of International Law in the Elimination of Child Labour* (Marinus Nijhoff, 2007), 138.

which a child can work.⁹ These categories are contained within Article 3 which states that the worst forms of child labour consist of:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;*
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;*
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;*
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.*

Domestic work undertaken by a child may fall within categories (a) and (d) of the worst forms of child labour depending on the surrounding circumstances. Some domestic work would not be classified as a 'worst form' of child labour within the scope of Article 3 and it is this situation which is considered within this chapter. It is not suggested that any child should be permitted to choose to work in conditions which are in breach of the Worst Forms of Child Labour Convention. Both the Worst Form of Child Labour Convention and the Minimum Age Convention have no doubt developed an international awareness about the potential forms of exploitation that children in employment may experience and have attempted to produce a universal response to the problem.

⁹ Minimum Age Convention.

2.2 European and UK Law

In the UK the main legislation which deals with child employment is the Children and Young Persons Act 1933.¹⁰ This Act was amended to implement EU Council Directive 94/33 EC of 22nd June 1994 on the Protection of Young People at Work.¹¹ Under the CYPA 1933 children are permitted to enter employment at the age of 14, but there are restrictions relating to the type of work undertaken and the hours they are permitted to work during school term time and school holidays.¹² Only light work may be undertaken which is defined in Article 3, Directive 94/33 EC and incorporated into the CYPA 1933. Section 18, CYPA 1933 states:

“light work” means work which, on account of the inherent nature of the tasks which it involves and the particular conditions under which they are performed—

(a) is not likely to be harmful to the safety, health or development of children; and

(b) is not such as to be harmful to their attendance at school or to their participation in work experience in accordance with section 560 of the Education Act 1996 or their capacity to benefit from the instruction received or, as the case may be, the experience gained;

For adolescents beyond the mandatory school leaving age,¹³ who are aged between 16 and 17 years old, the rules are relaxed and they may be employed full time. These children are described as young workers in order to distinguish them from the younger group of children discussed

¹⁰ Hereafter CYPA 1933.

¹¹ [1994] OJ L216/12, hereafter Directive 94/33 EC.

¹² Section 18, CYPA 1933.

¹³ Section 8, Education Act 1996.

above. Although there is a relaxation of the rules, some restrictions still apply until they reach the age of 18, at which time the law relating to adults in work will apply. The Working Time Regulations 1998 (as amended)¹⁴ is the main legislation dealing with the employment of 16 and 17 year olds and implements the EU Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time¹⁵ and also part of Directive 94/33 EC. A young worker may work for a maximum of 8 hours per day and a total of 40 hours per week. They must be provided with two days off per week which must be taken together.¹⁶ Additionally, they are not permitted to work between the hours of 10pm and 6am and must have a thirty minute break for every four and a half hours they work.¹⁷ They have a statutory right to at least 28 days annual holiday and must be paid a minimum wage of £3.68 with effect from 1st October 2011.

At first sight, children under the age of 13 are prohibited from entering employment and young workers are provided with additional rights compared to adult workers. However, it is apparent that there are numerous exceptions to these general statements contained within the legislation which, in certain circumstances, permit children to work in each of the age groups. Local Authority Byelaws may permit children under the age of 13 to work in certain categories of employment such as sports, theatre and modelling and the Local Authority has the ability to issue a performance licence to permit this.¹⁸ Children aged 13 may also be employed by and

¹⁴ SI 1998/1833, hereafter WTR 1998.

¹⁵ [1993] OJ L307/18.

¹⁶ Regulation 11, WTR 1998.

¹⁷ Regulation 7 and 12, WTR 1998.

¹⁸ Section 37 Children and Young Persons Act 1963.

under the direct supervision of their parent, on an occasional basis, in light agricultural or horticultural work.¹⁹ Until the introduction of the Children (Protection at Work) Regulations 2000, children as young as 10 years old were permitted to work in light agricultural or horticultural settings within the UK.

The Working Time Regulations 1998 contain further exceptions which prevent certain young workers from benefiting from the protection under the Regulations provided to young workers generally. These include young workers who are working on ships, those who are in the armed forces or where there is a *force majeure*.²⁰ Under section 23 CYPA 1933 children aged 16 or under are not permitted to take part in performances endangering life or limb, yet children who have reached the age of 12 may be permitted to be trained to take part in 'dangerous performances'²¹ which has been defined as including all acrobatic performances and performances as a contortionist.²² The various exceptions within numerous pieces of legislation create a fragmented and inconsistent approach to children's employment.

Recent developments will result in those beyond school compulsory school age but under the age of eighteen²³ being required to stay in full-time education, training or an apprenticeship. If they are employed, there must be sufficient relevant training and education provided.²⁴ Applying these

¹⁹ Section 18(2)(a)(i) Children and Young Persons Act 1933.

²⁰ Regulations 25-27, WTR 1998.

²¹ Section 24(2) CYPA 1933.

²² Section 30 CYPA 1933.

²³ Section 1 Education and Skills Act 2008.

²⁴ Section 2 Education and Skills Act 2008.

new provisions to adolescents who want to work from the age of 16 will remove the current scope for them to do so unless the position incorporates the relevant training and education required.

2.3 Regulation of Domestic Work in the UK

Occasional or short-term domestic work is excluded from regulation by Directive 94/33 EC which explicitly permits States to exclude this form of work under Article 2(2):

Member States may make legislative or regulatory provision for this Directive not to apply, within the limits and under the conditions which they set by legislative or regulatory provision, to occasional work or short-term work involving:

- (a) domestic service in a private household, or*
- (b) work regarded as not being harmful, damaging or dangerous to young people in a family undertaking.*

Excluding domestic work from regulation means that young people who work in such a setting are left without the same rights as young workers in other settings. They do not have the same rights to restricted hours of work, rights to time off or rest breaks. Similarly, under the WTR 1998 (as amended), Regulation 19 excludes domestic service within a private household from protection from the maximum working time of 48 hours per week. Additionally, any night work is normally limited by the maximum hours of night work in 24 hours and this does not apply to domestic work. Health assessments for both adults and young workers prior to undertaking night work are also not applicable to those in domestic work.²⁵

²⁵ Regulations 4(1), and (2); 6(1), (2) and (7); 7(1), (2) and (6); and 8, WTR 1998.

There have been recent developments in international law in relation to domestic workers. The Decent Work for Domestic Workers Convention was adopted by the ILO in June 2011. The Convention applies to all domestic workers, including children above the minimum age to enter employment.²⁶ The Convention does not prohibit children working, but does stipulate that the education of those children under the compulsory school age must not be affected by domestic work carried out by children.²⁷ The aim of the Convention is for all domestic workers to have fair employment conditions and equivalent employment rights and treatment as workers in other sectors. This Convention may prove useful to those children in countries where they are legally entitled to work as domestic workers, although it does not change the fact that no child can legally migrate for employment in domestic work in any UK household.

In order to migrate to the UK to enter domestic work there are strict immigration rules applicable in this situation.²⁸ Domestic workers must have worked for the employer they are accompanying to the UK for at least 12 months prior to their application. Once in the UK they are permitted to change employers but they must remain in employment as a domestic worker. In the context of this thesis it is important to note that migration to the UK for domestic work will only be legal for those people aged between 18 and 65. This immediately highlights a problem for young workers aged 16 and 17 who wish to migrate to the UK to enter domestic work. They cannot do so legally and must find other methods to gain entry

²⁶ Articles 2(1) and 4.

²⁷ Article 4.

²⁸ Immigration Rules 159A – 159H, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part>.

and achieve their aim to gain employment in domestic work. Many adult women are in the situation of not being able to satisfy the restrictive immigration rules and they too find alternative routes into domestic work in the UK. This approach to domestic work has the effect of potentially increasing women and young workers' vulnerability to abuse and exploitation rather than preventing them migrating to enter domestic work in the first place.

The restriction of legal migration for domestic work to those aged 18 or over, and the lack of regulation and protection currently within domestic work is problematic. If domestic work is potentially harmful to adolescents, there are arguably more effective ways of dealing with the issue than refusing entry to the UK. Permitting young workers to join the armed forces is more dangerous than permitting them to enter domestic work but joining the armed forces is legally sanctioned. There are alternatives which would assist in protecting children from exploitation as well as respecting their decision to migrate to enter employment in domestic work which are discussed below.

3. CHILDREN'S INDEPENDENT MIGRATION FOR THE PURPOSE OF WORK

The discussion within this chapter not only revolves around children working, but also their decision to migrate in order to do so. Children who migrate to the UK to enter employment in domestic work are not children claiming asylum or arriving with their parents. Instead they are arriving accompanied by an adult and enter the UK specifically to work, even if it is not presented this way to the immigration authorities. For example, children may arrive on visitor permits or student visas and subsequently overstay. In the UK, there is no legal requirement for 16 and 17 year olds to attend school which will draw less attention to these children, reducing

the likelihood that they will be discovered by the authorities. The following is a reminder of Bhabha's typology of independent child migrants previously discussed in *Chapter Four*:

(a) Children who travel in search of opportunities, whether educational or employment related

(b) Children who travel to survive - to escape persecution or war, family abuse, dire poverty

(c) Children who travel for family reunion - to join documented or undocumented family members who have already migrated¹⁵

(d) Children who travel in the context of exploitation (including trafficking).

Within the four categories explored by Bhabha there is a distinction drawn between children migrating due to trafficking and those migrating for employment. This is the distinction that is not being considered as a possibility when a child (of working age) is discovered in domestic work.²⁹

4. CHILDREN IN DOMESTIC WORK: SELF-DETERMINATION OR IN NEED OF PROTECTION?

Children in domestic work may arrive in this situation as a result of their own decision to enter employment. Children are normally regarded as 'dependants' or 'victims' within the migration discourse and this analysis is also applied to children's ability to make autonomous decisions relating to issues that affect their own lives. Children are often viewed as incapable of making important decisions and, the younger the child is, the less likely

²⁹ J Bhabha, 'Independent Children, Inconsistent Adults: International Child Migration and the Legal Framework' (2008) UNICEF Innocenti Research Centre, Discussion Paper, IDP No. 2008-02 at 2, available <http://www.unicef-irc.org/publications/pdf/idp_2008_02.pdf> [last accessed 30.10.2011].

their decisions are to be accepted as autonomous and valid.³⁰ It needs to be considered whether children discovered in domestic work can ever be treated as self-determining individuals who are in this situation as a result of their own decisions, or whether they should automatically be regarded as victims in need of protection.

The UNCRC recognises that children do have the capacity to form their own views, although this remains to be limited by a child's age and maturity. Article 12 UNCRC requires States Parties to:

'...assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

Article 12 gives the child the right to express their own opinions in relation to issues affecting their own lives but it is important to clarify that this does not mean that the ultimate decision is the child's. Although Article 12 UNCRC supports children's autonomy to a certain degree, having the right to be heard and being autonomous are not the same. This position evolves over time with the child's age and competence, as Tisdall states:

*'...not only are children entitled to express their views and have them taken seriously but they also have the right to take those decisions for themselves that they are competent to take.'*³¹

³⁰ M Pertile, 'The Fight Against Child Labour in a Globalized World' in F Nesi and L Nogler and M Pertile, (eds), *Child Labour in a globalized World: A Legal Analysis of ILO Action*, (Ashgate Publishing, 2008), 4.

³¹ G Lansdown 'International developments in children's participation: lessons and challenges' in E Kay and Others, *Children, young people and social inclusion: participation for what?* (Policy Press, 2006).

