

RECOGNIZING VICTIMS' PERSPECTIVES:
TOWARD A HUMAN RIGHTS-BASED
APPROACH TO HUMAN TRAFFICKING

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Michaelmas 2019
Doctor of Philosophy

Word Count: 100,000

ABSTRACT

A human rights-based approach to human trafficking promotes victim-centred responses that facilitate victims' empowerment, exercise of agency, and realization of their rights. The thesis engages with this approach through the qualitative exploration of sex trafficking victims' experiences with and perspectives on the criminal justice process and the post-trafficking assistance they receive in the Netherlands. This includes their experiences with law enforcement, lawyers, and a specialized shelter, the factors they considered when deciding whether to cooperate with authorities in the case against their traffickers, and their views on testifying, special measures, and sentencing. The empirical data is analysed through a human rights lens to discern the extent to which the Netherlands utilizes a human rights-based approach and meets its obligations to trafficking victims under international, regional, and domestic law in practice. Through both the successes and failures identified in this regard, victims' desire to be treated with respect and compassion, have their needs and cases taken seriously, and be updated frequently about the status of their cases became clear. Yet, there emerged a degree of diversity in participants' views about the types of assistance, support, and protection they need, such as with respect to the use of special measures in criminal proceedings, which underscores the importance of eliciting and accounting for individual victims' perspectives throughout the process. However, recent cuts to the level of resources devoted to combating trafficking and assisting its victims in the Netherlands raise serious concerns about whether victims' needs can be met and whether a human rights-based approach can be realized going forward.

ACKNOWLEDGMENTS

There are many people without whom this thesis would not have been possible. First, I would like to sincerely thank all of the women who participated in my study. I very much appreciate their willingness to share their perspectives and lived experiences with me, and their trust in me to provide a platform for their voices. Their vulnerability and resilience inspire me to put everything I have into this work.

I am deeply grateful to my DPhil supervisor, Dr Carolyn Hoyle, for her unfaltering support and encouragement throughout this journey. Her insightful and thought-provoking feedback vastly improved both this work and my skills as a researcher. I could not have asked for a better role model and mentor. Thank you, Carolyn!

I'd like to express my sincere gratitude for the help and support I received from the wonderful Toos Heemskerck-Schep. I'd like to thank her for inspiring me with her devotion to helping others, believing in this project, and trusting me to do right by the trafficked women. Toos enabled me to obtain access to research participants and without her, I would not have been able to conduct this study. For this, I will be forever in her debt. I'd also like to thank Toos for connecting me with the fabulous Lauran Bethell, who graciously allowed me to stay in her home while I was conducting fieldwork for this thesis. I am grateful for Lauran's support, kindness, and positivity, which have been a beacon of light and hope during this arduous journey. And I'd like to thank Mischa, Lauran's beloved cat, for being my 'emotional support animal' and providing me with warm cuddles and purrs following my long days at the shelter.

Thank you very much to Mill Bijnen for allowing me to conduct research at ACM. This study would not have been possible without her trust and permission to spend time in the shelter and interview the women residing there. I truly appreciate her help. I would also like to thank the mentors at ACM, especially Sanne Kleyn, Bernice Severin, and Julia Tchikhatcheva, for their assistance.

I'd like to thank the talented interpreters who enabled a diverse, multicultural group of women to participate in my research. They include Raluca Alexandru, Chaima Ben Haddou, Claire Buswell, Khadijah Jalloh, Marian Kardos, Manuela Klerkx, and Borislava van Braam van Vloten. Thank you all for your patience, sensitivity, and commitment to ensuring that trafficking victims' voices are heard.

I am very appreciative of the time a number of individuals took to improve my understanding of the Dutch legal and criminal justice context with respect to THB. Thank you to: Annet Koopsen, for patiently answering my questions and sharing her expertise on Dutch laws and legal practices as they relate to trafficking victims; Warner ten Kate, for informing me about prosecutions and witness protection; Harold van Gelder, for educating me about police practices with victims of THB; Suzanne Heerdink, for explaining important information in National Rapporteur reports written in Dutch; Dr Susanne Peters, for answering my questions about legal aid for trafficking victims; Tamar Strietman, for her excellent translation of Dutch law and policy documents; Noortje Bakker, for providing me with information about attorney compensation and directing me to useful sources; and Joost van Bennekom, for sharing his experiences representing trafficking victims and recommending other contacts. I'd also like to thank Roëlla Dissels for reaching out to her impressive network of contacts to seek answers to my remaining questions about the Dutch system, for connecting me with a participant, and for her much-appreciated enthusiasm about my research.

I'd like to thank my DPhil examiners, Dr Mary Bosworth and Dr Conny Rijken, for investing the time and energy into examining my thesis. I'm also grateful to Dr Bosworth, Dr Ben Bradford, and Dr Liora Lazarus for examining my work during the transfer of status and/or confirmation of status and for providing me with invaluable feedback.

Thank you to the Oxford Law Faculty and to Green Templeton College for supporting me with fieldwork grants. I'm also grateful to the Scatcherd European Scholarship committee for enabling me to spend three months at University College Dublin as a visiting doctoral student. I'd like to thank Dr David Doyle for helping to arrange my UCD visit and Dr Liam Thornton for supervising me while I was there. Dr Thornton's comments on Chapter 2 of this thesis were very helpful and I appreciate the time he took to provide me with constructive feedback.

I'd like to express my appreciation to Dr Marie-Bénédicte Dembour for our helpful discussions of European Court of Human Rights case law. Thank you also to Professor José Alvarez for his valuable insights on principles of treaty interpretation.

I'd like to thank the Oxford Law Faculty, Green Templeton College, and the NYU School of Law for funding my trips to conferences to present my thesis research findings. Thanks also to NYU for providing funding for a law student, Stephen Gray, to help me to complete my reference list and to track down last-minute citations. And I'd like to thank Stephen for helping me with these tedious but important tasks.

Thank you to Dr Charles Foster, my College Adviser, for his support and for hosting me for lunches and dinners at GTC over the years. He is one of the most interesting individuals I've had the pleasure of knowing and I've thoroughly enjoyed debating animal ethics and other important topics with him during my DPhil.

Thank you to Dr Lucie Cluver for encouraging me to pursue a DPhil at Oxford, for insightful advice, and for being a wonderful friend to me over the past fourteen years. Many thanks to Dr Anne Marie Lofaso, for being a great mentor, role model, and friend to me throughout this journey. I'd also like to thank Dr Susanne van 't Hoff-de Goede for her friendship, for generously hosting me during my fieldwork scoping visit, and for directing me to very helpful Dutch resources.

I'm very grateful to my family and friends for their encouragement and for understanding when I couldn't see them as much as I would have liked. Mom and Dad—thanks for eventually warming to the idea of me pursuing yet another degree and I'm sorry I've had to work all of the time! Thanks also for promising to come to my graduation all the way across the Atlantic.

Last but certainly not least, I would like to sincerely thank my husband, Steven Evers. His constant love, support, and faith in me through the ups and downs of my DPhil journey have made it possible for me to reach the finish line. Thank you, Steven, you are the best husband in the world and I could not have realized this dream without you!

DEDICATION

To the 39 women who shared their thoughts, feelings, and experiences with me for this research.

Your perspectives matter.

TABLE OF CONTENTS

ABSTRACT	ii
ACKNOWLEDGMENTS	iii
DEDICATION	v
TABLE OF CONTENTS	vi
TABLE OF CASES	x
TABLE OF TREATIES AND STATUTES	xi
LIST OF ABBREVIATIONS	xiii
INTRODUCTION	1
CHAPTER 1	12
Key Concepts and Context for a Human Rights-based Approach to Human Trafficking:	12
A Review of the Literature	12
I. Introduction.....	12
II. What is Human Trafficking?.....	13
III. Why Does Human Trafficking Occur?	16
A. Structural Factors	18
1. Poverty	18
2. Economic Inequality	18
3. Lack of Options.....	19
4. Migration.....	20
5. Gender Roles and Inequality	22
B. Proximate Factors	24
1. Transnational Organized Crime	24
2. Inadequate Legal Regimes	25
3. Poor Law Enforcement	25
4. Corruption	26
IV. Victim Dichotomies	27
A. ‘Good’ vs. ‘Bad’ Victims.....	28
B. ‘Victim’ vs. ‘Criminal’	31
C. ‘Victim’ vs. ‘Survivor’	33
D. ‘Passive’ vs. ‘Active’	34
V. A Human Rights-based Approach to Human Trafficking	36
VI. Prosecuting Traffickers and Protecting Victims	45
VII. Conclusion.....	51

CHAPTER 2.....	53
Sources and Content of Human Trafficking Victims’ Rights and State Duties under the THB Legal Framework.....	53
I. Introduction.....	53
II. International Law	54
III. European Union Law	62
A. Directive 2004/81/EC	63
B. Directive 2011/36/EU	67
C. Directive 2012/29/EU	74
IV. Council of Europe Law	80
A. Convention on Action against Trafficking in Human Beings (2005)	80
B. European Court of Human Rights.....	91
V. Best Practices under International and Regional Law	99
VI. Legal Framework in the Netherlands.....	105
VII. Conclusion.....	110
CHAPTER 3.....	112
Research Methodology: Navigating Vulnerability and Other Challenges	112
I. Introduction.....	112
II. Research Setting.....	112
III. Research Sample	113
IV. Data Collection.....	117
A. Methods.....	117
B. Gaining and Maintaining Access	118
C. Linguistic Challenges.....	123
D. Other Challenges.....	127
E. Limitations	127
V. An Ethical, Feminist Approach.....	130
A. Vulnerability	133
B. Informed Consent.....	135
C. Confidentiality and Anonymity	137
D. ‘Turning in upon Ourselves’ (Chiseri-Strater 1996): Reflexivity.....	138
1. Reflections on my ‘Positionalities’	139
2. Impact of Research upon the Participants	142
3. Researcher’s Experience of the Study.....	143
VI. Data Analysis	145