The extent to which this statement applies when considered in the context of children working is questionable. Where a child has entered employment as a result of their own decision, any judgment as to whether the child is capable of forming their own view and have the maturity to make that decision is not the child's. Adults determine whether a child has the required capacity. This determination is context specific and is affected by the seriousness of the decision involved. Provided that the child has been afforded the opportunity to voice their views and due weight has been given to those views, there will be no violation of Article 12 UNCRC. If a child's decision is not in accord with adult perception of the best interests of the child then it is unlikely that the child will be found to be competent to make their own decision to enter employment.

In UK law there is an inconsistent approach to children and their capacity to be self-determining individuals. This can be seen in the context of UK criminal law and the age of criminal responsibility. As James states:

*'...while the criminal law in the United Kingdom regards children as young as 10 years old as being responsible for their actions...'
'...family law regards children as being not capable of (or as needing protection from) taking responsibility, apparently setting increasingly high standards of competence the greater the perceived degree of responsibility'³²*

An analogy can be drawn between a child's capacity to make decisions relating to work and the approach taken to children's competence in the context of consent or refusal of medical treatment. UK case law has

³² AL James, 'Children, the UNCRC, and Family Law in England and Wales' (2007) 46(1) Family Court Review 53, 56.

illustrated that children may consent to medical treatment once they reach the age of 16, but their ability to refuse is limited, particularly where the refusal of treatment is life-threatening.³³ In these circumstances the courts have an inherent jurisdiction to assess the situation and the child's competence to refuse treatment. What is apparent from the case law is that when adults deem the treatment to be in the child's best interests and the child is refusing treatment, the child is often found to be lacking the required competence to make that decision.³⁴ Similarly, Article 12 UNCRC provides children with a right to be heard but this does not mean that they have an absolute right to self-determination. Any right to make autonomous decisions about their own future is conditional on adults' perceptions of what is in their best interests. Therefore, applying Article 12 to a child's decision to work will produce similar considerations relating to a child's competence when they undertake any work which is outside the legally sanctioned parameters of work for children. In these circumstances children are extremely likely to be found to lack the required competence to make these decisions. There is a clear relationship between Article 12 UNCRC and Article 3 UNCRC demonstrated in this context as Article 3 is used to justify decisions made in relation to the child which do not correspond with the child's own views.³⁵

³³ Section 8, Family Law Reform Act 1969; *Re W (A Minor: Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758.

³⁴ See for example *Re W (A Minor)* [1998] 2 FLR 810 which involved a 14 year old Jehovah witness who suffered horrific burns requiring operations involving blood transfusions. She refused. The court held that, even though she was intelligent her upbringing made her naive and that, as she matured, she would question her religion further, therefore she was found not competent to make this decision. Also see *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386.

³⁵ For discussion of the tension between Articles 3 and 12 UNCRC see N Thomas and C O'Kane 'When Children's Wishes and Feelings Clash with Their Best Interests' (1998) 6 International Journal of Children's Rights 137-154.

A child has a right to be heard and express their view under Article 12 UNCRC, but Article 32 UNCRC provides children with a co-existent right to be protected from economic exploitation. Under Article 32, children have a right to be protected from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. The child-rights perspective promoted by the UNCRC therefore establishes that the child is '*...both a self-determining subject and in need of protection.*'³⁶ It is this dual characterisation and the complex needs of children which are sometimes difficult to reconcile in practice.

Article 32 UNCRC does not require a complete prohibition on children working, but it does require States to set a minimum age for children to enter employment, and regulation of both the hours worked and the conditions of employment.³⁷ This mirrors the approach taken by the Minimum Age Convention. When considering both Article 12 and Article 32 in the context of children and work, at first sight that appear to be rights afforded to children which may potentially conflict. However, it may not necessarily be a question of choosing which of these rights to protect as it is possible for these two rights to co-exist and operate simultaneously for the benefit of a working child. This could potentially be of benefit to child domestic workers and those adolescents who wish to work. A child's right to self-determination is therefore conditional not only in relation to Article 32 and the protection of the child, but also in the context of Article 3 UNCRC and adult perception of the child's best interests.

³⁶ M Jacquemin, 'Can the Language of Rights Get Hold of the Complex Realities of Child Domestic Work? The case of young domestic workers in Abidjan, Ivory Coast' (2006) 13 *Childhood* 389, 390.

³⁷ Article 32(a) and (b) UNCRC.

5. AN ABOLITIONIST OR PRIORITISATION APPROACH TO CHILD EMPLOYMENT

A distinction between 'child work' and 'child labour' can be drawn from ILO Minimum Age Convention and the Convention on the Worst Forms of Child Labour. These Conventions do not prohibit all work for all children; instead any work carried out by a child under the minimum age to enter employment is prohibited. Any work that is '*detrimental to the child's health, personal development, education, growth...*' is also prohibited. In contrast, 'child labour' identifies any kind of employment or work carried out by children which fails to comply with the requirements of the Minimum Age Convention or the Convention on the Worst Forms of Child Labour.'³⁸

The ILO Conventions have been criticised because the restriction of work only to those children above a certain age regarded as unrealistic and '*a child-unfriendly model of childhood.*'³⁹ Work and education are not necessarily mutually exclusive and not all work is inherently harmful to a child's development. Furthermore, prohibiting all work for those under the minimum age does not eradicate child labour without additional supportive policies.⁴⁰ Nieuwenhuys argues that if children are not permitted to work, this creates only two legitimate spaces for children to grow up; '*...the sanctity of the nuclear family on the one hand and the school on the other*'. She regards this as problematic and states that if this became a universal standard then '*...there is a danger of negating the worth of often precious*

³⁸ M Pertile, (n30), 10.

³⁹ B White, 'Defining the Intolerable: Child Work, Global Standards and Cultural Relativism' (1999) 6 Childhood 133,134.

⁴⁰ Ibid

*mechanisms for survival, and penalizing or even criminalizing the ways the poor bring up their children.*⁴¹

5.1 Is All Work Inherently Negative for the Child?

Children who work are often assumed to have been forced into this situation as a result of pressure from within the family or through particular root causes such as poverty. The possibility that the child has made a deliberate choice to work is not considered in this analysis.⁴² As stated above, children are traditionally regarded as victims who are reliant on '*...exogenous processes determined by arguably well-intentioned adults and adult-led institutions.*'⁴³

When children make an autonomous decision to work it is not necessarily the fact that the child is involved in a work environment that is problematic. Rather it is the conditions under which the work is carried out and the abuse and exploitation of children within a working environment. There are factors which may increase the potential likelihood that a working arrangement will become exploitative. The child's physical distance from their family is problematic and whether effective contact is maintained is an important issue. It has been suggested that closer connections between the parent and employers may provide additional security for the child whilst they are working

⁴¹ O Nieuwenhuys, 'The Paradox of Child Labor and Anthropology' (1996) 25 Annual Review of Anthropology 237, 242.

⁴² K Basu, 'Child Labor and the Law: Notes on Possible Pathologies' (2004) at 3 Harvard Institute of Economic Research, Discussion Paper No. 2052, available at <<http://www.economics.harvard.edu/pub/hier/2004/HIER2052.pdf>> [last accessed 01.11.2011].

⁴³ K Moore, 'Supporting Children in Their Working Lives: Obstacles and Opportunities Within the International Policy Environment' (2000) 12 Journal of International Development 531, 532.

away from home.⁴⁴ Payment or non-payment is often used to assess whether a situation is exploitative for the child. Often where payment is not made directly to the child the implication is that the child is in a more exploitative situation than if they were paid directly.⁴⁵ Although these factors are important, they are not individually conclusive in determining whether an employment arrangement is exploitative or not.

Work undertaken by children is not always inherently negative for them because children may also gain from this experience. Whether work, including domestic work, has negative consequences for the child is dependent on the context. Work is central to the childhood of many children. The fact that some children look for employment opportunities and are willing to migrate to obtain work is not necessarily culturally unacceptable or perceived as inappropriate by the children themselves or their parents.⁴⁶ It is acknowledged that work, including domestic work may be exploitative, but assumptions about children's independent migration as inevitably exploitative and harmful need to be challenged and potential positive outcomes for the child identified.⁴⁷

⁴⁴ A Whitehead and I Hashim, 'Child Migration' (2005) at 32 Background Paper for DFID Migration Team available http://www.childmigration.net/dfid_whitehead_hashim_05 [last accessed 01.11.2011].

⁴⁵ Ibid.

⁴⁶ S Punch, 'Childhoods in the Majority World: Miniature Adults or Tribal Children?' (2003) 37(2) *Sociology* 277, 279.

⁴⁷ S Punch, 'Migration Projects: Children on the Move for Work and Education' September (2007) at 10, Paper Presented at Workshop on Independent Child Migrants: Policy Debates and Dilemmas' Organised by Development and Research Centre on Migration, Globalisation and Poverty, University of Sussex and UNICEF Innocenti Research Centre available <http://www.migrationdrc.org/news/reports/icm/Punch_migration_paper.pdf> [last accessed 30.10.2011].

6. THE ROLE TAKEN BY CHILDREN IN THE DECISION-MAKING PROCESS

A child's decision will no doubt be influenced by their social circumstances but this does not necessarily mean that they have been forced to work. Accepting children as competent self-determining individuals involves recognising that they may make decisions regarding their own future which may not fall within current norms. The child's decision is not necessarily wrong or result in negative outcomes for the child, even if the decision does not conform to these social standards or norms.

6.1 Children's Views of Domestic Work

It may be suggested that domestic work should be classified as one of the worst forms of child labour. The involvement of excessively long hours and the fact that the child is often confined to an employer's house are two reasons supporting this rationale. However not all domestic work falls within these parameters and children do not necessarily view domestic work in these terms.⁴⁸

Some children in domestic work are undoubtedly in need of protection and the appropriate response is to remove the child from the situation and provide them with assistance to aid their recovery from their experience. In contrast, other children may wish to have the opportunity to work. This was the situation of some of the child domestic workers in Zimbabwe involved in Bourdillon's research. No generalisations are being made or suggestion that all children view domestic work in this way, but the research illustrates one possible viewpoint that is shared by

⁴⁸ UNICEF, 'Child Domestic Work'(1999) International Child Development Centre, Innocenti Digest 5, available <<http://www.unicef-irc.org/publications/pdf/digest5e.pdf>> [last accessed 11.11.2011].

some children. Bourdillon found that, although the children had some complaints about certain aspects of their work, they were happy in their work and wished to continue working.⁴⁹ This research highlighted several important points relating to children working in domestic work. Not all children were involved in domestic work where they were required to work excessively long hours.⁵⁰ Some were genuinely treated as part of the family, playing with the other children in the household, eating with the family and provided sleeping facilities equivalent to the other children. In some circumstances children identified in Bourdillon's research had been given a contract of employment and they were aware of their rights whilst in domestic work.

It was not a uniform picture since other children in domestic work were treated very differently and were given less nutritious food than the family within the household.⁵¹ Children's views about domestic work were found to vary quite considerably. Domestic work was viewed as a positive choice by some children, providing a place to live, an opportunity for them continue school or conversely an opportunity to cease attending school, and providing the means to buy their own necessitates. For some children, their employment was a source of pride for them. Other children regarded domestic work as involving excessive hours of unpleasant work for very little reward and as a situation to they were forced into through lack of an alternative which they saw as a

⁴⁹ M Bourdillon, 'Child Domestic Workers in Zimbabwe: Children's Perspectives' in B Hungerland and Others, (eds) *Working to be Someone: Child Focused Research and Practice with Working Children* (Jessica Kingsley, 2007) , 55.