VII. Conclusion.....	147
CHAPTER 4.....	148
Post-trafficking Assistance and Protection:	148
Victims’ Perspectives on their Experiences with Police, the Shelter, and Lawyers	148
I. Introduction.....	148
II. Police.....	149
A. Victim-centred Responses.....	150
B. Non-compliance with the Principles of Universality, Non-discrimination, and Equality.....	156
C. Lack of Respect.....	162
D. Lack of ‘Due Diligence’	165
E. Lack of Gender-Sensitivity	173
III. Shelter.....	175
A. Shelter Staff	177
1. Empowerment through Assistance, Support, and Care.....	177
2. Constraints on Agency	179
3. Insensitivity	184
4. Lack of Due Diligence	186
B. ‘Activities’ and Psychological Support.....	188
C. Safety	191
IV. Lawyers	192
A. Empowerment through Assistance and Advocacy.....	193
B. Lack of Communication.....	194
V. Falling through the Cracks	196
VI. Conclusion.....	199
CHAPTER 5.....	201
Deliberating at a Crossroads:	201
Victims’ Decisions with respect to Participating in the Criminal Justice Process.....	201
I. Introduction.....	201
II. Reflection Period.....	203
III. Factors Participants Considered when Deciding whether or not to Press Charges against their Traffickers	205
A. Retribution for Past Harm.....	205
B. Prevention of Future Harm	208
C. Gaining or Maintaining Access to Rights	216
D. Closure and Relief.....	225

E.	Futility.....	226
F.	Receiving or Giving Support	228
G.	Link with Traffickers	231
H.	Rule of Law.....	232
I.	Leaving the Past Behind	233
J.	Disinclination to Discuss Details of Trafficking Situation with Law Enforcement.....	235
K.	Absence of Choice	236
IV.	Decision-making Factors Absent from This Study	237
V.	Conclusion.....	239
CHAPTER 6.....		242
Participation in Criminal Proceedings: Trafficking Victims’ Perspectives on Testifying, Protective Measures, and Sentencing.....		242
I.	Introduction.....	242
II.	Views on Giving Testimony	244
III.	Protective or Special Measures	248
A.	Victim Preferences and Perspectives regarding the Presence or Absence of the Accused during Their Testimony.....	252
B.	Victim Perspectives on Video-link versus In-court Testimony	258
IV.	Victims’ Ideas about How to Help Sex Trafficking Victims to Give Testimony	260
V.	Victims’ Perspectives on Sentencing and Punishment	267
C.	Nature of Punishment and Sentences.....	269
D.	Justifications for Punishment and Sentencing Views	270
E.	Impact of Religion and Culture.....	276
VI.	Conclusion.....	279
CONCLUSION		281
I.	The Research Question	281
II.	Victims: The Missing Link	286
III.	Directions for Future Research	290
IV.	In Closing.....	291
BIBLIOGRAPHY		299

TABLE OF CASES

European Court of Human Rights

<i>C.N. v United Kingdom</i> (2012)	94, 166
<i>Chowdury and Others v Greece</i> (2017)	99, 166, 171
<i>Hilden v Finland</i> (1999).....	262
<i>J. and Others v Austria</i> (2017).....	98-99, 168, 171
<i>L.E. v Greece</i> (2016).....	96-98, 101, 168
<i>M. and Others v Italy and Bulgaria</i> (2012)	95-97, 99
<i>Rantsev v Cyprus and Russia</i> (2010)	16, 92-96, 166-168, 171
<i>Siliadin v France</i> (2005)	91-92, 100
<i>S.M. v Croatia</i> (2018)	99, 104-105, 171, 248

European Commission on Human Rights

<i>Kurup v Denmark</i> (1985)	262
<i>X. v Denmark</i> (1981).....	262

European Court of Justice

<i>Marks & Spencer plc v Commissioners of Customs & Excise</i> (2002).....	63
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Committee on the Elimination of Discrimination against Women

<i>Zhen Zhen Zheng v The Netherlands</i> (2009).....	55
<i>N. v The Netherlands</i> (2014).....	55

TABLE OF TREATIES AND STATUTES

Treaties and Charters

Charter of Fundamental Rights of the European Union (2000).....	62
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979).....	54
Convention on the Rights of the Child (CRC) (1989)	5, 54
Convention Relating to the Status of Refugees (1951).....	61, 103
Council of Europe (CoE) Convention on Action against Trafficking in Human Beings (2005)	16, 37, 40-41, 50-51, 80-91, 100-105, 168, 173, 187, 191-192, 201, 211, 237, 243, 269, 283
European Convention on Human Rights (ECHR) (1950)	40, 62, 91-99, 166, 168, 261-262
Protocol relating to the Status of Refugees (1967)	61
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) (2000).....	8, 13-16, 37, 50, 55-62, 88-89, 92, 94, 100-104, 173, 191-192, 243
Treaty on the Functioning of the European Union (TFEU) (2009).....	63
Treaty of Lisbon (2007)	62
United Nations Convention against Transnational Organized Crime (2000).....	13, 55-58

EU Legislation

Directive 2004/81/EC	37, 50-51, 63-67, 69, 101-103, 105, 176, 187, 201, 237, 240, 283
Directive 2011/36/EU	6, 14, 37, 50, 63, 67-74, 77-78, 82-83, 85-86, 88-89, 100-104, 169, 173, 187, 191-192, 201, 248, 252-253
Directive 2012/29/EU	37, 39, 45, 50, 63, 74-80, 82, 101-104, 108, 151, 162, 170, 172- 175, 184-186, 191-192, 205, 211, 242-243, 248, 252-253
Framework Decision 2001/220/JHA	74-75
Framework Decision 2002/629/JHA	67-68

Dutch Law

Dutch Constitution	148
Besluit slachtoffers van strafbare feiten (Decree on victims of criminal offences) (2017)	108, 253, 285
Regeling verstrekkingen bepaalde categorieën vreemdelingen (Provision of benefits for certain categories of foreign nationals) (2015)	108
Vreemdelingencirculaire (Aliens Circular) 2000 (B)	105-106, 176, 193, 202, 204-205, 219, 222
Wetboek van Strafrecht (Dutch Criminal Code)	110
Wetboek van Strafvordering (Dutch Code of Criminal Procedure)	109-110

LIST OF ABBREVIATIONS

ACM	Amsterdam Centrum Mensenhandel (Amsterdam Human Trafficking Centre)
'B8 Regulation'	Vreemdelingencirculaire (Aliens Circular) 2000 (B): (B8)
CATW	Coalition against Trafficking in Women
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Convention on Economic, Social, and Cultural Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CtEDAW	Committee on the Elimination of Discrimination against Women
CtRC	Committee on the Rights of the Child
'Dutch National Rapporteur' or 'National Rapporteur'	Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GAATW	Global Alliance against Traffic in Women
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRBA	Human-Rights-based Approach
ILO	International Labour Organization
IND	Immigratie- en Naturalisatiedienst (Immigration and Naturalization Service)
NFS	Not For Sale
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
'Palermo Protocol'	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
PTSD	Post-traumatic Stress Disorder
THB	Trafficking in Human Beings

UN	United Nations
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNODC	United Nations Office on Drugs and Crime
UNPF	United Nations Population Fund

INTRODUCTION

Human trafficking and its victims have received significant international attention in recent years (Gozdziak and Collett 2005: 100; Winkler 2009: 7). Yet, trafficking victims' voices have been notably absent from much of what has been written about them. The dearth of empirical research conducted with victims is attributable in no small part to the difficulty of obtaining access to this vulnerable and hard-to-reach population (Bosworth, Hoyle, and Dempsey 2011: 769-773, 775; Brunovskis and Surtees 2010: 13-15; Cameron 2008: 80; Goodey 2004: 34-35). Trafficking victims constitute a hidden population whose size and boundaries are unknown and for which no sampling frame exists (Tyldum and Brunovskis 2005: 18). Gatekeepers who provide services to victims are often reluctant to allow researchers to come into contact with them due to a protective instinct and concerns about the potential for re-traumatization and re-victimization (Bosworth, Hoyle, and Dempsey 2011: 772; Segrave, Milivojevic, and Pickering 2011: 27). This is particularly so in regard to victims of sex trafficking, no doubt due to the serious harms they have suffered to their physical integrity. Gatekeepers may also not trust outside researchers to maintain victims' confidentiality and anonymity or want to exercise sole control over victims and their information (Brunovskis and Surtees 2010: 15; see also Goodey 2004: 34-35). Moreover, even when researchers have physical access to trafficking victims, it can be a long and challenging process to gain their trust in a way that allows 'access' to information about their lived experiences (Brunovskis and Surtees 2010: 10, 13).

The absence of victims' perspectives in scholarly research impacts and extends to law- and policy-making. In recent years, 'victim-centred' responses to trafficking in human beings (THB) have become the gold standard (see GRETA 2012: 11, 22; GRETA 2018b: 2; U.S.

Department of State 2018a). Yet, very often so-called ‘victim-centred’ policies and initiatives are developed and assessed without any or with only very little input from victims themselves (Goodey 2005: 116-117). The result is interventions which are not ‘grounded in the lived realities of the persons they are intended to support and assist’ (Surtees 2007: 15). This thesis contends that, for a response to THB to be truly ‘victim-centred’, victims’ perspectives on it must be sought and taken seriously. It also demonstrates the significant value of the information victims can provide through the analysis of qualitative data from semi-structured interviews with 39 female sex trafficking victims.

Victim-centred responses to THB are promoted through a human rights-based approach (HRBA) (Obokata 2006: 380, 384), which puts victims’ human rights at the centre of all efforts to prevent and combat it (OHCHR 2010: 51; OHCHR 2002: 1). This approach was developed in response to the strong state focus on law enforcement and immigration measures aimed at addressing THB but which failed to help and were often harmful to victims (Stewart 1998: 12-13; see also Lee 2011: 35-36). The UN High Commissioner for Human Rights underscored the tendency of responses to THB to be ‘largely ineffective’ and neglect the human rights of trafficking victims when introducing its *Recommended Principles and Guidelines on Human Rights and Human Trafficking* in 2002 (UN 2002: 12). This guidance promotes a victim-centred, rights-based alternative to the prevailing problematic approaches.