⁵⁰ M Bourdillon, (n49), 56.

⁵¹ M Bourdillon, (n49), 62-63.

source of humiliation.⁵² For these children, the experience of domestic work was a negative one.

Bourdillon's research illustrates that, rather than viewing domestic work as an inherently negative experience, some children also had positive experiences. It is possible that is not just an isolated view of domestic work identified by this one piece of research, but is in fact an indication of the views of domestic work more generally. The research also demonstrated that there were a range of experiences related to the conditions within domestic work, the attitudes of the children to entering employment and the overall happiness of the children.⁵³

Children were aware that in Zimbabwe they were limited to 6 hours of light work a day which was the legal maximum for children under the age of 17. They thought that this limit was unrealistic and suggested an alternative range of hours. They felt that the maximum 6 hours of light work permitted should apply to those children under the age of 13. 13 and 14 year olds should be limited to a maximum of 8 hours, whilst children who were between the age of 15 and 17 should be permitted to work up to a maximum of 10 hours per day. The children justified these hours by describing what work children of various ages should be expected to carry out. The workload and range of duties increased the older the child became.⁵⁴ This particular aspect of the research illustrates that children are able to make decisions and support their reasoning with sensible and logical ideas of what is realistic in the context of children in domestic work. Where children did have

⁵² M Bourdillon, (n49), 63.

⁵³ M Bourdillon, (n49) at 58-59.

⁵⁴ M Bourdillon, (n49) at 60.

complaints it was often regarding inadequate provision of rest time and holidays rather than the nature of the work *per se*.⁵⁵ For some children the conditions were the source of unhappiness, rather than the fact that they are in employment.

The issue of children working and migrating to do so ultimately needs to be approached from a different perspective. There needs to be recognition of the differences between the situation where the child has chosen to work and experiences good working conditions, and the situation where they are trafficked into domestic work and exploited. One such way to draw this distinction, is to support children in employment in order to improve, regulate and monitor the conditions in which they are working, but continue to protect those children trafficked into this situation. These varying approaches require a proactive response, rather than a reactive one, and in responding in this way a child's autonomy is respected because not every child discovered in domestic work is treated as a trafficked child. This discussion leads to the question of whether a child can truly consent to enter domestic work as employment, which involves consideration of external influences on their decision.

6.2 Are Children Making Truly Voluntary Decisions?

There are numerous reasons why children migrate and enter employment and whether these choices are truly voluntary ones is very much dependent on the circumstances at the time the decision is made. In Bourdillon's research, 66% of the children interviewed stated that they had chosen the employment themselves and overall 61% of the

⁵⁵ M Bourdillon, (n49), 61.

children stated that they did not want to stop working.⁵⁶ An even higher percentage of children involved in Camacho's research of child domestic workers in the Philippines claimed that they were in domestic work as a result of their own choice.⁵⁷ There are often influences on the child's decision and the extent and nature of this influence may change the the decision. In some circumstances, although a child claims that they freely choose to migrate to work, this may not necessarily be the case particularly where external factors have not been acknowledged.

6.3 The Role of the Family

The child's family are often involved in the decision-making process. This may involve not only parents, but siblings and grandparents.⁵⁸ The child will often consult with some of their family in deciding whether to migrate to work, but the ultimate decision often remains with the child themselves.⁵⁹ In circumstances where a child enters work, it is often assumed that it has been the parents who have made this decision.⁶⁰ Parents may take a variety of views in relation to their child migrating to work. They may in fact conform to the dominant perception of

⁵⁶ M Bourdillon, (n49), 57. 72% of the children interviewed were aged 15-18 and 29 of the children were under 15 which was the legal minimum age to enter employment in Zimbabwe.

⁵⁷ AZV Camacho, 'Family, Child Labour and Migration: Child Domestic Workers in Metro Manila' (1999) 6 (1) Childhood 57 80% of the children interviewed.

⁵⁸ S Punch, 'Youth Transitions and Interdependent Adult-child Relations in Rural Bolivia', (2002) 18 (2) Journal of Rural Studies 123, 129.

⁵⁹ AZV Camacho, (n57), 64-65.

⁶⁰For a discussion of children's involvement within the context of family migration see HL Ackers 'From 'Best Interests' to Participatory Rights: children's involvement in family migration decisions' (2000) Working Paper 18. Centre for Research in Family, Kinship and Childhood: Leeds, available <http://www.sociology.leeds.ac.uk/assets/files/FLaGWorkingPapers/WP18_Ackers.pdf> [last accessed 11.10.2011]; N Bushin, 'Researching Family Migration Decision-Making: A Children-in-Families Approach' (2009) 15(5) Population, Space and Place 429-443.

children's migration and instigate their child's entry into domestic work or at least encourage the child to do so. Conversely, parents may be hostile to the possibility of their child entering domestic work and try to prevent their child leaving, or at least postpone their departure, by refusing to give the child their consent.⁶¹ As Hashim identifies, "...children do make strategic life choices and negotiate with adults to do so".⁶²

6.4 Cultural Influences

Even where a child claims that it is their own choice to enter domestic work, this statement needs to be considered within the context of the child's cultural circumstances. There will, in some circumstances, be factors which influence the child's decision whether these are explicit or not. Socialisation may occur where the family's work history may influence the child's work and migration.⁶³ As Camacho stated:

*'The family does not only transmit work-related values, it also transmits migration-related values to its members. The cultural context of the community likewise may socialize children towards work-related migration.'*⁶⁴

⁶¹ S Punch, (n58), 129.

⁶² IM Hashim, 'The Positives and Negatives of Children's Independent Migration: Assessing the Evidence and the Debates' (2006), 26, Working Paper T16, Sussex Centre for Migration Research, available <http://www.migrationdrc.org/publications/working_papers/WP-T16.pdf>[last accessed 01.11.2011].

⁶³ AZV Camacho, (n57), 68.

⁶⁴ AZV Camacho, 'Understanding the Migration Experiences of Child Domestic Workers: Towards Alternative Perspectives on Children and Migration' (2007) 64-66 in Conference Report Focus on Children in Migration – From a European Research and Method Perspective available <http://www.childsrights.org/html/documents/adem/16.%20Conference_Report_Warsau.pdf>[last accessed 01.11.2011].

There may be cultural expectations and attitudes that children will work deriving from practices which may have the effect of labelling children who migrate to work as 'good' children.⁶⁵ This indirectly implies that those children who do not enter employment are 'bad'. Work may be seen as doing what is expected from dutiful children and in these circumstances it is not a question of whether a child will work or not, but rather a question of what work they will do.⁶⁶ Migrating to work may be so deeply rooted into the culture in which the child lives that the child's migration is reinforced and seen as the normal practice.⁶⁷ It is doubtful whether the child entering work in this situation could be considered to have made a truly voluntary decision.

Children often work within their own family home, carrying out chores similar to those children who have migrated into domestic work. Other children are expected to help in the family business or to care for elderly relatives or younger siblings.⁶⁸ If this situation is acceptable, the difference between this work and child domestic work is questionable. The answer to that question must be that the separation of the child from their family and community due to the migration significantly changes the circumstances and risks the child may be exposed to. In turn, this often results in the child being denied access to an education, a right which all children have under Article 28 UNCRC. This would suggest that it is not the work itself which is the main issue, but the conditions, locality and lack of contact with the family that are problematic.

⁶⁵ Ibid.

⁶⁶ AZV Camacho, (n57), 66.

⁶⁷ S Punch, (n47), 3.

⁶⁸ J Aldridge and S Becker, 'Children as carers' (1993) 69 Archives of Disease in Childhood 459-462.

6.5 Economic Reasons

As Whitehead and Hashim have argued, a central motivation for migration is children's '*need or desire for income*'.⁶⁹ Economic factors are a major reason motivating children to migrate for work and in these circumstances it varies whether the child has made their own decision or whether there are influences affecting the child's migration. The pressure put on a child, even if not explicitly, has the potential to eradicate any perceived voluntariness of the child's decision. Migration due to economic reasons may fall into two categories, either necessity or choice. Necessity through poverty is a key issue which underpins the need for the child to migrate to work. This migration may enable the child to provide financially for themselves, or alternatively the child may feel a sense of responsibility to help to improve their family's economic situation by sending remittances home to their families.⁷⁰ Where poverty prevents parents sending their children to school it is not uncommon for children to migrate to provide for either their own or their siblings' school fees.⁷¹

The second category of migration which results from economic influences is arguably more about the child's choice rather than necessity. A child may wish to be economically independent from their family and have the ability to buy goods to which they would not otherwise have access, or they may wish to save for their future.

⁶⁹ A Whitehead and I Hashim, (n44).

⁷⁰ AZV Camacho, (n64), 64.

⁷¹ A Whitehead and I Hashim, (n44), 28 citing IM Hashim, 'Working with Working Children: Child Labour and the Barriers to Education in Rural Northeastern Ghana' (2004) D.Phil. thesis, University of Sussex.

6.6 More General Reasons

There are more general reasons which may influence children's migration including divorce, domestic violence, abuse or alcohol related issues,⁷² gender-based discrimination or personal crisis,⁷³ or for gathering items which would be seen as necessary for when they married. This is not an exhaustive list of reasons children migrate, but it gives an indication of the wide variety of reasons for which children may choose to migrate.

Children's choices may genuinely voluntary where the child perceives their migration and work as an opportunity to have '*new life experiences*'⁷⁴ or to '*have their eyes opened*'.⁷⁵ Children's migration may be intertwined with the process of their development from childhood into adulthood, and may be seen as 'a rite of passage' toward their economic and social independent life.⁷⁶ In research conducted by Carpena-Mendez, children who were interviewed said that they wanted to have the opportunity to learn new skills, to be able to go to new

⁷² JC Andvig, 'An Essay on Child Labor in Sub-Saharan Africa – A Bargaining Approach' (2000) at 3, Working Paper No. 613, Norwegian Institute of International Affairs, available < <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=27349>> [last accessed 01.11.2011].

⁷³ T Bastia, 'Child Trafficking or Teenage Migration? Bolivian Migrants in Argentina' (2005) 43 (4) *International Migration* 57, 80.

⁷⁴ IM Hashim, (n62), 26.

⁷⁵ IM Hashim, 'Research Report on Children's Independent Migration from Northeastern to Central Ghana' (2005), 33, Development Research Centre on Migration, Globalisation & Poverty, University of Sussex, available <http://www.migrationdrc.org/publications/research_reports/ImanReport.pdf> [last accessed 01.11.2011].

⁷⁶ S Punch, (n47), 3; F Carpena-Mendez, "'Our Lives are like a Sock Inside-out": Children's Work and Youth Identity in Neoliberal Rural Mexico', in R Panelli and S Punch and E Robson, (Eds) *Global Perspectives on Rural Childhood and Youth: Young Rural Lives* (Routledge, 2007), 46.

places and meet new people.⁷⁷ In the context of children in Africa where children are often fostered, it was often assumed that these agreements are made between adults without the involvement of the child. Although this is predominately the case, it has been shown that ‘a significant minority’ of children are often at the centre of the decision-making process.⁷⁸

6.7 The Role of Intermediaries

When children decide to migrate for work, they will rarely travel alone and may often look for assistance.⁷⁹ This assistance may be found through a friend, relative or broker.⁸⁰ If children are actively seeking someone to accompany them in order to increase their safety during the journey it further complicates the distinction between trafficked children and working children. The distinction between intermediaries and traffickers appears to be a fine one. Both are involved in the transfer of the child from their home and their international migration, but in the case of intermediaries the child has actively looked for someone that can assist them and provide additional safety for them during the journey to their place of employment. If it is accepted that children who have made their own decision to work have not been trafficked then it is likely that these intermediaries would be smugglers, rather than traffickers. Whether a child is considered to have the capacity to make a

⁷⁷ S Punch, (n47), 6.