In recent years, the international community has recognized the value of a HRBA to THB (Gallagher and Karlebach 2011: 5; Uhl 2010: 121). The approach ‘is normatively based on international human rights standards and is operationally directed to promoting and protecting human rights’ (OHCHR 2010: 49). This definition was first articulated within the development context (OHCHR 2000: 10). Although the content of many of the rights at issue differ, the

application of a HRBA to human development informs the use of this conceptual framework in response to THB, as the underlying principles remain the same across contexts (OHCHR 2014: 8). These core principles, derived from international human rights instruments such as the Universal Declaration of Human Rights, are as follows: universality and inalienability; indivisibility; inter-dependence and inter-relatedness; equality and non-discrimination; participation and inclusion; accountability and rule of law (UNDG Human Rights Working Group 2003: 2). They have been identified as key foundations of rights-based approaches across a wide range of areas in addition to development, such as reproductive rights (UNFPA, Danish Institute for Human Rights, and OHCHR 2014: 75), climate change (OHCHR 2015: 9), disability (UNGA 2018), social work (Lombe 2013), and most notably for our purposes, THB (Rijken 2009: 215). The UNDG Human Rights Working Group (2003: 3) articulated these six principles in its *Statement of Common Understanding*¹ and, in applying them to development programming, concluded that essential elements of a HRBA include employing empowering strategies, including all stakeholders in analysis, and recognizing that people are ‘key actors in their own development, rather than passive recipients of commodities and services’. These tenets should also be applied in a HRBA to THB in order to empower victims, include their perspectives in policy and programme analysis, and recognize them as agentic beings capable of making reasoned judgments about their post-trafficking needs, recovery, and future lives.

As can be observed in the application of the core principles underlying a HRBA, though ‘empowerment’ is not explicitly identified as one of them in the *Statement of Common Understanding*, it has been recognized as an indispensable part of the approach (see *ibid.*; UNDP

¹ This Statement sets out a standard framework for a HRBA to development cooperation and programming in an attempt to reduce variation in interpretation and application of this approach among UN agencies (UNDG Human Rights Working Group 2003: 1).

2003: 5-6, 11). ‘Empowerment’ has been defined as ‘the expansion of freedom of choice and action to shape one’s life’ (Narayan 2002: xviii; see also OHCHR 2004: 14). At its core, a HRBA empowers individuals by recognizing them as rights-holders who are legally owed and can claim entitlements from duty-bearers (typically states) (OHCHR 2006b: 4-5; see also Alston 1995: 10; OHCHR 2014: 8). Rather than viewing individuals, such as those living in poverty or victims of THB, as passive recipients of charity, this approach conceptualizes them as active holders of inalienable rights, which states are legally obligated to respect, protect, and fulfil (Broberg and Sano 2018: 667; Hamm 2001: 1014; UNDP 2003: 1-2, 4). Furthermore, application of the aforementioned key principles underlying a HRBA fosters the empowerment of rights-holders (see OHCHR 2006b: 5). For example, emphasizing the principles of equality and non-discrimination within interventions should enable traditionally marginalized and disenfranchised individuals to claim their rights. And the norms of participation and inclusion should increase the influence of rights-holders’ voices upon the design and implementation of interventions that are targeted towards them.² Thus, just as ‘[f]undamentally, a human rights approach to poverty is about the empowerment of the poor’ (OHCHR 2004: 13; see also OHCHR 2006b: 4), a HRBA to THB is essentially about the empowerment of trafficking victims.³ This contrasts with crime control and immigration approaches to THB, which tend to disempower victims by using them as ‘prosecutorial tools’ (Marmo and La Forgia 2008: 173; see also Segrave Milivojevic, and Pickering 2009: 68, 159) and constraining their freedom of movement (Kapur 2008: 113; Sharma 2017: 46-47), respectively.

² Hamm (2001: 1019) asserts that the right to participation under a HRBA ‘includes control of planning, process, outcome, and evaluation’ of projects and programs and that ‘[p]articipation in this sense is empowerment’. In other words, rather than only seeking feedback from the people a project will impact when it is already planned and designed, this population has a right to participate and have their views taken seriously at all stages of the project’s life cycle (ibid.; see also Filmer-Wilson 2005: 218-219; UNDP 2003: 5).

³ Consequently, when this thesis refers to the core principles of a HRBA, ‘empowerment’ is included.

The core principles of a HRBA remain constant across different issues and contexts, but the identities of rights-holders and, to a lesser extent, duty-bearers, as well as the content and sources of relevant rights, vary. Within the THB context, rights-holders include victims,⁴ potential victims, and individuals accused or convicted of THB offences (OHCHR 2014: 8-10).⁵ The identity of duty-bearers has been more controversial. While it is undisputed that states are duty-bearers with obligations related to THB under international and regional human rights law (such as treaties and European Court of Human Rights case law) (ibid.), whether there can be other duty-bearers in this context has been contested. In its *Fact Sheet on Human Rights and Human Trafficking*, the UN OHCHR (ibid. 8-9) asserts that duty-bearers are ‘usually States’ but reminds the reader that ‘individuals and private entities, such as corporations, can also be subject to legal obligations’. In contrast, Piotrowicz (2009: 189-193) argues that states are the sole duty-bearers under human rights law, based on the history and purpose of human rights as a means of protecting individuals from states’ exercise of power. He thus concludes that THB it is not a violation of human rights because it is usually committed by private individuals and not states (ibid. 186).⁶ However, Piotrowicz overlooks instances of duties imposed upon private individuals within human rights law, such as Article 27(2) of the Convention on the Rights of the Child (1989) (considered one of the ‘core’ international human rights instruments (OHCHR 2006a: 33)), which obligates ‘parent(s) or others responsible for the child . . . to secure . . . the conditions of living necessary for the child’s development’. Yet, within international and

⁴ This thesis focuses on victims of THB as rights-holders.

⁵ There is some overlap with a HRBA to development, which focuses on ‘excluded and marginalized populations’ and ‘those whose rights are at risk of being violated’ as rights-holders (OHCHR 2006a: 16).

⁶ This assertion stands in stark contrast with the explicit recognition of THB as a human rights violation in a variety of hard and soft law instruments and secondary sources (Explanatory Report to CoE Convention on Action against Trafficking in Human Beings 2005: para. 42; OHCHR 2014: 5; Piotrowicz 2009: 176).

regional law concerning THB, there exist no such binding obligations imposed upon private individuals, so Piotrowicz is correct that THB perpetrated by them is not technically a violation of human rights (though it should be noted that non-binding soft law instruments do identify non-state actors, such as corporations, as (voluntary) duty-bearers with respect to THB (e.g. UNGA 2019: 6)⁷).

Whether the state is the primary or sole duty-bearer under human rights law does not interfere with the applicability of a HRBA, and it is agreed that states have legal obligations with respect to THB under both perspectives (OHCHR 2014: 9-10; Piotrowicz 2009: 195-197). Regarding the substance of these obligations, on a general level, states are required to (1) criminalize THB, (2) investigate, prosecute, and punish traffickers with due diligence, (3) assist and protect trafficking victims, and (4) address the root causes of THB (see Obokata 2006: 381, 387; Rijken 2009: 216).⁸ Specifically, human rights instruments and jurisprudence articulate concrete duties aimed at fulfilling these broader obligations. For example, states' duties to provide trafficking victims with safe accommodation and material assistance⁹ directly serve the third general obligation and indirectly contribute to the second and fourth. Regarding the second broad obligation, victims who feel safe and have their basic needs met are more likely to be willing to participate in the criminal justice process than those who do not (see Konrad 2008:

⁷ In the development context, soft law instruments also recognize non-state actors as duty-bearers (e.g. Declaration on the Right to Development Art. 2(2)).

⁸ These categories of obligations align with the '3P' paradigm—prosecution, protection, and prevention—which is a widely-used framework globally for responses to THB (see UNODC 2009a: 3; UNODC 2018: 6; U.S. Department of State 2018a: 1). The first two general obligations are encompassed in the 'prosecution' prong (see UNODC 2009: 10, 17-25), the third corresponds with the 'protection' component (see *ibid.* 10-11, 26-39), and the fourth with the 'prevention' component (see *ibid.* 11, 40-44). In the development arena, the range of substantive obligations under a HRBA is much broader than that in the THB context and covers the full range of civil, political, economic, social, and cultural rights (see OHCHR 2006a: 7, 33; UNDP 2000: iii, 2, 73-75).

⁹ These duties are concretely articulated in Article 12(1)(a) of the 2005 Council of Europe Convention Action against Trafficking in Human Beings and in Article 11(5) of Directive 2011/36/EU.

175; UN.GIFT 2008a: 2, 4), and victim testimony is typically necessary to convict traffickers (Kara 2009: 38; Laczko and Gramegna 2003: 183; OHCHR 2010: 156; Rijken and Römken 2011: 92). With respect to the fourth general obligation, the provision of safe accommodation and financial assistance ameliorates the impact of poverty—a root cause of THB (Cameron and Newman 2008: 22-23)—upon victims’ vulnerability to re-trafficking. In this way, individual concrete duties can serve multiple broad obligations and thus, the general categories are often intertwined and should not be conceived of as mutually exclusive.

While positive human rights law provides a necessary legal framework for a HRBA approach to THB, it is not enough; for this approach to be realized in practice, the state agents tasked with carrying out these legal obligations vis-à-vis individual rights-holders must do so properly. In other words, police, judges, prosecutors, service providers, and other state agents who interact with and/or serve trafficking victims must respect their rights, provide them with their entitlements, and treat them with the dignity that is required under human rights law and norms. These actors must fulfil the substance of state duties in a manner that comports with the core human rights principles mentioned above, including non-discrimination, equality, universality, and inalienability (see Global Alliance Against Traffic in Women (GAATW) 1999; Jordan 2002: 33; OHCHR 2014: 8). To discern the extent to which this is the case, knowledge about victims’ perspectives and lived experiences must be sought (Doyle et al. 2019: 233, 245), and they themselves are the best source of this information (see Surtees 2007: 16, 21).

While the HRBA to THB has largely garnered a positive reception and widespread support (UNGA 2010: 13), it has not been immune to criticism. There has been concern over governments employing human rights discourse around THB to serve political ends, such as to justify increasing surveillance and tightening border controls (Lee 2011: 35). Relatedly, Kapur

(2007: 242-243) and Wijers (2015: 61, 64) suggest that states have curtailed the freedom of movement of people they view as potential victims in the name of fulfilling their duty to prevent THB.¹⁰ Even champions of the HRBA to THB have acknowledged its shortcomings. For example, Gallagher (2010: 4) contends that ‘the inherent political, legal, and structural weaknesses of the international human rights system itself’ have created an impediment to swift action against THB occurring within that system alone. She marvels at the speed with which the Palermo Protocol was finalized and entered into force, which she attributes to the fact that it was negotiated under auspices of the UN Commission on Crime Prevention and Criminal Justice rather than the UN human rights system (*ibid.*; Gallagher 2001: 976). The aforementioned challenges highlight the important role of ‘general political motivation’ in the realization of a HRBA—which Broberg and Sano (2018: 675) raise with respect to development assistance, but which is true across contexts (see also Rijken and Römken 2011: 91). States must be motivated to carry out their legal obligations towards rights-holders in good faith in order for a HRBA to become a reality, and within the human rights realm, this motivation very often takes the form of political pressure (see Human Rights Watch 2004: 9, 323; Koh 1999: 1408-1411).

In spite of its potential shortcomings, a HRBA to THB holds a great deal of promise. It is a means of empowering trafficking victims as rights-holders and guarding against states’ tendency to instrumentalize them in furtherance of their own interests. It accounts for the vulnerability of individuals who have been victimized without compromising their dignity or agency. And it challenges conceptions of ‘ideal’ victimhood, hierarchies of victimization, and

¹⁰ For example, in the 1990s, Bangladesh banned women from working abroad as domestic workers and both Nepal and Bangladesh set minimum age limits for women seeking employment abroad in any field (Kapur 2007: 243).

the neglect of victims' voices through its commitment to universality, inalienability, equality, non-discrimination, participation, and inclusion.

In light of the foregoing discussion, this thesis aims to address the following question: to what extent is a victim-centred, HRBA to THB realized? This research question is explored within the context of the Netherlands, which has become a focal point for discussion and debate around sex trafficking since it legalized prostitution in 2000. The participants in this study were primarily residing in a government-funded shelter for female trafficking victims in Amsterdam or in shelter-affiliated housing. The data from the semi-structured interviews is supplemented with ethnographic observations from the shelter. While this thesis speaks to all of the four broad human rights obligations regarding THB, particularly given their intertwined nature, it focuses on state obligations to investigate, prosecute, and punish THB and to protect and assist victims, given the relatively rare opportunity to conduct in-depth, qualitative research with trafficking victims themselves.¹¹ Consequently, the practical operation of these obligations is viewed through the lens of victims' perspectives and experiences, rather than those of government or civil society actors.

The thesis proceeds in six chapters. Chapter 1 engages with the landscape of literature on THB, discusses key themes and context, including the scope of its definition, its root causes, and dichotomies in the discourse surrounding trafficking victims. It also builds upon the foundation for a HRBA to THB set out in this introduction, which is the conceptual framework and lens

¹¹ Trafficking victims are generally less well-positioned to speak to the law on the books, which is central to states' obligation to criminalize THB (the first obligation), and state efforts to address the root causes of THB (the fourth obligation), as compared to the second and third obligations. States' obligation to investigate, prosecute, and punish traffickers (the second obligation) represents the practical side of the obligation to criminalize THB, which supports a doctrinal interpretation of the first obligation. Victims, particularly those who are 'in the system' (as are this study's participants), often have knowledge about aspects of their cases related to the second obligation, and naturally, they possess significant knowledge related to measures (or lack thereof) to assist and protect them (the third obligation).

through which the empirical data is later analysed. Chapter 2 discusses trafficking victims' rights and states' legal obligations under international and regional law from a victim-centred, human rights-based perspective. It also sets out the Dutch legal framework concerning THB, with a focus on victims' rights, as this is the context to which the research participants have been exposed. The third chapter discusses the qualitative, empirical methods employed in the study. Beyond the sample characteristics and research setting, this chapter devotes significant space to discussing the many ethical and logistical challenges inherent in conducting primary research with a vulnerable, hard-to-reach, multinational population. It also addresses limitations of the study and its methodology. Drawing on a feminist methodological approach, I reflexively examine my 'positionalities' and the impact they likely had on my interactions with participants, the collection and interpretation of data, and my ability to do this research in the first place.

Following these three foundational chapters are three chapters analysing the empirical data from the semi-structured interviews and ethnographic observations. Chapter 4 discusses participants' experiences with the Dutch police, the shelter in Amsterdam, and the lawyers providing them with legal assistance, their reflections on how well these 'chain partners' have met their needs, and their views about how the process and system could be improved for victims of THB. Participants' lived experiences are analysed through a human rights lens to shed light on the extent to which the Netherlands is meeting its obligations to trafficking victims and facilitating the realization of their rights. The following chapter explores the contours of victims' decision-making processes with respect to cooperating with authorities in the investigation and prosecution of their traffickers. It draws out the factors they consider and situates them both within the landscape of empirical research with similar populations and within the broader socio-legal context. The idea that victims are positioned to make free and informed

decisions about their cooperation, as is required under a HRBA, is challenged. Chapter 6 discusses participants' views about participating in criminal proceedings against their traffickers. In light of their existing participatory rights, their perspectives on testifying, the use of protective or special measures, and sentencing are explored. The chapter confronts presumptions in favour of applying special measures in THB cases and highlights potential risks associated with falsely raising victims' expectations regarding their ability to influence case outcomes. In furtherance of victim-centred policy measures, this chapter also gives voice to participants' ideas about how to assist trafficking victims in the exercise of their participatory rights. A conclusion follows, summarizing key findings and themes from the preceding chapters, discussing implications and recommendations for law, policy, and practice, and proposing directions for future research.

Recognizing and respecting victims' perspectives is essential to the development, execution, evaluation, and improvement of a HRBA to THB. The thesis contributes to this effort, while addressing the gap in the literature with respect to primary research with trafficking victims. It does so with an emphasis on 'the political act of making space for the voices of those traditionally spoken for' (Moore and Hofeller 2019: 80) to enable 'individual women's understandings, emotions, and actions in the world [to] be explored in those women's own terms' (Jayarate and Stewart 1995: 217). Thus, this thesis not only promotes victim-centred responses; it is victim-centred itself. Focusing on the perspectives and lived experiences of the women in this research provides valuable insights into their post-trafficking needs, preferences, and thought processes, and the extent to which the Netherlands realizes a victim-centred HRBA to THB.

CHAPTER 1

Key Concepts and Context for a Human Rights-based Approach to Human Trafficking: A Review of the Literature

I. Introduction

This literature review further explores the HRBA and provides important context for analysing sex trafficking victims' perspectives on the criminal justice process, post-trafficking services, and actors involved in both. Much of the literature under review applies to all forms of THB, but with an emphasis on sex trafficking, given that all of the research participants were victims of this form. The chapter begins by setting out the most widely-recognised definition of THB, which will be adopted for the purposes of this study, and highlighting the controversy surrounding it. Understanding what actually constitutes THB is essential to states' fulfilment of their obligation to criminalize the practice. Drawing on Cameron and Newman's (2008) conceptual model, the chapter then addresses the underlying structural and proximate factors contributing to trafficking vulnerability. This is essential to both understanding states' obligation to address the root causes of THB under a HRBA and to appreciating the impact of contextual forces upon victims' perspectives and decision-making processes. Next, the chapter grapples with dichotomies pervading the discourse around trafficking victims. These dichotomous constructs reflect Christie's (1986) 'ideal victim' paradigm and create a 'hierarchy of victimization' (Lee 2005: 7-8; O'Brien, Carpenter, and Hayes 2013: 407-410), which is contrary to a HRBA and interferes with the ability of certain types of victims to claim their rights. Consequently, this discourse likely influences victims' post-trafficking experiences and perspectives. Building on the discussion of dichotomies and the HRBA foundation set forth in the Introduction, the chapter then further conceptualises THB under a HRBA. It explains the core principles and relates them to the THB context, situates the key obligations within Shue's

(1980: 52) tripartite respect-protect-fulfil framework, connects a HRBA and victim-centred approach, and explains the role of victims' needs within a HRBA. Lastly, the chapter examines the complex relationship between prosecuting traffickers and protecting victims, which are the two categories of HRBA obligations at the heart of this thesis. After highlighting problems with prevailing state approaches, it identifies steps states can take to address these obligations in accordance with a victim-centred HRBA. By engaging with scholarship from multiple disciplines, this literature review provides the context for an in-depth investigation into victims' experiences and perspectives in the aftermath of their trafficking victimization.

II. What is Human Trafficking?

Under a HRBA to THB, states are obligated to criminalize the practice, which requires an understanding of what THB actually means. The prevailing internationally-recognized definition of THB is set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol' or 'Protocol') to the United Nations Convention against Transnational Organized Crime (Dinan 2008: 59). Adopted by the UN in 2000 and gaining 175 state parties since then (UNTC 2019), the Palermo Protocol defines 'trafficking in persons' as:

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[.] (Article 3(a)).

Where any of these means have been used, the consent of the trafficked person to the intended exploitation is irrelevant (Article 3(b)).

The Palermo Protocol's definition has been employed in the Council of Europe ('CoE') Convention on Action against Trafficking in Human Beings ('Convention') (2005: Art. 4) and by the EU in Directive 2011/36 (as well as by INTERPOL and by numerous international organizations) (see Dempsey, Hoyle, and Bosworth 2012: 139-140). Notably, none of the state parties to the Palermo Protocol made any reservation with respect to Article 3 (UNTC 2019), signalling their acceptance of its definition of THB. Yet, Dempsey, Hoyle, and Bosworth (2012: 146-156) found that in many of their domestic criminal codes, trafficking is defined differently, and in a number of cases, more narrowly (see also Kotiswaran 2015: 43). Domestic definitions tend to be narrower than that of the Palermo Protocol with respect to the consent of the trafficked person, acts that constitute trafficking, and the means by which trafficking occurs (Dempsey, Hoyle, and Bosworth 2012: 146-156). State parties that only criminalize a narrower range of conduct than is covered by the Protocol's definition of THB are in violation of their obligations under Article 5 of the Protocol, which require them to adopt legislation criminalizing the conduct set forth in Article 3 (ibid. 147, 150). This also means that these states are not adequately carrying out their legal obligation to criminalize THB under a HRBA.