⁷⁸ JC Andvig, (n72), 16.

⁷⁹ JC Andvig, (n72), 35.

⁸⁰ T Caouette, ‘Small Dreams Beyond Reach: The Lives of Migrant Children and Youth along the Borders of China, Myanmar and Thailand’ (2001), 45, A Participatory Action Research Project of Save the Children (UK) available <<http://www.burmalibrary.org/docs4/small%20dreams%20beyond%20reach.pdf>> [last accessed 01.11.2011].

truly voluntary decision to migrate to work has serious ramifications in terms of the legal response to these children.⁸¹

7. THE APPROACH WITHIN THE TRAFFICKING FRAMEWORK

For an offence of child trafficking to have been committed, the child must have been moved for the purpose of exploitation; therefore without the characterisation of the domestic work as exploitative there cannot be an offence of trafficking.⁸² When discovered in domestic work, the child is treated as being in need of protection and the people discovering the child will often assume that they have been forced into this situation. There is no evidence that when a child is discovered, consideration is given to the possibility that the work undertaken by the child⁸³ may be classified as or viewed by the child as lawful ‘child work’ rather than unlawful ‘child labour’. There is also no indication that a child will ever be considered to be in domestic work as a result of their own autonomous decision to work.

Within the legal definition of trafficking a distinction is made between trafficking adults and trafficking children. For an offence of trafficking to be committed against a child, the Trafficking Protocol removes the requirement of any:

‘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

⁸¹ See *Chapter Two* for discussion of the distinctions in these concepts.

⁸² See *Chapter Two* for a detailed discussion of this point.

⁸³ This refers to a child who has reached the minimum age to enter employment, discussed above.

achieve the consent of a person having control over another person.⁸⁴

This means that the presence of threats or force in facilitating the migration cannot be used to distinguish between child trafficking and children choosing to work. Furthermore, Article 3(b), Trafficking Protocol states:

'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;'

Taken literally this theoretically means that while adults may consent to the intended exploitation where there was no threat or deception but there is no possibility for a child to do the same. Adults may 'voluntarily' consent to an exploitative employment relationship where there is a lack of alternatives available to them and the exploitative situation is more beneficial than any other options. However, it could be argued whether consent under these circumstances is actually true consent if the only choices are equally exploitative.

Applying this approach to children is problematic. If children were legally permitted to consent to work, knowing that it was exploitative, in situations where work would be better than their current circumstances, then this would have potentially longer term and more severe consequences for children than adults. Children are still maturing and physically developing and need support during their childhood.

⁸⁴ Article 3(a), Trafficking Protocol.

In reality there are children choosing to migrate to work and despite the poor conditions they may be working in, they do not wish to leave their employment.⁸⁵ Treating all children discovered in domestic work as trafficked children does not therefore deal with the entire problem. The child will be removed from the exploitative situation and protected in the short term, but if they are making decisions to work, even in exploitative conditions, there is no reason to believe that they will not make similar decisions in the future.

The trafficking legal framework restricts the possibility for a child to consent to an exploitative situation and in doing so respects the child's right to protection from economic exploitation under Article 32 UNCRC. If a child is moved for the purpose of being exploited then that is sufficient for an offence of trafficking to be committed. However, there may be situations where a child has made the decision to migrate to enter domestic work as a form of employment and are subsequently discovered in domestic work and assumed to be trafficked. This has the effect of restricting and ignoring the autonomy of these children.

Even where children are not actually exploited there appears to be an assumption that these children were forced to enter domestic work and must have been exploited in some way. Children in domestic work are portrayed as passive victims who had no involvement in taking the decision to migrate. The assumptions being made about these children result in the conflation of voluntary child migration for employment with forced migration of children falling within the trafficking definition. This arguably prevents the most appropriate legal response

⁸⁵ M Bourdillon, (n49), 58.

being provided. Each of these situations requires either an employment law or trafficking law response respectively.

The overriding consideration to those children discovered in domestic work is the protection of these children rather than consideration of the possibility that a child has the ability to be self-determining. By failing to consider that a child may be in domestic work as a result of their own decision, there are situations captured that are not actually trafficking. This arguably weakens the effectiveness of the legal response to child trafficking and results in a failure to distinguish between children working in domestic work and those who have been trafficked. From the perspective of the child, there is an obvious conflict between self-determination and protection from exploitative situations when applied to the child who wishes to migrate to work. The question still remains as to where the line should be drawn between the child's freedom to decide their own future and enter work, and the protection afforded to them in this context which may have the effect of restricting that freedom.

7.1 The Focus on Consent

Within the trafficking legal framework, attempts have been made to distinguish the concepts of trafficking and smuggling through focusing on the issue of consent, or exploitation.⁸⁶ However, on their own neither consent nor exploitation is necessarily enough to make this distinction as there are significant potential overlaps between trafficking and smuggling.⁸⁷ The same issue is relevant in the context of children migrating to work and child trafficking. The impact on the child varies

⁸⁶ K Skrivankova, 'Combating Trafficking in Human Beings' (2006) 20(1) International Review of Law Computers & Technology 229, 229.

⁸⁷ As discussed in *Chapter Two*.

depending on whether they are regarded as having been trafficked or smuggled. A trafficked child is seen as a victim who is in need of protection but is in the exploitative situation through no fault of their own. In contrast, a smuggled person is viewed as a criminal or at the very least, as an accomplice to a crime which results in possible prosecution and/or deportation. It is not clear whether a child would ever be viewed as a 'smuggled child' because this would require recognition of the child's ability to give consent to the smuggling arrangement. There is no acknowledgement of a child independently migrating to obtain work. A paternalistic stance which fails to recognise a child's autonomy and does not consider that children in these situations have the capacity to consent has been adopted.

The focus on the issue of consent does not adequately acknowledge the possibility that true consent has not been obtained. It has been argued that focussing on consent fails to recognise the circumstances in which this consent was given, for example the influence of extreme poverty, vulnerability, lack of alternative choices or family pressure.⁸⁸

8. WESTERNISED UNIVERSAL STANDARDS

The ILO Minimum Age Convention and the Convention on the Worst Forms of Child Labour both attempt to set global standards in relation to children's work. The Convention on the Worst Forms of Child Labour was more readily accepted by the international community than the Minimum Age Convention. The Minimum Age Convention caused difficulties for countries with cultural differences and approaches to children working which were not necessarily adequately accounted for within the standards set by the Convention. White argues that these attempts could be seen as

⁸⁸ VE Munro, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' (2006) 46 *British Journal of Criminology* 318, 328.

representing '*...the antithesis of cultural relativism and of principles of recognizing and respecting differences*'.⁸⁹ However, due to the inbuilt, somewhat restrictive, flexibility of the ILO Conventions White suggests that they '*side-stepped the issue of cultural relativism*' by allowing States to define and determine what other forms of work are harmful and hazardous to children.⁹⁰

Although the UNCRC and the ILO Conventions are intended to apply to all countries in the world and, since they have been ratified by most countries, are literally universal, this does not necessarily mean that they are applied in the same way to the same extent in every country. These instruments create aspirational global standards which arguably approach the issue of child work from a westernised viewpoint. Pertile argues that it is essential that:

*'...the cultural implications of the fight against child labour be carefully assessed and discussed. Without such a debate, the fight against child labour runs the risk of bringing about the uncritical imposition of dominant values alien to the societies on which they are imposed.'*⁹¹

Defining which work is bad for children and which should be classified as one of the worst forms of child labour involves issues of cultural relativism. Children's lives and experiences are diverse and are dependent on many factors including the place they live, the child's gender, age and

⁸⁹ B White, (n39), 134.

⁹⁰ B White, (n39), 141.

⁹¹ M Pertile, (n30), 5 citing Zelizer, VA 'Pricing the Priceless Child: The Changing Social Value of Children', Princeton NJ, Princeton University Press, 1994.

the particular circumstances of the individual child. Children's experiences and needs are not homogenous and therefore account has to be taken of cultural differences that undoubtedly exist.⁹²

9. THE EFFECT OF ENFORCING A MINIMUM AGE FOR CHILDREN WORKING

Like adults, children who wish to work but have no legal avenues to do so will look for alternative routes into employment. This applies even where they have no legal right to migrate for work. These children are potentially in a more vulnerable situation, ultimately undermining the purpose of putting in place restrictions on entry into work and the type of work undertaken. The current legal framework concerned with child work has made positive steps towards eliminating the worst forms of child labour as embodied in the Convention on the Worst Forms of Child Labour. However, by setting the minimum age at which children may be legally permitted to enter work, many children are working without any legal protection or rights. This is the reality for many children despite the prohibition on any work that they are currently doing.

In order to explore this problem it is useful to consider Jacquemin's research concerning young domestic workers in Abidjan, Ivory Coast and the effect of the enforcement of Minimum Age Convention. The research focused on a non-governmental organisation, the International Catholic Child Bureau (ICCB), and the action that this organisation took to assist children who were working and the impact of their work.

⁹² B White, (n39), 134.

The range of ICCB's work was fairly broad and included holding workshops which aimed to provide healthcare for young domestic workers. They provided advice and assistance relating to the rights of these workers and extended their reach to employment agencies with the aim of educating agencies to assist in the enforcement of the minimum age for placement of children in domestic work, as required by the Minimum Age Convention. They used the media to educate the public in relation to child domestic workers and the current law and encouraged and assisted child domestic work to create associations. The most interesting feature was that children who were working as child domestic workers but were below the age of 15, the minimum age for children to be legally working, were excluded from these associations.⁹³ This had the effect of, on the one hand assisting in the enforcement of children's rights and the minimum age as defined by the Minimum Age Convention, but on the other hand effectively making younger child domestics invisible and compounding their vulnerability.

The fact that ICCB had been so successful in educating employment agencies, assisting in the enforcement of the Minimum Age Convention with 80% of agencies complying with the requirements, was positive for many children. However, the remaining 20% of agencies refused to cooperate as they were able to make a lot of money by arranging work for younger children. This had the effect of forcing those children below the minimum legal age who still wanted to, or had to work, little choice but to go to one of the more exploitative agencies.⁹⁴ Even if 100% of the agencies had complied, younger children would have had to seek other

⁹³ M Jacquemin, (n36), 396.

⁹⁴ M Jacquemin, (n36), 389-400.

methods of obtaining employment giving rise to an increased risk of exploitative work.

It is clear that the Minimum Age Convention has the effect of ensuring that children working above the minimum age are provided with rights within an employment situation which is a positive step for children. It does not actually prevent children who are younger than this minimum age from working. It is these children that the current legal framework is particularly failing.

10. LEGALLY ENFORCEABLE EMPLOYMENT RIGHTS FOR ALL CHILDREN

An alternative approach, which may have the added benefit of respecting children's rights under both Article 12 and 32 UNCRC simultaneously, would involve maintaining the existing categories of the worst forms of child labour under the Worst Forms of Child Labour Convention. Children in these situations should be removed and protected. At the same time, rather than focusing on a minimum age for employment, which is not necessarily enforceable for the benefit of all children across different cultures, all work that children undertake, regardless of the age of the child, could be regulated. This would involve extensive efforts by States to inspect and regulate private dwellings where individuals work in order to provide domestic workers with the same rights as other employees. This is the particular aim of the ILO Decent Work for Domestic Workers Convention, however to date the UK has not signed or ratified this Convention and therefore domestic workers in the UK do not enjoy the same rights as employees in other sectors. It is acknowledged that it is a controversial suggestion that focus should be on the conditions of work rather than the minimum age for employment and the implications of this need to be explored.

Focusing on the conditions of employment and providing rights for all children in work would be an improvement for those children who are under the current legal age to enter employment but are nevertheless working. Currently this category of children is completely unprotected and they enjoy no legal employment rights at all. They are therefore at an increased risk of exploitation. The current legislative response to children working is not in line with the reality of the situation of these children. Children under the minimum age for work are automatically being seen as incapable of making autonomous decisions and as victims who are in need of protection. This paternalistic approach does not assist those children who wish to work. It is not necessarily the work itself that is a problem, but the sacrifices that are made in order to do so, such as losing contact with the family and failing to benefit from an education.

Taking the approach of either removing or lowering the age limit for children to legally enter work is likely to disproportionately affect children from developing countries rather than children from westernised societies. Cultural constructions of childhood would be central in this context. It would not be unusual within some cultures for childhood to involve not only play and school but also work, whilst at the same time other cultures would not include the formal schooling or less importance would be placed on this element. By recognising the cultural differences and applying universalised standards within a flexible framework to different countries will potentially result in children in some countries, apparently being exposed to an increased risk of exploitation. However, by approaching the issue from the perspective of providing rights to all children who work regardless of their age this would in fact benefit these children rather than discriminate against them and ensure they have protection from

exploitation through legally enforceable rights that they do not currently have.

There is some evidence to suggest that children in domestic work who have reached the minimum age to legally enter employment are quite often 'let go' by their employers who replace them with younger children.⁹⁵ This is because children legally permitted to work benefit from employment protection and gain rights which were previously unavailable to them. If any child who entered employment, regardless of their age, had legal rights under employment law which ensured that the duties carried out were suitable to their age and ability, there would be less attraction for employers to employ younger children and more overall protection for all working children.

There are however, potential problems with this suggested approach. If no minimum age for children to enter employment is implemented, it may result in extremely young children entering work. Even if there were legally enforceable employment rights that all working children could rely on regardless of their age, it would be likely to result in children working instead of receiving an education. This could result in longer-term problems for the child and much narrower choices for their own future. The importance of children having a childhood where they can play, rest and enjoy the various stages of their development may be eroded. If it is legally sanctioned, more parents may be more tempted to send their children to work than is currently the case. Despite the employment rights that would be available, the expectations placed on children within the workplace may be beyond what they are capable of, both physically and psychologically. Therefore, although there appear to be good arguments for

⁹⁵ A Kielland and M Tovo, *Children at Work: Child Labor Practices in Africa*, (Lynne Rienner Publishers, 2006) 97.

removing the minimum age for children to enter work and the extension of employment rights to all children in work, the possible negative consequences for the child outweigh them.

11. CHILD DOMESTIC WORK AND MIGRATION

Having considered the position of children of all ages, the particular circumstances of adolescents who have reached their own decision to enter domestic work will now be considered. Even though these children are over the minimum age to enter employment, as defined by the Minimum Age Convention 1973, and therefore entitled to employment rights, there is still a potential risk to these children where their decision involves their migration to work.

The risks presented to the adolescent will vary depending on whether they migrate to work and, if so, the place to which they migrate. If an adolescent works but remain within their own family home, they benefit from the protection and security that their family and community can hopefully provide. They remain in familiar surroundings raised by their parents within their own culture and being able to socialise with their peers. Their parents would have opportunities to monitor the work their child is undertaking and ensure that this work does not exceed their physical capabilities.

Conversely when an adolescent migrates, this may involve internal migration within their country of origin, or international migration. Both situations increase the child's risk of exploitation, but international migration is particularly problematic. Despite being legally old enough to work, the fact that these adolescents are migrating across international borders to work increases their vulnerability to exploitation and abuse. They leave their family, friends, community, culture and any security that

their parents may be able to offer. If these adolescents are subsequently exploited in domestic work in the UK, they will be deprived of contact with their family. Given that they would present in the UK illegally if they migrated to the UK since there is no legal opportunity for anyone under the age of 18 to be employed in domestic work, they would have limited opportunity to seek help. This factor is also used by those adults exploiting them to deter them from approaching the authorities.

12. CONCLUSIONS

This chapter's overall aim was to consider whether it was ever contemplated that a child above the legal age of employment discovered in domestic work had arrived in that situation due to their own autonomous decision or whether these children are automatically presumed to have been trafficked. It has been illustrated within the discussion above that there is little or no evidence to suggest that the possibility that a child has chosen to migrate to work is considered.

Drawing the distinction between a trafficked child and a child working in domestic work in practice is very difficult despite the clarity within the law to distinguish the two. There are numerous factors which may be taken into account but it is not clear whether it is possible to definitively categorise the situation of these children accurately. For example, the fact that a child in this situation is not in education and not attending school may be an indication that the child may have been trafficked. However, a child may also attend school, but still be exploited in domestic work. In these circumstances it is unclear which child, if any, would be considered a trafficked child and the lack of education will not necessarily separate these categories.

Similarly, if a child does not receive direct payment for work undertaken this may not automatically mean that they have been trafficked, even though there is a tendency for this to be assumed. A child may be receiving payment in kind such as accommodation, schooling and other opportunities otherwise unavailable to them. Payment may be made directly to the parents in order to put money aside for the child's needs on their return, such as items they require for a future marriage. The child in these situations cannot be said to be exploited if they are receiving fair reward, directly or indirectly, for the work they do in conditions which are not damaging to the child. If the child receives no payment of any kind this can however be one indication that they may have been trafficked.

In relation to a child's ability to make autonomous decisions to migrate and enter employment in domestic work the limitations and the potential tension between Articles 12 and 32 UNCRC were discussed. The limitations on children's migration, age when entering employment and scope of permissible work were identified. This revealed that no child of any age had a legal right to migrate and enter domestic work in the UK and there are restrictive immigration rules in this regard. This restrictive approach arguably forces children to look for other avenues which will secure their entry, such as smuggling or agreeing to more dubious and potentially exploitative situations than they would have preferred if there were legal alternatives. Even if children cannot legally consent to exploitative situations, they may be doing so in reality. The root cause behind a child wanting to work is not tackled by treating this child as a trafficked child.

This chapter has argued that it is not the fact that children work that is necessarily the problem which instead lies in their conditions of work.

Limiting children's ability to work through a legal minimum age for children to enter employment in the Minimum Age Convention, has the effect of forcing younger children who want to work to find work by other means which potentially puts them in a more vulnerable position.⁹⁶ A younger child would currently have no legally enforceable employment rights because they have no legal right to work prior to reaching the minimum age for employment. These children cannot turn to authorities to monitor or enforce the conditions of their work. The suggestion was raised that, rather than providing for a minimum age for entry into employment, employment rights and protection could be provided to all children who work regardless of their age. This acknowledges the children who are working illegally and are currently unprotected, and encompasses the reality of many children's lives throughout the world. However, this was found to be problematic as it may result in fewer children attending school and receiving an education which is an important part of a child's development. More parents may be more willing to send young children to work if this is legally sanctioned as a legitimate strategy. Very young children may therefore be at an increased risk of having to carry out work that is beyond their capabilities and that is harmful to them.

Where the child migrates to work rather than remain within their own family and community this raises particular issues. If a child is forced either by parents or others into a work situation and migrate as a result of others' decisions rather than their own, this more readily falls within the definition of trafficking. Similarly, where a child has agreed to migrate to work under a sense of duty or responsibility or as a result of persuasion, or where they cannot leave their work due lack of alternative choices this

⁹⁶ Bey, M 'The Mexican Child: From Work with the Family to Paid Employment' (2003) 10(3) Childhood 287, 295.

is arguably still trafficking as there was an intention at the point of movement that the child's labour would be exploited against their will. Consent is therefore important, but from a different perspective than that adopted in the definition of trafficking contained in the Trafficking Protocol. The child's view and understanding of the situation is vital. Article 12 UNCRC and the child's right to be heard should be respected. If a child who is above the minimum age of employment has made a genuine autonomous decision to work and are subsequently exploited, it could be argued that this is not trafficking as there may not have been the intention to exploit the child at the point of movement. An employment law response would be more appropriate in these circumstances.

In the particular case of adolescents discovered in domestic work in the UK who insist that they have made their own decision to migrate, in order to fully respect their autonomy they would have to be treated as having been smuggled into the UK rather than trafficked. The adolescent would then be in breach of UK immigration rules, potentially prosecuted and subsequently returned to their country of origin. This is likely to be an untenable position and highlights the tension between protecting the child and respecting their wishes and feelings. These adolescents would be treated as trafficked children and their right to protection from exploitation under Article 32 UNCRC would take precedence over their Article 12 rights.

The discussion in this chapter has illustrated that there are limitations in terms of the respect given to a child's autonomous decisions to migrate to work. Several factors play a role in these limitations. For example, children's vulnerability increases when they migrate to work and the level of this is dependent on how far they migrate. Children who internationally migrate are particularly at risk given the additional

problems they may experience. These problems range from issues relating to travelling to the place they want to work, to the potential for them to be exploited given that they have no support from their family or community available to them. Even when the child is above the legal minimum age to work, they would often look to adults to facilitate their migration and despite these adolescents viewing their migration as a choice they have made, the adults involved may have the intention to exploit them. Additionally, in terms of the UK, there are no legal avenues available for children to migrate to the UK in order to enter employment in domestic work. This adds to the difficulties in justifying any prioritisation of respect of a child's autonomous decisions over their need of protection. The UK has made a decision to restrict employment in domestic work to adult migrants only. For this reason the UK would continue to treat any children in domestic work as trafficking victims and would look to prosecute the adult who had the intention to exploit the child at the point of them leaving home.

Although it is acknowledged that this does not respect the child's autonomy, some line has to be drawn in relation to what can be justified as acceptable work in the UK for children. Accepting that it is right for children to internationally migrate into domestic work, (which does not currently provide the same legal employment rights under UK law), is problematic. If a child's autonomy were to be prioritised over their right to protection under these circumstances it would result in increasing the vulnerability to this particular group of children to exploitation.

However, it may be possible that children above the legal age of employment who remain within their own family and community and who migrate internally within their own country may have more justification to insist that their own decisions to enter domestic work are

respected. As has been discussed earlier, there are countries which permit children to enter domestic work as a form of employment and it is therefore sensible to find new ways to ensure that all these children benefit from equal employment rights and protection regardless of the sector they work in. A more flexible approach to children working could be taken which would serve to protect all children from exploitative employment situations and protect them from potentially looking to adults to facilitate work in more dubious circumstances than they otherwise would.

Younger children, who have no legal right to work, present particular challenges to the response to child employment and child trafficking. The current system of setting a minimum age for employment is not providing rights and protection for all working children. Two choices exist, first to remove the minimum age for employment and allow children of any age to work and provide protection for all of them, or secondly to maintain the minimum age to enter employment and make more concerted efforts to reach children working below this age. The first is a more difficult situation to accept for many States due to the fact that young children working would be being sanctioned by the State. The second would require acknowledgement that very young children are in fact in some cases working. The response would need to encompass more targeted help for both the child and the family in order to discover the root cause of the child entering work. This would entail providing support, education and alternatives for the child other than work. This would require a commitment from States to increase efforts to discover these younger children and assist them in order for them to find alternatives.