According to the Interpretative Notes (*travaux préparatoires*) to the Palermo Protocol the terms, 'exploitation of the prostitution of others' and 'other forms of sexual exploitation' are purposely not defined (United Nations 2006: 347), allowing states to decide whether all sex work constitutes proscribable sexual exploitation or whether prostitution can be a permissible form of work (Jordan 2002: 32). The lack of a definition for these terms has given rise to a contentious debate over their meaning (Dinan 2008: 59) and reflects the polarizing ideological split among anti-trafficking advocates, which played a central role during the Protocol negotiations (Segrave, Milivojevic, and Pickering 2009: 16-17; Tomkinson 2012: 55-56). On one side of the debate are

radical feminists (also known as ‘neo-abolitionists’), who argue that ‘any practice that involves moving people within and across local or national borders for the purpose of sexual exploitation’ constitutes THB (Hughes 2000: 627), regardless of whether coercive tactics are used, on the grounds that prostitution is inherently exploitative, harmful, and not freely chosen (Farley 2004: xxiii-xxiv; Leidholdt 2004: 177-178; Raymond 2002: 493-497). This view is endorsed by law-and-order advocates, old-style feminists (Dickenson 2006: 43), and organizations such as the Coalition against Trafficking in Women (CATW) and the European Women’s Lobby (Cameron 2008: 82; Cameron and Newman 2008: 35). On the other side of the debate sit liberal feminists, who do not view sex work as exploitative in the absence of coercion (Cameron 2008: 83; Cameron and Newman 2008: 35; Doezema 2000: 33; Dinan 2008: 59). Neo-liberals, neo-feminists (Dickenson 2006: 43, 45), and organizations such as the Global Alliance against Traffic in Women (GAATW) and the Foundation against Trafficking in Women espouse this position (Cameron 2008: 83; Cameron and Newman 2008: 35; Doezema 2000: 33; Segrave, Milivojevic, and Pickering 2009: 5; Tomkinson 2012: 56). Contrary to radical feminists, who call for the complete abolition of the sex industry, liberal feminists generally support its regulation to combat unfair working conditions and other labour rights violations (Segrave, Milivojevic, and Pickering 2009: 5).

In the nearly twenty years since the definition of THB in the Palermo Protocol was articulated, this debate has continued (see, e.g., Dempsey 2017; Shah 2018: 321; Wijers 2015) and remains far from settled. Dempsey, Hoyle, and Bosworth (2012: 160-161) contend that disagreement over the definition of sex trafficking is the most likely explanation for the gaps they observed between the Protocol’s definition of THB and those found in many state parties’

domestic anti-trafficking laws. As such, definitional issues also continue to impact upon states' obligation to criminalize THB under a HRBA.

III. Why Does Human Trafficking Occur?

Under a HRBA, states are obligated to address the root causes of THB. This is no easy task, as numerous factors have been identified as contributors to THB's prevalence and persistence. Broad, contextual forces—such as poverty, inequality, discrimination, armed conflict, and other pervasive violence—often converge to limit individuals' options for survival and a satisfactory quality of life, rendering them vulnerable to trafficker victimization (Cameron and Newman 2008: 1-3; Simeunovic-Patic 2005: 23-24; Wylie and McRedmond 2010: 7-8). Individual factors, including personal attributes such as an adventurous spirit (Rijken 2009: 221; Surtees 2005: 14) or low self-esteem (Adejumo 2008: 1491; Bovenkerk and van San 2011: 195-196),¹² and relational issues, such as an unstable family life, also often play a role in vulnerability (Rijken 2009: 221; Surtees 2005: 14). Individual factors can also exacerbate the impact of structural factors. For example, a person living in poverty whose family suddenly faces medical or other expenses may accept a deceptive offer to earn money abroad, which she would not have accepted but for these personal circumstances combined with poverty. However, it is generally unreasonable and even undesirable to expect states to meddle in potential victims' personal attributes, relationships, and particularized circumstances. It therefore makes sense that international and regional law focus on broad factors impacting on many within society when articulating states' obligations to address the root causes of THB (see Convention Art. 5(2); Convention Explanatory Report para. 103; Palermo Protocol Art. 9(4); *Rantsev v. Cyprus and Russia* 2010: para. 293; see also Council of the European Union 2009: 17).

¹² Importantly, individuals with personal characteristics that increase their vulnerability to being trafficked should not be blamed for their victimization.

Cameron and Newman (2008) put forth a useful framework for understanding the broad contextual factors contributing to the incidence of THB. They contend that the interaction of structural factors, which account for the broad social, economic, and political context, with proximate factors, consisting of police and governance issues, explains why it occurs. According to Cameron and Newman, structural factors shed light on the causes of vulnerability to trafficking (2008: 2). They include economic factors such as globalization, poverty, and economic downturns, social factors including gender discrimination and social inequality, ideological factors such as racism, xenophobia, and cultural stereotyping, and geopolitical factors such as war and civil strife (ibid. 1-3). Cameron and Newman group proximate factors into three categories: (1) ‘legal and policy aspects’, which include poor law enforcement and inadequate legal regimes; (2) ‘rule of law’, which covers corruption and state complicity in criminal activities; and (3) ‘inadequate partnership between civil society and state’, which includes poor educational campaigns, apathetic civil society, and a lack of awareness about trafficking risks among vulnerable communities (ibid.). Notably, proximate factors underlie human trafficking’s status as a high-profit, low-risk enterprise for traffickers (Cameron 2008: 89-91, 103; McCabe 2013: 136; Turek 2013: 81; Segrave, Milivojevic, and Pickering 2009: 16; United Nations Global Initiative to Fight Human Trafficking (‘UN.GIFT’) 2008a: 2; UN.GIFT 2008b: 5).

Examining the root causes of vulnerability to THB is essential to understanding both a HRBA and the perspectives and experiences of victims. With respect to the former, as states are obligated to address these root causes, exploring them is a necessary part of identifying the content of their legal obligations. Regarding the latter, the contextual dynamics that contribute to (and perpetuate) victims’ trafficking influence their decision-making processes, their perspectives on the existence and range of their options, and how they view, interact with, and

respond to criminal justice authorities and other state actors. As such, the following sub-sections address the impact and operation of various structural and proximate factors featured in Cameron and Newman's model.

A. *Structural Factors*

1. Poverty

It is widely accepted that poverty significantly increases individuals' vulnerability to trafficking (Bernat and Zhilina 2011: 2; Clark 2012: 113; Cameron and Newman 2008: 22; McCabe 2013: 139; Obokata 2006: 383, 396; Turek 2013: 78). Most trafficking victims share the goal of escaping from poverty (Cameron and Newman 2008: 23). The desperation associated with poverty motivates individuals to take risks in search of additional income, such as accepting employment opportunities without knowing the full nature and circumstances of the work involved (ibid. 22; Turek 2013: 77; Williams 2008: 132). It also encourages them to take risks in an attempt to reduce costs, such as by sending children away to live with others (Cameron and Newman 2008: 23; Williams 2008: 132; see also Tiano 2012: 34-35). Traffickers can take advantage of this willingness to take risks by inducing those afflicted by poverty to accept deceptive opportunities for additional income and/or cost reduction, when in actuality, the traffickers plan to ensnare them in exploitative situations. In addition to increasing vulnerability to trafficking, poverty limits victims' ability to extricate themselves from highly exploitative situations once they are trafficked (Cameron and Newman 2008: 22).

2. Economic Inequality

In general, people are trafficked from poor, underdeveloped regions to more affluent regions (Bernat and Winkeller 2010: 187; Calvani and Jung 2012: 59; Cameron and Newman 2008: 22; Dinan 2008: 58). The unequal growth and development stemming from globalization

has contributed to the increasingly large disparity between the wealthiest and the poorest nations of the world, as well as that between rich and poor individuals within countries (Burke 2013: 10; Cottingham et al. 2013: 54; Letschert and van Dijk 2011: 6; Turek 2013: 74-75; see also Rijken and Römken 2011: 75 citing Arya and Roy 2006: 20-21; Tiano 2012: 28, 44).

It is important to note that ‘relative’ poverty, not only ‘absolute’ poverty, contributes to the occurrence of THB (Cameron and Newman 2008: 25-26, 29-30; Dinan 2008: 63; Tiano 2012: 28). Globalization, as well as technological advances in media and communications (especially the increasing reach of Western media), have contributed to a change in people’s expectations, particularly in developing countries, as they provide opportunities to learn about the standard of living in other regions (Cameron and Newman 2008: 25-26, 29-30; Dinan 2008: 63). In addition to Western media, the ‘demonstration effect’, which is the influence of seeing one’s community members show signs and share stories of wealth acquired as a result of their time in different countries or regions, plays a role in perceptions of relative poverty (Cameron and Newman 2008: 29-30 citing Kumar et al. 2001: 36). Although economic conditions in a particular community or region may remain stable in absolute terms, the people living there may perceive their economic circumstances more negatively as the group against which they compare themselves expands (Cameron and Newman 2008: 25-26, 29-30; Dinan 2008: 63). ‘Relative’ poverty ‘can magnify the psychological and social impacts of objective poverty’ (Tiano 2012: 28). As a result of both ‘relative’ and ‘absolute’ economic inequality, people are motivated to migrate to other regions in an attempt to raise their standard of living (Cameron and Newman 2008: 25-26, 29-30; Dinan 2008: 63).

3. Lack of Options

Poverty, discrimination, and a lack of viable employment opportunities severely limits people's options and freedom of choice. The idea that freedom of choice must be respected is connected to the notion that choices embody the will of the autonomous individual (Dickenson 2006: 46). Pursuant to Marxist theory, the conditions under which choices about employment are made must be scrutinized to determine whether they are, in fact, free and autonomous (ibid. 45-46). Furthermore, feminist theory views women's employment choices as constrained not only by the conditions under which they are made, but also by how women are socially constructed (ibid. 46-47). The persistent absence of options due to systematic limitations can lead to 'adaptive preferences', whereby individuals internalize a lack of freedom of choice and come to view themselves as undeserving of or uninterested in better employment options than the one they 'choose' (ibid. 47-49). By adapting their preferences, they appear to be choosing freely, but their evaluation of their preferences should not be taken at face value (ibid.). Therefore, though an individual may accept a recruiter's offer of employment abroad, even in a dangerous or undesirable industry, her decision may not have been 'freely chosen', but rather, constrained by a lack of other options and her adaptive preferences (ibid. 45-49).

Along these lines, Loff, Gaze, and Fairley (2000: 1765) assert that '[d]iscussions about trafficking should be considered against a background of global inequity in which people may make rational decisions to act in ways that might be illegal, socially unacceptable, or self harming'. Thus, within the context of constraining structural factors, an individual's 'rational choices' may increase their vulnerability to trafficking.

4. Migration

'Human trafficking cannot be [fully] understood in isolation from the broader topic of migration' (Cameron and Newman 2008: 8; see also Dinan 2008: 58), as it 'occurs primarily

within the context of economically motivated migration’ (Dinan 2008: 60). Globalization has increased the movement of labour across borders to meet the increased demand for cheap, low-skilled workers (Burke 2013: 10 citing Naim 2006; Cameron and Newman 2008: 25-27; see also Calvani and Jung 2012: 53). The flow of labour migration is generally from poorer countries in the global South to richer ones in the global North (Rijken and Römken 2011: 75). In addition to economic circumstances, important drivers of migration include major threats to security, such as war, terrorism, and civil violence, and a desire to escape the rule of authoritarian regimes (Calvani and Jung 2012: 51).