It has been highlighted that there are several issues involved in children working in domestic work and whether these children once discovered

are treated as working children or trafficked children. It has been shown that the age of the child is relevant, as is migration and whether it is internal or international migration. The combination of these factors influence to what extent a child's autonomy can be respected and when it is necessary for the child's protection under trafficking laws to be the priority. As children have no legal right to migrate to the UK to enter employment in domestic work, it is assumed that the adult responsible for the child's movement has intended to exploit the child in domestic work and therefore any child found in this situation in the UK will be treated as a trafficked child. In contrast, children who remain within their own country and migrate internally may be protected from exploitation through employment law where the child (over the minimum age for employment) has freely chosen to work where there is no evidence of an adult arranging the child's migration with the intention to exploit them.

It is possible that families and children over the age for employment could be supported and educated about the risks involved with domestic work and migration and how international migration involves particular risks and the probable outcome if the child is discovered. At the same time, countries of origin should consider ways of increased enforcement of the ILO Minimum Age Convention and better regulation of the conditions of work of children above the minimum age. Providing all children, above the minimum age, who voluntarily enter employment with legally enforceable rights, will empower children as independent actors, rather than treating them only as vulnerable victims. It will also allow children in employment relationships to be protected through employment law and those who have been genuinely trafficked into this situation to be protected as such. States could also take action to protect those children working who are below the minimum age of employment and ensure that these children and their parents are aware of the increased

risks associated with entering work. Alternatives for these children should be provided and consideration of the root causes for these children to enter domestic work at such a young age explored.

Conclusions

The objective of this thesis was to examine the legal regulation of child trafficking to assess the ability of the legal framework to protect children and their rights, using children in domestic work as a case study. In order to achieve this objective, the level of individualisation necessary within the legal and policy responses was explored. This process challenged the set of assumptions that surround child trafficking and the stereotypical image of the trafficked child that has been created based on these assumptions. Each of the substantive chapters took a particular aspect of child trafficking as the focus. The research examined the legal instruments aimed at tackling human trafficking and it was initially assumed that the problems in tackling the phenomenon were created by the law itself. The research revealed that this is not the case, and the enforcement of the law and the discourse surrounding trafficking played a much greater role.

The research represents the first comprehensive analysis of children in domestic work, explicitly acknowledging the relationship with private fostering. A range of different sources were drawn on to assist in the recognition of the complexities involved and provide new insights into child trafficking. The concept of individualisation used within the thesis enabled the diversity of the phenomenon to be explored and illustrate the value in individualising children within the trafficking responses. The complexity of gender issues was explored within the context of child trafficking and the research exposed that the assumptions being made about women did not necessarily apply to this particular type of exploitation. Women, both within the home and the receiving household were seen to be reinforcing the gendered nature of domestic work and were actively participating in trafficking and exploiting girls in this situation. Often a children's rights approach has taken a binary approach with either

a focus on the welfare of the child or the empowerment of children. The research contributes to a children's rights approach within the context of trafficking and domestic work, recognising the complexities involved and the role played by children themselves in the decisions reached for them to enter domestic work. A more flexible approach to children's rights was identified which individualised children and took account of their characteristics, such as age, which should influence the particular response made to this situation.

Any examination of trafficking is inevitably challenging given that the extent of the phenomenon is unknown and the true picture cannot be quantified. It was demonstrated in *Chapter Five* that the available research is limited in terms of scope, both geographically and the type of exploitation targeted. The current empirical research is disjointed and therefore incomparable between countries. This has resulted in suggestions about the extent and nature of trafficking often being speculative rather than based on concrete substantiated numbers. This is problematic not only in theory, but it has real practical consequences for trafficked children. Legal and policy responses are being informed by these estimates with resources being targeted towards particular forms of exploitation, such as sexual exploitation, which are assumed to be the most prominent.

With this in mind, the research presented in this thesis suggests a number of areas in which changes could be made, both in terms of information-gathering on trafficking, as well as in relation to formal legal and policy responses to the phenomenon. In particular the policy focus needs to shift to include a more balanced approach to all forms of exploitation, including trafficking which is the result of more informal arrangements. This would assist in more appropriate responses to child trafficking and avoid the current position where many children are being obscured or overlooked.

The research also revealed in *Chapter Five* that a new approach to data collection needs to be taken if the statistical information is to be relied on with any confidence. The starting point needs to be on the development of reliable data collection at the national level which is based on previously agreed international standardised procedures and definitions. Only when all countries are collecting the same information, based on the same definitions and following the same robust and systematic procedure should this result in reliable and comparable data. This would be in contrast to the current system where there is little or no agreement between countries about the specific data that is to be collected or how this is to be shared with and compared to other countries data. The United Nations would be well placed to try to bring agreement on the method, scope and reporting of statistics. This is due to the fact that most countries throughout the world are signatories to the Trafficking Protocol and may be more willing to cooperate. The EU has the capacity only to directly influence Member States; however the EU could effectively work with the United Nations to help to implement the standards agreed upon.

Only when responsibility is taken for the collection of data which is comparable can the extent of the problem start to be understood and the trends between countries exposed. This will obviously take some time before a more accurate picture of the global problem can be provided. Even then it still needs to be acknowledged that due to the hidden nature of the phenomenon there are still likely to be discrepancies between the confirmed and actual number of cases of child trafficking. *Chapter Five* discussed the temptation to rush to make assumptions and generalisations based on limited research and the potential for this to limit appropriate policy responses and the possibility that many trafficked children may be overlooked as a consequence of the approach taken. Reliable data would

allow more targeted preventative action between countries of origin, transit and destination.

It was also recognised in *Chapter Five* that data collection is more than just trying to provide numbers of victims. Qualitative data is just as important as quantitative data since it provides detail and insight into children's experiences of trafficking. With this in mind, the research presented in this thesis has attempted to draw on a wider body of empirical research, some of which admittedly focuses on a relatively small sample, with a view to providing richer, more in-depth insights into the variable experiences of trafficked children. The disaggregation of data is an important part of extending existing knowledge. This provides an opportunity to learn more about the various characteristics of the children who are trafficked, their country of origin and methods of recruitment, transport and entry into the UK. Additionally their age and gender, the type of exploitation and details of who traffickers are and whether family, friends or organised criminal groups are involved are important aspects of this data collection. This data collection is important as it shapes the trafficking legal framework and the enforcement of the law. Once more detail is obtained about the diverse range of variables involved in trafficking it will allow a more targeted response to all forms of child trafficking, in terms of the types of exploitation and the actors involved.

The examination of the trafficking framework in *Chapter Four* revealed that the dominant approach has been to respond to trafficking as a problem of transnational organised crime with a particular focus on sexual exploitation. Also children's migration has been framed primarily, either in terms of migration as part of family unit or as unaccompanied asylum seeking children. When considered, children's independent migration is placed in the context of forced migration. The assumption exists that

trafficked children are unaccompanied asylum seeking children. This is problematic for those children in domestic work who arrive accompanied and the child makes no claim for asylum. This means that we are not looking in all the right places to find these children and even when they arrive in the UK, they will not necessarily be recognised as trafficked children. The law itself is broad enough to encompass all aspects of trafficking whether it involves organised crime, more informal arrangements, sexual or labour exploitation and internal or international migration; however the enforcement of the law remains skewed towards organised crime and sexual exploitation and children's forced migration.

The law has a role in making it as difficult as possible for children to be trafficked by defining clear offences and severe penalties which act as a deterrent. Traffickers will look for the greatest profit with the least risk involved so it is important that countries have criminal laws in place to act as a deterrent which are consistent with international standards. To prevent particular countries from being seen as 'more appealing' to traffickers, it is important that the law provides a consistent approach universally and the Trafficking Protocol and the CoE Convention play an important role in achieving this aim. *Chapter One* highlighted that the scope of the offences under the Trafficking Protocol was initially problematic by only applying where transnational organised crime is involved, however the CoE Convention resolved this problem and applied to all trafficking both organised and more informal. UK law reflects the latter position and therefore prohibits all trafficking regardless of the type of exploitation and the methods used to recruit and transport victims.

Currently in the UK, trafficking is dealt with alongside smuggling under the umbrella of immigration crime. This has resulted in a great deal of confusion between the two concepts as the analysis in *Chapter Two*

demonstrated. In order to prevent this confusion, trafficking should be separated from smuggling and no provisions relating to trafficking should be contained within an Act dealing with aspects of immigration crime, such as the Asylum and Immigration Act 2004. A separate Act of Parliament that only dealt with trafficking, both sexual and labour exploitation where either informal arrangements or organised crime were involved would provide a clear message to those enforcing the law that there are very clear legal differences between trafficking and smuggling. Each concerns different actors and different ultimate objectives. Separating trafficking into a separate Act of Parliament would not prevent the relationship between the two concepts to be recognised in practice when appropriate.

The level of protection available to victims varies considerably between instruments, with the Council of Europe Convention leading the way towards a more human rights approach and putting victims' rights at the centre of the legal response. The interests of the individual and the protection of victims' rights have, in the past, been secondary to the protection of States interests and the security of external borders. Although border control is still of concern to States, there is now more acknowledgement that the protection of trafficking victims is important. It is possible for a balanced approach to be developed where the interests of both the State and the individual are equally captured by the legal response; however it is questionable whether this balance is yet to be fully achieved in practice. UK law provides protection for children under the current child protection system as prescribed under the Children Act 1989. However, it must be ensured that specialist trained staff are available to these children and their status as trafficking victims must be recognised to ensure that these children benefit from the protection afforded specifically to trafficked children, such as the 45-day reflection period. Without these

children being identified as trafficked children and brought to the attention of local authorities, the UK child protection system cannot be utilised.

More concerted efforts of raising awareness of the potential manipulation and abuse of private fostering arrangements as discussed in *Chapter Six* needs to occur within both countries of origin and the UK. The UK has an obligation to protect children from trafficking and it could be said that these obligations are being met by having legislation in place which criminalises child trafficking and a system of child protection which is applicable to all children within the UK's jurisdiction who are defined as being in need or at risk. However protection is also required in the form of preventative strategies aimed at preventing the child being trafficked in the first place. Although the UK does take some preventative action, there needs to be a more proactive, rather than reactive, approach involving countries of origin, transit and destination to provide more consistent protection of children from trafficking. A good example of a proactive approach is the work undertaken by AFRUCA who work to educate the African community in London about the need to inform Local Authorities if they are caring for a child who is not a child of the family for longer than 28 days, whilst at the same time highlighting the vulnerability of the tradition of private fostering to abuse. The organisation works with international partners to collaborate and share information with organisations who are seeking to promote the welfare of African children throughout Europe. Importantly, AFRUCA also educate children themselves about the risks involved and the rights they have.¹ Such an approach could be adopted and applied more widely to all trafficked children and the various types of exploitation and countries involved. This would illustrate the UK's commitment to preventing child trafficking, rather than mainly reacting to the problem once it has occurred.

¹ <http://afruca.org/about-us/our-aims.html>

Additionally there needs to be further research concerning children in private fostering and the link with trafficking needs to be explored further to assist with the understanding of the most appropriate response to this particular problem. Realistically the only way for this to be achieved would be working with gatekeepers, such as social services, teachers, migrant support groups or charities involved with children who are privately fostered. Similarly there is a need for further research to explore the routes into trafficking beyond organised crime, to develop a more nuanced response which can adapt to the various settings in which trafficking occur with a broader perspective beyond the dominant focus on sexual exploitation and organised crime.

There is a great potential for the EtCHR to shape the UK's future response to child trafficking as was illustrated in *Chapter Three* this has already happened in terms of the obligations placed on States arising from the ECHR. This process is likely to continue, especially given the number of cases pending before the ECtHR. The current range of obligations on the UK arising from decisions of the ECtHR include the need to conduct timely investigations into possible cases of trafficking, to investigate any threat to a child's life where there is knowledge, or ought to have been knowledge, of a real and immediate risk, and a child must be removed from an alleged exploitative situation. If a child dies within the UK there is an obligation on the authorities to investigate this even where it was not as a result of State actions. The UK also has an obligation to ensure that criminal sanctions are in place to punish child traffickers as well as those involved in any stage of the process. Children must also be protected from inhumane or degrading treatment. The ECHR is a living instrument and trafficking is a phenomenon that has a rapidly changing nature, therefore it is possible that the ECtHR may establish additional State obligations in the

future and the ECHR may provide further protection for child trafficking victims.

The European Court of Human Rights (ECtHR) case law on Article 4 ECHR presented in *Chapter Three* demonstrates the difficulties involved in the practical application of the various legal concepts. There are considerable overlaps between different legal concepts associated with trafficking which results in a significant lack of clarity in the law and associated policy frameworks. This is problematic as without clear distinctions there is reduced legal certainty and this makes the practical application of these various legal terms extremely difficult. These overlaps obscure the true picture of trafficking and compound the difficulty of producing an accurate statistical picture of the phenomenon. There are practical implications for trafficking victims who are not recognised as such and are instead treated as criminals who have breached UK immigration laws. The ECtHR needs to provide clear guidance of the definitional boundaries for improved legal certainty and to avoid adding to any confusion which may impact on the effective protection of victims. These problems with definitional boundaries are not only ones that exist in theory, but ones that have practical ramifications for individuals.

Measuring the impact of the UK legislative and policy response to child trafficking is vital, as is the need to monitor progress. Monitoring mechanisms have the potential to not only assess the current progress, but to identify areas where more attention is needed. One such area is the development of indicators specifically for children who arrive in the UK accompanied as discussed in *Chapter Six*. Indicators that concerned this particular group of children would help to take into account different forms of exploitation and would help in developing more effective identification strategies for all trafficked children. The existing indicators primarily focus

on unaccompanied children.² There is some recognition that children may be accompanied on their arrival to the UK where there may be '*...little evidence of any pre-existing relationship or even an absence of any knowledge of the sponsor*' or '*...unsatisfactory accommodation arranged in the UK, or perhaps no evidence of parental permission for the child to travel to the UK or stay with the sponsor.*'³ However children accompanied to the UK are more at risk of not being identified as a trafficked child due to the fact that these may be the only signs which may indicate the child may be trafficked.⁴ Some improvements have been made to the visa regulations when a child is visiting the UK accompanied by an adult. The child's photograph must appear on the visa along with the name and passport number of the adult travelling with the child.⁵ Although this is a positive improvement aimed at protecting children, it will not account for those children who are arriving with an adult claiming they are the child's parent. In these circumstances, the development of specific indicators for children arriving accompanied by an adult would be useful for border control officials who will examine the documentation and be aware of the possibility that the relationship that is claimed is not a genuine one.

²See for example, United Nations Office on Drugs and Crime 'Human trafficking indicators' available

<<http://ec.europa.eu/anti-trafficking/entity.jsessionid=gvQCTCFL7TZ6jJ7LMMHvIFGZ2jM2h7Zrpp0lxJrhVZJRsl9x6Wn!797973069?id=3f0e6fdf-db43-42f1-8966-58a99d5f6499>> [last accessed 05.05.2012].

³ UK Department for Education Consultation, 'Working together to safeguard children: Safeguarding children who may have been trafficked' (2011) 7, available <<http://www.education.gov.uk/consultations/index.cfm?action=conResults&external=no&consultationId=1497&menu=3>> [last accessed 05.05.2012].

⁴ Ibid.

⁵ Immigration Rule 46A; Home Office.

<http://www.ukba.homeoffice.gov.uk/visas-immigration/visiting/child/requirements/>

Effective identification of child trafficking victims is crucial since without finding these children they cannot benefit from any of the protection provided for trafficking victims. *Chapter Six* revealed that accurate identification of victims requires the stereotypical image of the trafficked child to be challenged; otherwise only a select group of trafficked children are being protected. Many trafficked children do not 'fit' with the stereotypical image and are therefore overlooked. These children may be difficult to find, however this does not mean that we should not attempt to develop a broader approach to include them in the efforts to protect them from trafficking and exploitation. If a child's own family is involved and exploitation takes place within a private household by individuals who present the arrangement as private fostering, this hides the exploitative situation and the invisibility of these children is compounded. There is a need improve the obligations on States in relation to the identification of child trafficking victims. Children in domestic work are less visible than other groups of trafficked children and they undermine the assumption made about 'the trafficked child'.

A further important finding of the research presented in this thesis is the inherently gendered nature of child trafficking. *Chapter Seven* explored the complexities of this gender dynamic. A child's characteristics influence the purpose that they are trafficked for. Child trafficking is gendered in nature, although this is usually only acknowledged within the trafficking framework when the child is sexually exploited. There is an assumption that women are the victims of trafficking rather than recognising the alternative role women take as perpetrators. Mothers in both the home and the destination household often reinforce the gendered nature of roles within the home with expectations that girls will carry out particular tasks and chores. This impacts on parents expectations of which type of work their daughter will enter. Often, women may be the recruiter of the child,

particularly since a woman may be trusted more by the child's community and family. In fact, women are equally capable of taking a major role in child trafficking and despite the law being gender neutral and applying to both men and women equally, there needs to be more training for those enforcing the law and identifying potential victims to highlight that assumptions about women's roles should not be made. Women's roles could be incorporated explicitly into indicators developed for accompanied children suggested earlier and by doing so the response would be incorporating a gender perspective into a children's right response. Recognition of the importance of gender throughout the trafficking process is necessary in order to address a broader range of situations, including children in domestic work, where women play a role other than 'victim'. Due to the significant influence of cultural traditions, prevention strategies which specifically target families and communities to provide education about the impact the reinforcement of gender roles and the manipulation of legitimate, traditional practice such as private fostering are required.

Exploring child domestic work exposed particular problems where this was an exploitative situation. Where the child had been trafficked into domestic work, this would automatically fall under the definition of one of the worst forms of child labour. Trafficking has significant negative impacts, affecting children's right to an education as well as their ability to have time to rest and play as this is extremely limited due to the excessive hours they are required to work and the demands placed on them. Their physical and emotional development is often in jeopardy.

Trafficking raises challenging children's rights issues and *Chapter Eight* revealed the tensions between empowerment and vulnerability and the fact that all is not necessarily what it seems in the trafficking context. The fact that some children may have chosen to enter domestic work as a form of

employment raised some interesting issues. It was revealed that not every situation involved exploitation and it is possible for a child to have a positive experience of domestic work. Children in domestic work as a result of what the child themselves views as an employment relationship was considered both in terms of the child found in domestic work in the UK who had migrated internationally and those children migrating within their own country to enter employment in domestic work.

Particular assumptions about children were made within the trafficking framework, namely that they did not have the capacity to make these autonomous decisions relating to their own lives. The research revealed that a paternalistic approach to children discovered in domestic work in the UK was taken and the right to protection from economic exploitation under Article 32 UNCRC took priority over the child's right to be heard under Article 12 despite these children being over the minimum age for employment. It was identified however, that there were reasons why this was the most appropriate rights balance due to the fact that these children were internationally migrating into the UK where there were specific restrictions which prevented all children migrating to enter domestic work. Additionally the fact that international migration was involved increased the vulnerability of these particular children to abuse and exploitation. They were in a position where they were without support of their family and community and due to the fact that they could not legally migrate to enter domestic work as a form of employment meant that their illegal status could be used to further control the child.

Where children above the minimum age to enter employment were migrating internally within their own country, it was suggested that it was more likely that it would be possible to respect their autonomous decisions to enter domestic work, particularly where there were not the same

restrictions for children into this type of employment as those in the UK. However, where very young children were in domestic work, their age was problematic due to the increased vulnerability involved for them and there is a need to approach this group of children in a different way.

Trying to balance the need to protect the child from exploitation and the need to respect the child as a capable autonomous being could be addressed if specific provisions relating to a child's autonomy could be incorporated into the preventative strategies taken by States. For each of these groups of children, slightly different responses are needed. Those who wish to internationally migrate would need to be educated about the increased risks involved and the outcome for them once discovered. This may help to deter children from internationally migrating to work. Children who wish to migrate within their own country could be informed of their employment rights and given tools to protect themselves and avenues they could take where help is needed. Additionally, countries of origin could work with children and families of those children wanting to work who are under the minimum age for employment to find alternatives for the child, other than employment. Each situation has different levels of risk and only by working in source countries with both children and their parents to educate them of these risks can children be enabled to make informed autonomous and safe decisions.

A main finding of the research revolved around the level of individualisation of children present in the responses to trafficking which has been discussed at various points throughout the thesis. Adopting individualisation as a method for examining the responses to child trafficking revealed that there are considerable gaps in the trafficking framework as it relates to children. The overall message to come out of the research is that incorporation of individualisation into the trafficking

framework is necessary, but this must be tailored to the particular aspect of trafficking of concern. Having only one level of individualisation throughout the response to child trafficking would not be appropriate. Article 3 UNCRC demands that children should be considered as a group separate from adults and the best interests of children as a group should be protected. This reflects level 1 of concept of individualisation. Child trafficking involves very different issues to trafficking of adults since children may be more vulnerable and will be exposed to different forms of exploitation, and this needs to be acknowledged more explicitly within the trafficking framework.

Currently the legal framework covers many scenarios and all forms of exploitation; however the focus of the practical responses to child trafficking does not fully reflect this. The trafficking responses need to account for children not only as a separate category to adults, but as a category of children which is determined by the type of exploitation they experience. This approach meets level 2 of individualisation which is concerned with the different categories of sub-group of children determined by the particular form of exploitation each group of children experience. This would allow the particular characteristics and needs of each particular group of children to be recognised and incorporated into the responses to child trafficking. Children's interests and vulnerabilities may change depending on the type of exploitation experienced and the methods used by traffickers.

Although the trafficking framework makes some distinction between adults and children, Article 3 UNCRC also requires the individual child's best interests to be considered. This would meet level 3 of individualisation which focuses on the individual child and their needs. It is perhaps unrealistic for this level of individualisation to be possible when creating

general policies to respond to the problem of human trafficking, as logically the individual child is only known when they are discovered and removed from the exploitative situation. It is more suited to the provision of appropriate protection to address the needs of a particular child once they are identified as a trafficked child. This level of individualisation cannot be expected to apply when defining the offence of trafficking, but a definition of trafficking that considers children as a group may be more effective than one that links their vulnerability to trafficking and exploitation, to the same forms of exploitation experienced by women.⁶

The separate legal instrument suggested earlier removing the association between trafficking and immigration crime could in fact be developed specifically with children in mind and could incorporate all levels of individualisation discussed in the thesis. A separate legal instrument focusing solely on child trafficking would satisfy the level 1, group level of individualisation, but would also allow recognition of different forms of exploitation children experience, (level 2 of individualisation). This instrument could incorporate the various characteristics and recognise that different needs may arise dependent on these factors. Gender issues could be dealt with from a much more child-focused perspective with children's rights incorporated into the gender response. Individualisation through a separate legal instrument would accommodate the varying needs of children and the effects of gender and age to be explicitly incorporated into the legal framework. The specific methods used by traffickers to recruit children into different types of exploitative situations could be explicitly incorporated into a legal instrument responding to child trafficking. The family's role could also be factored in. Accompanied children as well as unaccompanied children could be accounted for within such a response and

⁶ Level 1 (group level).

the association between trafficking and smuggling could be removed to refocus the attention on child trafficking from the perspective of providing protection rather than criminalising children for breaches of immigration law.