In its Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002), the United Nations Office of the High Commissioner for Human Rights (OHCHR) emphasizes that freedom of movement is a human right and that efforts to combat THB should not infringe upon this right (see also Haque 2006: 12; Limoncelli 2009: 262, 266; Pescinski 2015). In light of this principle, Haque (2006: 11-13) criticizes destination countries’ use of trafficking as an excuse to implement more restrictive migration policies (see also Dinan 2008: 67, 75; Segrave, Milivojevic, and Pickering 2009: 15) and recommends that anti-trafficking policies include provisions for safe migration as well. According to Kneebone (2010: 138), the ‘trafficking-migration nexus has fuelled an anti-immigration approach’.

There is debate over the impact of migration policies upon THB. Some argue that restrictive immigration policies and strict enforcement, in light of strong migratory pressures, motivate those seeking to migrate to accept ‘assistance’ from traffickers (or smugglers, who then pass them on to traffickers) as well as discourage them from reporting their exploitative circumstances in destination countries, for fear of being subject to immigration penalties (Cameron and Newman 2008: 27; Dinan 2008: 71-75; Jordan 2002: 29; Konrad 2008: 162, 174;

Tiano 2012: 42-44; see also Calvani and Jung 2012: 64). While acknowledging this argument, Konrad (2008: 166-167) counters that trafficking also thrives where there are relatively open borders and traffickers encounter little resistance or scrutiny. Accordingly, Konrad asserts that ‘there is no evidentiary basis for determining conclusively the correlation between a particular migration policy and human trafficking’ (ibid. 167).

5. Gender Roles and Inequality

One of the root causes of the trafficking of women is ‘systematic discrimination against women in public and private life and the subordination of women generally’ (Cerone 2001: 73; see also Kara 2009: 32; Obokata 2006: 383; Todres 2006: 889). This discrimination leads to a lack of equal economic opportunities for women, contributing to their overrepresentation among the world’s poor and among those willing to migrate in search of employment (Cameron and Newman 2008: 38-39; see also Doezema 2000: 42; Tiano 2012: 44). In many countries, the law provides women with fewer rights than it does men (Turek 2013: 80). For example, in countries in the Middle East and North Africa where inheritance laws and practices are based upon Sharia law (Islamic law), a woman’s share of an inheritance is generally half that of a man’s in the same position (United Nations 2013: 38). With respect to political rights, in Lebanon, women must prove that they possess an elementary school education in order to vote, a requirement which does not apply to men (Tovrov 2011). Regarding social rights, discriminatory laws in a number of countries make women’s access to divorce and remarriage more difficult than men’s. For instance, under Muslim personal laws in Bangladesh, which apply to approximately 90 percent of the country’s population, men have a right to unilateral, no-fault divorce, but women only have such a right if their husbands agree to its inclusion in the marriage contract (Human Rights Watch 2012: 6, 31, 38). Also, in Israel, all Jewish divorces are delegated to government-funded

rabbinical courts, which only grant a divorce upon the consent of both parties (Chernofsky 2014; Human Rights Watch 2014; Sanders 2013). However, the vast majority of spouses refusing to consent to divorce are men, men whose wives refuse to consent to divorce can remarry with the permission of 100 rabbis but ‘trapped’¹³ women cannot, and any children women have with another partner before the divorce is granted are considered illegitimate and are not permitted to marry under Israeli law (this rule does not apply to men’s children with another partner) (ibid.). Gender-based discrepancies in legal rights such as these can interfere with women’s ability to fully participate in society (politically and otherwise), thereby reducing their access to freedoms and opportunities and increasing their vulnerability to being trafficked (Turek 2013: 80; see also Kara 2009: 30-32).

In addition to discriminatory laws, women and girls are disfavoured in many cultures, particularly in developing countries (McCabe 2013: 139; Turek 2013: 80). For example, certain cultures view sons as ‘breadwinners’ who can financially support their aging parents, but daughters are considered to be burdensome because they require a dowry (Cameron and Newman 2008: 40-41; Turek 2013: 80; see also Human Rights Watch 2012: 3, 25). Consequently, both *de facto* and *de jure* discrimination against women and girls contributes to their vulnerability to THB.

Sex trafficking is considered a gendered phenomenon because most sex trafficking victims are female (Amir & Beeks 2006: xi; Calvani and Jung 2012: 58; ILO 2012: 14¹⁴; Segrave, Milivojevic, and Pickering 2009: 28; Smith 2011: 274; see also McCabe 2013: 136 citing McCabe 2008; Rijken and Römken 2011: 74). Due in large part to gender-based

¹³ A Jewish, Israeli person whose spouse refuses to consent to divorce is trapped in the marriage.

¹⁴ The International Labour Organization estimates that 98 percent of individuals sexually exploited in the private economy are female.

discrimination and inequality, women and girls tend to have less control over their bodies and sexual relations than men (Todres 2006: 889). Furthermore, radical feminists have argued that the commodification of women's bodies is linked to 'society's acceptance of men's prerogative to "buy" women' (Roces 2009: 276).

B. *Proximate Factors*

1. Transnational Organized Crime

The involvement of organized criminal networks in human trafficking is well-documented (van Liempt 2006: 38¹⁵; see also Calvani and Jung 2012: 60; Jacobsson and Kotsadam 2013: 88, 90-91; Segrave, Milivojevic, and Pickering 2009: 140) and their role in the trafficking 'business' has become increasingly significant (Segrave, Milivojevic, and Pickering 2009: 7; Williams 2008: 130, 138-139). There are several features of trafficking operations that strongly suggest the involvement of organized crime, including the widespread use of violence, bribery, and corruption, the employment of sophisticated methods of concealment through false documentation, and the existence of well-established routes, methods, and facilitators (Williams 2008: 138-139). Cooperation among criminal organizations and networks is common and facilitates the trafficking 'business' (ibid. 141; Cottingham et al. 2013: 61, 63). Alliances can be found at different stages of the trafficking process and between actors at various levels, such as when transnational criminal organizations collaborate with local criminal groups (Williams 2008: 138). Williams (2008: 141) attributes the cooperative rather than competitive relationships among different criminal organizations in the trafficking business to the expansion of the market, which generates an abundance of opportunities to profit.

¹⁵ Citing Aronowitz 2001; Aronowitz 2003; Dijk 2002; Kleemans, van den Berg and van de Bunt 1998; Salt and Hogarth 2000.

However, some dispute the involvement of transnational organized crime in THB, arguing that there is not sufficient evidence to conclude that there is a link between the two (Augustín 2005: 101; Segrave, Milivojevic, and Pickering 2009: 9-10). Augustín (2005: 101) suggests that trafficking is connected to ad hoc ‘opportunistic networks’ consisting of current, former, and potential migrants, which facilitate migration, rather than to large-scale criminal organizations. However, Augustín draws on the work of Massey et al. (1993)—who contend that migrant networks actually *reduce* the risks associated with international migration—a position which seems to be antithetical to Augustín’s assertion (ibid. 448-449).

2. Inadequate Legal Regimes

Many source and transit countries lack the laws, regulations, and enforcement mechanisms necessary to combat human trafficking (Fredette 2009: 108; Williams 2008: 145, 149; see also Kara 2009: 38, 200). For example, ‘laws against sex trafficking are overwhelmingly anemic’ (Kara 2009: 200). In some cases, countries are parties to international instruments related to trafficking, but fail to effectively implement them into their domestic legal systems (Rajbhandari 2008: 239; Shahinian 2008: 262; see also Rodríguez Pizarro 2008: 218-219). In addition, penalties for trafficking are generally light and far from commensurate with the gravity of the offense (Williams 2008: 149-150). In many instances, individuals arrested for trafficking are sentenced as if they merely committed a misdemeanour (ibid. 149). As a result, traffickers in these countries are able to act with impunity.

3. Poor Law Enforcement

Even in countries where a legal framework addressing THB exists, enforcement of anti-trafficking laws is generally poor (Ebbe 2008: 36; Kara 2009: 200; Williams 2008: 149; see also McCabe 2013: 136). ‘Law enforcement has tended to be complacent and give [trafficking] a low

priority' (Williams 2008: 150). In some cases, nations are weakened by natural disasters, economic crisis, political conflict or civil war and, as a result, are unable to effectively enforce their laws and protect their citizens (Tiano 2012: 33, 41). Under these conditions, criminal networks can flourish and gain influence over law enforcement and border control agencies (ibid.), which poses a tremendous barrier to the enforcement of anti-trafficking laws in these weakened states.

4. Corruption

Corruption among public officials and law enforcement agents allows traffickers to operate efficiently and with minimum interference (Ebbe 2008: 36; Kneebone 2010: 153-154; Williams 2008: 146-148), and 'is one of the major contributing factors to the crime of trafficking in persons' (UN.GIFT 2008b: 2; see also Clark 2012: 118; Turek 2013: 81). Corruption that facilitates trafficking most frequently involves government officials and law enforcement agents knowingly circumventing anti-trafficking laws and/or purposely overlooking cases of THB (Turek 2013: 81; see also Farr 2012: 74). Furthermore, witnessing transactions, such as the payment of bribes, between traffickers and corrupt officials can dissuade victims from reporting their traffickers to authorities because they are less likely to trust law enforcement and other government agents as a result (ibid.). Therefore, corruption is a key reason why trafficking remains a low-risk crime for traffickers (ibid.).

The preceding structural and proximate factors are not exhaustive, but represent a number of the major contributors to trafficking victimization, which often converge to exacerbate vulnerability. Not only do these factors underlie first-time victimization, but they often perpetuate a cycle of victimization that can result in individuals being trafficked multiple times. Structural and proximate factors are a more likely explanation for re-trafficking than van Dijk's

(2011: 110) claim that victims ‘often allow themselves to be trafficked again’. While van Dijk rightly questions whether policies aimed at protecting and assisting trafficking victims are ‘really geared towards the[ir] interests’ and ‘perceived as such by victim communities themselves’ (ibid.), his claim that victims ‘often *allow* themselves’ (emphasis added) to be re-trafficked is presumptuous, particularly as he did not cite any research in support of it. This assertion amounts to ‘victim-blaming’ (see Ryan 1976) and grossly underestimates the impact of structural and proximate factors.

IV. Victim Dichotomies

When conducting primary research with victims of THB, it is important to understand trends in the discourse surrounding this population in order to manage the research process in a sensitive manner as well as to better understand the impact of social constructs on victims’ interactions with others (including criminal justice authorities and other state agents) and on how they frame their experiences.¹⁶ The following dichotomies pervade the discourse surrounding trafficking victims, particularly those trafficked for sex, and are therefore useful to consider. Like many dichotomous labels, those discussed below are ‘overly simplistic’ and ‘fail to take into account the complexities’ and nuances of individuals’ lived experiences (Leisenring 2006: 327). Importantly, they tend to undermine the application of a HRBA because the manner in which state agents construct victims’ identities often impacts upon victims’ ability to realize their rights. Lobasz (2009: 342, 344) contends that greater attention must be paid to how trafficking victims are socially constructed because the dominant discourse perpetuates harmful stereotypes that ‘effectively remov[e] all who do not fit . . . [within idealized] construction[s] from rights

¹⁶ Analogously, Leisenring (2006: 327) found that existing discourses around ‘victims’ and ‘survivors’ influenced how ‘battered women’ represented themselves and their experiences.

protections’. The disparate treatment of those who have experienced THB on the basis of discursive dichotomies violates the core human rights norms of universality, non-discrimination, and equality.

A. *‘Good’ vs. ‘Bad’ Victims*

O’Brien, Carpenter, and Hayes (2013: 407-410) and Doezema (2000: 24, 34) assert that the majority of women trafficked into prostitution are aware that the jobs offered to them involve sex work, and therefore, the narrative of the innocent, coerced victim is very often a myth. However, due to a ‘hierarchy of victimization’ in which a distinction is made among ‘good’ victims, who are unwilling to engage in sex work but are forced to do so, and ‘bad’ victims, who agree to engage in sex work but are then exploited for their labour, this ‘trafficking myth’ is perpetuated (ibid.). This notion is supported by the fact that some governments and NGOs are eager to assist ‘good’ victims but not ‘bad’ ones, regarding the latter as ‘undeserving’ of help or not ‘genuine’ victims (Brunovskis and Surtees 2008: 57-60; Jordan 2002: 31; Segrave, Milivojevic, and Pickering 2009: 15-16; Tomkinson 2012: 51, 59-62; Wijers 2015: 66). Tyldum and Brunovskis (2005: 26) assert that trafficking victims who knew that they would be working in the sex industry or had prior prostitution experience are often perceived as ‘unworthy’ or ‘guilty’, and are likely to be underrepresented among victims identified through NGOs or rehabilitation programmes (see also Rijken and Römken 2011: 82). Their unworthiness is linked with the presumption that they bear responsibility for their trafficking victimization by knowingly subjecting themselves to risky situations (Rijken and Römken 2011: 81-82; see also Goodey 2005: 124-125; Lee 2011: 65-66). This notion smacks of ‘victim-blaming’, which overlooks social and structural forces contributing to victimization (Ryan 1976) and is associated with negative psychological consequences for victims (Fox and Cook 2011: 3408).

The ‘good’ vs. ‘bad’ victim phenomenon recalls Christie’s (1986) ‘ideal victim’ paradigm. According to Christie, the ‘ideal’ victim, who is readily given legitimate victim status and effectively draws the public’s sympathy, possesses certain attributes (ibid. 18-19, 21-22, 27). He or she is weak (particularly in relation to the offender), engaging in ‘respectable’ activities, and blameless for his or her own victimization (ibid. 19). Christie gives the example of two rape victims—a young virgin versus a prostitute—to demonstrate how victims of the same crime can fall at the opposite ends of the ‘ideal victim’ spectrum (ibid.). Analogously, a young virgin would be perceived as a much more sympathetic and ‘ideal’ sex trafficking victim than a woman who has willingly engaged in prostitution, as the former is viewed as innocent and the latter as dishonourable and risky. In this way, the degree of harm or suffering victims experience is not directly correlated with the amount of sympathy they receive (ibid. 19-20). Public sympathy often translates into attention, protection, and assistance for victims who are perceived as more ‘ideal’ and deserving, based on their characteristics and corresponding position in society (see ibid. 28). Thus, ‘trafficked persons who transgress normative expectations of what victims look like, how they act, or what they need, may be denied legitimate victim status’ (Lee 2011: 69).

Policies that discriminate against ‘bad’ or non-ideal victims include those that reduce the penalty for trafficking when the victim was aware she was going to be engaging in sex work at the outset (as has been noted in Germany, Columbia, Uganda, Canada, Japan, and Brazil) and those that allow law enforcement to refuse to investigate complaints of trafficking made by women who continue to work as prostitutes (as was the case in the Netherlands) (Doezema 2000: 43 citing Wijers and Lap-Chew 1997: 128-130; O’Brien, Carpenter, and Hayes 2013: 408 citing Doezeema 1998: 45). In court proceedings against traffickers, defence lawyers often attempt to discredit sex trafficking victims by focusing on their sexual history, including any involvement

in voluntary sex work, which exemplifies the notion that only ‘innocent’ and ‘chaste’ women can claim protection from sexual violence and exploitation (Doezema 2000: 43 citing Wijers 1998: 11; Segrave, Milivojevic, and Pickering 2009: 138-140; see also Lee 2011: 66). Moreover, O’Brien, Carpenter, and Hayes highlight the exclusive focus on the narratives of ‘good’ victims and the absence of those of ‘bad’ victims during U.S. congressional hearings held between 1999 and 2005, as evidence of the hierarchy of victimization (ibid. 409-410).

According to Doezema (2000: 42-43), the ‘good vs. bad’ victim dichotomy is linked to women’s role as the bearers of their families’ and nations’ honour. As exemplified by the aforementioned policies that discriminate against ‘bad’ victims, many states’ laws and practices connect national honour and female sexuality (ibid. 43). Consequently, sexually ‘impure’ women often do not receive the same rights and protections from the state as ‘innocent’ women do (ibid. 37, 43; see also Goodey 2005: 125).

Neo-abolitionist scholarship has been criticized for reinforcing the classification of women forced to work as prostitutes as ‘innocent’ victims in need of protection and those who purport to have chosen sex work as ‘guilty’, ‘immoral’, and ‘uneducated’ (Segrave, Milivojevic, and Pickering 2009: 4). However, O’Brien, Carpenter, and Hayes (2013) and Doezema (2000) go too far in their attempt to combat this distinction; labelling the narrative of the naïve victim who is forced into sex work a ‘myth’ effectively delegitimizes the experiences of many victims. There is ample evidence that this ‘mythical’ account is, in fact, an accurate portrayal of numerous trafficking victims’ experiences (Kara 2010: 8-10; Friesendorf 2007: 381). It would be more accurate and constructive for O’Brien, Carpenter, and Hayes (2013) and Doezema (2000) to recognize the other patterns of victimization in addition to this particular account, rather than attempting to discredit it in favour of the other narratives.

There is also evidence that the ‘good’ vs. ‘bad’ victim dichotomy can extend beyond victims’ behaviours and decisions before and during their trafficking victimization, to the attitudes and behaviours they exhibit while they are in post-trafficking assistance programs (Brunovskis and Surtees 2008: 62-64, 69-73; see also Bjerkan and Dyrliid 2005: 140). ‘Good’ victims in these programs are not ‘too assertive’, are ‘malleable’, and are eager ‘to change and “to learn”’ (Brunovskis and Surtees 2008: 63). They must acknowledge that their decisions to migrate and/or enter into prostitution were mistakes and conform to service providers’ ideas of acceptable behaviour, such as modest dress, minimal make-up, and not using swear words (ibid. 62-64 69-73; Bjerkan and Dyrliid 2005: 140). In contrast, ‘bad’ program beneficiaries resist providers’ rules, expectations, values, and pressure to change their attitudes and behaviour (Brunovskis and Surtees 2008: 62-64; 69-73). Brunovskis and Surtees (ibid.) criticize this dichotomous framework on the grounds that it encourages providers’ unreflective dismissal of pushback from program participants (as resistant beneficiaries can simply be labelled as ‘bad’) and undermines victims’ exercise of agency (see also Bjerkan and Dyrliid 2005: 154), which are both valid concerns.

B. *‘Victim’ vs. ‘Criminal’*

Akin to the ‘good’ vs. ‘bad’ victim distinction, van Liempt (2006: 32) argues that when consent is taken into account in determining whether sex work constitutes THB, there is a danger that women who are coerced into prostitution will be viewed as ‘victims,’ while those who actively choose to become prostitutes will be seen as ‘criminals’ (see also Lobasz 2009: 341; Wijers 2015: 66). Furthermore, regardless of whether they consented to sex work, sex trafficking victims are often processed as criminal offenders in places where prostitution is illegal (Bernat and Winkeller 2010: 186-187; Wijers 2015: 65).

Another dimension of the victim/criminal dichotomy is that trafficking victims who are in violation of immigration laws are often viewed as criminals, particularly those who do not fit neatly within the ‘good’ victim construct (Tomkinson 2012: 64; Srikantiah 2007: 195; see also Rijken and Römken 2011: 81). Trafficking victims who crossed borders illegally tend to only be viewed as legitimate victims if they did so involuntarily, solely due to trafficker coercion or fraud, and not because of any of the ‘push’ factors that typically motivate voluntary undocumented migration (Srikantiah 2007: 194; see also Wijers 2015: 67). As a result of this distinction, it is often assumed that trafficking victims are ‘easily distinguishable’ from smuggled migrants (*ibid.*). In reality, however, this is not the case: ‘law enforcement agents who encounter forced labor are likely to mistake it for illegal immigration and treat the victims as criminals’ (Turek 2013: 83 citing Lankford 2010: 14; see also Bernat and Winkeller 2010: 187; Kneebone 2010: 149; Lobasz 2009: 331).¹⁷ It is common for trafficking victims to be prosecuted for crossing borders illegally—not only in foreign countries, but in their home countries as well (upon repatriation) (Konrad 2008: 176; see also Wijers 2015: 65). The arrest and criminal status of repatriated trafficking victims stands as an obstacle to successful reintegration into their communities (Konrad 2008: 175).

Feminists and NGOs have attempted to shift the common state practice of treating trafficked individuals as ‘criminals’ to one of treating them as ‘victims’ (Lobasz 2009: 329-333, 343; Williams 2008: 151). However, they have only had limited success in doing so, and in many countries trafficking victims are still often treated as criminal offenders (Letschert and van Dijk 2011: 10; Williams 2008: 151). This reflects the ‘tendency of states to place immigration

¹⁷ Based on their exploratory study of ten human smuggling criminal investigation files in the Netherlands, van der Leun and Schijndel (2016: 39) assert that ‘[b]eing seen as an illegal migrant worker may obscure the fact that the same person can also be [a] victim of exploitation in need of protection, with very serious implications for the migrant concerned’.

controls and national security concerns before human rights protection of trafficking victims' (Lee 2011: 34; see also Lobasz 2009: 332-333; Wijers 2015: 64), which is antithetical to a HRBA.