A separate legal instrument would clearly demonstrate to those enforcing the law that children have different experiences and needs which need to be taken into account and would illustrate the full range of variables involved in child trafficking. It would also provide focus and clarity for child trafficking and assist States in providing targeted action to deal with specific elements of child trafficking. Importantly it would encourage law, law enforcement and perceptions to come together. This is currently not happening and this is the particular stumbling block preventing protection for all trafficked children, rather than just a select group.

The concept of individualisation has many potential uses in the future. It could act as a framework for future research which could consider the various different types of exploitation involved in child trafficking in more detail. This would reveal what particular characteristics are influencing the recruitment of children into each type of exploitation and would also identify the specific needs of these separate groups of children. This may lead to any patterns or similarities between different sectors being revealed, and would assist in appropriate responses to the various exploitative situations and enable more targeted and specialised prevention strategies to be employed. The concept of individualisation could be further applied and used as the basis for policy development and incorporated into methods of data collection.

The potential use of individualisation is far-reaching and the requirements of Article 3 UNCRC could be met entirely within the context of responses

to child trafficking. Currently children falling outside the image of the trafficked child are being overlooked to a great degree. Without change and a much more child-focused approach adopted, the real problem will not be dealt with and a significant proportion of trafficked children will continue to fall between the existing gaps.

Trafficking is complex in every analytical respect, sociologically, practically and empirically and so it is necessarily difficult for the law to capture it as a phenomenon. In terms of children in domestic work there is a triple jeopardy that exists for this particular group of children. They are children and therefore more vulnerable to trafficking, they are exploited in a sector that is not the main focus of policy responses and they are obscured by the current response due to the fact that they do not conform to the stereotypical image of the trafficked child presented by the trafficking framework. The focus on sexual exploitation developed over a number of decades, but in comparison research into labour exploitation and trafficking is still in its infancy. Therefore there is hope that the focus between the two will become more balanced over time. One clear message from the research is that the law can try to regulate trafficking, set benchmarks and standards in terms of offences and protection however the implementation of the law is a massively complex process and the law is not enough on its own. Instead law enforcement and policy responses are equally important and the law is only as effective as its implementation.

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Appendix A

<u>April 2008 to March 2009</u> DATA FROM UKHTC STATISTICAL QUARTERLY REPORTS	1st Quarter April to June 2008	2nd Quarter July to Sept 2008	3rd Quarter Oct to Dec 2008	4th Quarter Jan to March 2009	Annual figures April 2008-March 2009
<u>DEFENDANTS dealt with under ss57-59 Sexual Offences Act 2003</u>					
<u>GENDER</u>					
Male	19	7	17	7	50
Female	12	4	8	6	30
Total number of defendants	31	11	25	13	80
Number of Convictions under the Asylum and Immigration Act 2004			4		4
<u>Disposal at court</u>					
not guilty - no other offences	6	5	3	3	17
Not guilty - but other offences	5	0	0	0	5
Guilty	14	2	9	4	29
Lie on File - guilty plea for other offences and sentenced	6	2	0	5	13
Lie on File- no other offences	0	1	2	0	3
Caution	0	1	0	0	1
NFA- convicted of Conspiracy to Traffick	0	0	3	0	3
NFA - Convicted of other Offences	0	0	8	0	8
Deported on European Arrest Warrant	0	0	0	1	1
Dealt with under s.57 trafficking into UK	15	8	7	Not provided	30
Dealt with under s.58 trafficking within UK	13	3	18	4	38
Dealt with under s.57 and s.58	3	0	0	Not provided	3

Appendix A Continued

<u>April 2008 to March 2009</u> DATA FROM UKHTC STATISTICAL QUARTERLY REPORTS	1st Quarter April to June 2008	2nd Quarter July to Sept 2008	3rd Quarter Oct to Dec 2008	4th Quarter Jan to March 2009	Annual figures April 2008-March 2009
<u>VICTIMS</u>					
Number of victims	35	67	107	18	227
Number of different countries of origin	20	26	14	11	71
Number of victims of EU Origin ***	11	28	81	11	131
Number of victims of Non-EU Origin	24	39	26	7	96
Number of victims of UK Origin ***	N/A	N/A	N/A	N/A	N/A
<u>GENDER</u>					
Male	1	19	60	5	85
Female	34	48	47	13	142
<u>TYPE OF EXPLOITATION: FEMALE</u>					
sexual	21	32	Not provided	11	64
Domestic servitude	11	11	Not provided	0	22
Forced Labour	2	5	Not provided	2	9
Unknown reason	0	0	Not provided	0	0
<u>TYPE OF EXPLOITATION: MALE</u>					
Sexual	0	0	Not provided	0	0
Domestic Servitude	0	0	Not provided	1	1
Forced Labour	1	19	Not provided	3	23
Unknown reason	0	0	Not provided	1	1

Appendix A Continued

April 2008 to March 2009	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Annual figures
DATA FROM UKHTC STATISTICAL QUARTERLY REPORTS	April to June 2008	July to Sept 2008	Oct to Dec 2008	Jan to March 2009	April 2008-March 2009
Sexual	N/A	N/A	N/A	N/A	N/A
Domestic Servitude	N/A	N/A	N/A	N/A	N/A
Forced Labour	N/A	N/A	N/A	N/A	N/A
Unknown reason	N/A	N/A	N/A	N/A	N/A
<u>TYPE OF EXPLOITATION - NOT DISAGGREGATED BY GENDER</u>					
Sexual	N/A	N/A	18	N/A	18
Domestic Servitude	N/A	N/A	3	N/A	3
Forced Labour	N/A	N/A	79	N/A	79
Unknown reason	N/A	N/A	7	N/A	7
<u>AGE of VICTIMS</u>					
Unknown- not recorded at time of encounter	0	0	6	0	6
under 10 (category added as from May 2009)	N/A	N/A	N/A	N/A	N/A
10 and 11 (category added as from May 2009)	N/A	N/A	N/A	N/A	N/A
12 to 15 (category added as from May 2009)	N/A	N/A	N/A	N/A	N/A
16 and 17 (category added as from May 2009)	N/A	N/A	N/A	N/A	N/A
10 to 17	1	4	11	2	18
18 to 20	12	8	13	5	38
21 to 25	9	13	23	6	51
26 to 30	6	13	15	3	37
31 to 35	2	11	10	2	25
36 to 40	3	10	12	0	25
40+ (Category added as from April 2009)	N/A	N/A	N/A	N/A	N/A
41 to 45	1	6	8	0	15

Appendix A continued

<u>April 2008 to March 2009</u>	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Annual figures
DATA FROM UKHTC STATISTICAL QUARTERLY REPORTS	April to June 2008	July to Sept 2008	Oct to Dec 2008	Jan to March 2009	April 2008-March 2009
46+	1	2	N/A	0	3
46 to 50 (category added as from October 2008)	N/A	N/A	5	0	5
50+ (category added as from October 2008)	N/A	N/A	4	0	4

*** April 2008-Mar 2009 includes victims from UK

From April 2009 the number of victims with EU origins excludes those from the UK and a separate figure is reported

Appendix B

April 2009 to March 2010	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Annual figures
DATA FROM UKHTC NRM Report	April to June 2009	July to Sept 2009	Oct to Dec 2009	Jan to March 2010	
<u>VICTIMS</u>					
Number of referrals	148	199	180	179	706
Number of different countries of origin					69
Number of victims of EU Origin ***	36	15	35	19	105
Number of victims of Non-EU Origin	107	162	135	159	563
Number of victims of UK Origin ***	5	22	10	1	38
<u>GENDER</u>					
Male	41	49	48	48	186
Female	107	150	132	131	520
<u>TYPE OF EXPLOITATION: FEMALE</u>					
sexual		No Quarterly Statistics Available			263
Domestic servitude					96
Forced Labour					39
Unknown reason					15
<u>TYPE OF EXPLOITATION: MALE</u>					
Sexual		No Quarterly Statistics Available			1
Domestic Servitude					10
Forced Labour					98
Unknown reason					5

Appendix B Continued	1st Quarter April to June 2009	2nd Quarter July to Sept 2009	3rd Quarter Oct to Dec 2009	4th Quarter Jan to March 2010	Annual figures
		No Quarterly Statistics Available			
Sexual					53
Domestic Servitude					19
Forced Labour					15
Unknown reason					20
		No Quarterly Statistics Available			
Sexual					2
Domestic Servitude					8
Forced Labour					41
Unknown reason					21
<u>AGE of VICTIMS</u>		No Quarterly Statistics Available			
Unknown- not recorded at time of encounter					
under 10					17
10 and 11					6
12 to 15					61
16 and 17					95
18 to 20					84
21 to 25					124
26 to 30					137
Appendix B Continued					
31 to 35					70
36-40					49
40+ (Category added as from April 2009)					63

*** April 2008-Mar 2009 includes victims from UK

From April 2009 the number of victims with EU origins excludes those from the UK and a separate figure is reported

Appendix C

Quarterly Statistics

National Referral Mechanism

Annual figures

Annual figures

April 2008 - March 2009

April 2009 - March 2010

VICTIMS

Number of victims	227	706
Number of different countries of origin	71	69
Number of victims of EU Origin ***	131	105
Number of victims of Non-EU Origin	96	563
Number of victims of UK Origin ***	N/A	38

GENDER

Male	85	186
Female	142	520

TYPE OF EXPLOITATION: FEMALE

sexual	64	263
Domestic servitude	22	96
Forced Labour	9	39
Unknown reason	0	15

TYPE OF EXPLOITATION: MALE

Sexual	0	1
Domestic Servitude	1	10
Forced Labour	23	98
Unknown reason	1	5

Appendix C Continued

	Quarterly Statistics	National Referral Mechanism	
	Annual figures	Annual figures	
	April 2008 - March 2009	April 2009 - March 2010	
		Female	Male
Sexual	N/A	53	2
Domestic Servitude	N/A	19	8
Forced Labour	N/A	15	41
Unknown reason	N/A	20	21
<u>AGE of VICTIMS</u>			
Unknown- not recorded at time of encounter	6	0	
under 10 (category added as from May 2009)	N/A	17	
10 and 11 (category added as from May 2009)	N/A	6	
12 to 15 (category added as from May 2009)	N/A	61	
16 and 17 (category added as from May 2009)	N/A	95	
10 to 17	18	N/A	
18 to 20	38	84	
21 to 25	51	124	
26 to 30	37	137	
31 to 35	25	70	
36 to 40	25	49	
40+ (Category added as from April 2009)	N/A	63	
41 to 45	15	N/A	
46+	3	N/A	
46 to 50 (category added as from October 2008)	5	N/A	

50+ (category added as from October 2008)

4

N/A

*** April 2008-Mar 2009 includes victims from UK

From April 2009 the number of victims with EU origins excludes those from the UK and a separate figure is reported