C. '*Victim*' vs. '*Survivor*'

The terms, 'victim' and 'survivor', represent diametric constructions of identity. While the 'victim' label implies passivity and helplessness, the term, 'survivor', connotes agency, action, and initiative (Dunn 2005: 2, 7-23; Leisenring 2006: 311-312; Lee 2011: 65; Rock 2014: 12). Kathleen Barry, one of the first theorists to employ the 'survivor' concept (Leisenring 2006: 312), asserts, '[m]ore than victims, women who have been raped or sexually enslaved are *survivors*' (Barry 1979: 46). She argues that the 'victim' framework fails to account for these women's 'ongoing and changing' identities and resourceful coping (ibid. 47). Furthermore, beyond recognizing women as survivors, Barry advocates for 'effective survival', which involves women organizing against the serious threat of sexual violence (ibid. 49).

Paradoxically, it is possible for individuals to identify with aspects of both 'victim' and 'survivor' typifications (Leisenring 2006: 327-328). Likewise, there has been an increasing tendency for activists, researchers, and clinicians to construct battered women as both 'victims' and 'survivors' (Dunn 2005: 21-22).¹⁸ However, Dunn (2005: 24) and Leisenring (2006: 327) acknowledge that 'victim' and 'survivor' constructions are limited in that they fail to capture the full range of battered women's experiences and the complexities of daily life. The application of this discourse to sex trafficking victims raises similar issues; Rijken and Römken (2011: 81) contend that the portrayal of trafficking victims as 'helpless without any social or intellectual

¹⁸ Schneider (1986: 221-222) essentially makes this argument but largely avoids using the term, 'survivor', instead referring to this characterization of battered women with the term, 'agent'.

resources whatsoever' reduces them to one-dimensional stereotypes. Thus, using the concepts of 'victim' and 'survivor' poses the danger of oversimplifying individuals' multi-dimensional experiences and identities (as is the case with most diametric constructions). Recognizing the tension surrounding the term, 'victim', this thesis uses it to refer to a person who has experienced the offence of human trafficking in the legal sense rather than as a construction of identity.

D. *'Passive' vs. 'Active'*

The 'passive' vs. 'active' dichotomy underlies aspects of the 'good' vs. 'bad' victim, 'victim' vs. 'criminal,' and 'victim' vs. 'survivor' dichotomies. The former category within each dichotomy is constructed as 'passive', while the latter is viewed as 'active' and implies agency. Accordingly, 'good' victims were forced to engage in sex work by those controlling them, while 'bad' victims made the decision to do so freely; 'victims' were coerced into violating prostitution and immigration laws, while 'criminals' chose to do so; 'victims' neither have control over their circumstances nor the ability to change them, while 'survivors' actively take steps to help themselves.

The 'passive' vs. 'active' dichotomy is also present elsewhere in human trafficking discourse. Typical trafficking victims are often perceived as 'women from the developing world' who are 'traffickable, helpless victims' (Tomkinson 2012: 61; see also Kapur 2008: 118; Uy 2011: 205, 210-211, 218) 'unable to act as agents in their own lives' (Doezema 2000: 37; see also Kapur 2008: 118; Srikantiah 2007: 202; Uy 2011: 211). In this manner, non-Western women are stereotyped as 'passive' beings rather than 'active' decision-makers seeking to improve their economic, social, and/or political circumstances. In addition, some scholars argue that narratives about 'rescuing' trafficked women strip them of their self-determination and agency (Cameron and Newman 2008: 42; Tomkinson 2012: 62 citing Godec 2010: 241; see also

Segrave, Milivojevic, and Pickering 2009: 5¹⁹). This view objects to the characterization of victims as ‘passive’ and in need of ‘saving’ by rescuers acting upon gendered interpretations of victims’ needs (Cameron and Newman 2008: 42). Yet, due to common conceptions of ‘real’ trafficking victims as passive, those who escape their trafficking situations on their own risk losing legitimate victim status (Srikantiah 2007: 199).

In Christie’s (1986: 19) model, blamelessness for one’s crime victimization is an attribute of the ideal victim. With regard to trafficking victims, Srikantiah (2007: 197; 199-200) observes that the utter passivity of the ‘iconic’ victim prior to her rescue is the basis for her blamelessness. Thus, due to the dichotomies that dominate the discourse around THB, victims are typically rewarded for passivity and punished for exercising agency. For example, trafficking victims who voluntarily decided to migrate illegally or become sex workers are often denied complete and legitimate victim status, along with the accompanying public sympathy (see Christie 1986: 18, 21) and media attention (see Srikantiah 2007: 205). They are perceived as ‘blameworthy’ criminals rather than as ‘deserving’ victims (see Weber, Fishwick, and Marmo 2014: 223). The denial of victim status to those who have experienced THB puts the realization of their rights out of reach. On a practical level, state agents responsible for carrying out human rights obligations towards trafficking victims are much more likely to identify those whose narratives track the dominant discourse as rights-bearing victims than those whose narratives do not. On a conceptual level, the passivity of the ideal and deserving trafficking victim is contrary to how victims are viewed under a HRBA, which prizes and seeks to facilitate their exercise of agency and control over their lives (see Jordan 2002: 30).

¹⁹ Segrave, Milivojevic, and Pickering (2009) assert that ‘pro-sex work’ scholars take this position.

An important means of challenging the harmful dichotomies that pervade the discourse is by conducting primary research with trafficking victims: ‘[i]f a range of victims’ voices becomes part of the anti-trafficking debate, our conception of trafficking victims will surely expand to encompass a wide range of experiences from a diverse group of victims’ (Srikantiah 2007: 209). This is one of the ways in which this thesis contributes to our knowledge and understanding of trafficking victimhood realities.

V. A Human Rights-based Approach to Human Trafficking

The core principles underpinning a HRBA have been identified as: universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law (UNDG Human Rights Working Group 2003: 2); and empowerment (UNDP 2003: 5-6, 11). But what do these general principles mean and how are they to be applied within the THB context? First, universality and inalienability are rooted in the idea that ‘[a]ll human beings are born free and equal in dignity and rights’, as stated in Article 1 of the Universal Declaration of Human Rights (ibid.). In practice, this means that trafficking victims who belong to disfavoured groups, such as undocumented migrants or voluntary sex workers, are just as entitled to enjoy their rights as those who fit idealized notions of trafficking victimhood are. These rights are also inalienable, meaning that they cannot be taken away or given up (ibid.). Second, indivisibility signifies that human rights are of ‘equal worth and validity’ (Darrow and Tomas 2005: 502) and no hierarchy exists among them (UNDG Human Rights Working Group 2003: 2). Despite the equal intrinsic merit of rights, priority-setting in human rights programming is acceptable when there are resource and institutional constraints (Darrow and Tomas 2005: 503; UNDP 2003: 7). However, priority-setting must not be done arbitrarily and should comport with the principles of a HRBA

(see OHCHR 2006b: 12-13). For example, when a state engages in priority-setting related to THB, it must involve meaningful participation of all stakeholders (see *ibid.* 13), including trafficking victims. It must also avoid prioritization that would produce or exacerbate unequal and discriminatory outcomes (see *ibid.*), such as those that would favour rights realization for more sympathetic or ‘ideal’ trafficking victims over that of less ‘ideal’ trafficking victims.

Third, like the principle of indivisibility, inter-dependence and inter-relatedness speak to the relationship between different rights. Specifically, they recognize that ‘[t]he realization of one right often depends, wholly or in part, upon the realization of others’ (UNDG Human Rights Working Group 2003: 2). For instance, within the THB context, victims’ ability to claim their right to be heard during criminal proceedings²⁰ often depends on the realization of their rights to information,²¹ interpretation and translation,²² protection from intimidation and retaliation,²³ temporary residency,²⁴ and special measures.²⁵ In this manner, human rights are ‘conceptually and functionally linked’ (Darrow and Tomas 2005: 504) and the extent to which certain rights are realized can facilitate or impair the realization of other rights.

Fourth, the principles of equality and non-discrimination reflect the equal, inherent dignity of all human beings (UNDG Human Rights Working Group 2003: 2). Consequently,

²⁰ Directive 2012/29/EU Art.10.

²¹ Council of Europe Convention on Action against Trafficking in Human Beings (‘Convention’) Art. 12(1)(d), 15(1); Directive 2004/81/EC Art. 5; Directive 2011/36/EU Art. 11(5)-(6); Directive 2012/29/EU Arts. 3-4, 6; Palermo Protocol Art. 6(2)(a), (3)(b).

²² Convention Art. 12(1)(c); Directive 2004/81/EC Art. 7(3); Directive 2011/36/EU Art. 11(5); Directive 2012/29/EU Arts. 5(2)-(3), 7; Palermo Protocol Art. 3(b).

²³ Convention Arts. 12(2), 28, 30(b); Directive 2011/36/EU Art. 12(3); Directive 2012/29/EU Arts. 9(3)(a), 22; Palermo Protocol Art. 6(5).

²⁴ Convention Art. 14; Directive 2004/81/EC Art.8; Palermo Protocol Art.7.

²⁵ Convention Art. 30; Directive 2011/36/EU Art. 12(4); Directive 2012/29/EU Arts. 20, 23. ‘Special’ or ‘protective’ measures are steps and procedures ‘aimed to protect victims as well as their families and witnesses from any further form of violence and re-victimisation or secondary victimisation’ (European Institute for Gender Equality 2011).

people are entitled to equal access to and enjoyment of their rights without discrimination on the basis of their characteristics, status or personal circumstances, including their race, sex, age, national origin, language, disability, sexual orientation or occupation (ibid.; UNDP 2003: 7). These principles not only require that states avoid implementing overtly or intentionally discriminatory laws, policies, and practices, but also guard against those which appear neutral but have discriminatory effects (Darrow and Tomas 2005: 506; OHCHR 2004: 18; OHCHR 2006b: 10). Furthermore, states must ensure that the agents carrying out their legal obligations towards rights-holders do so in an equal and non-discriminatory manner.²⁶ The principles of equality and non-discrimination come into play when police officers, prosecutors, or judges do not take allegations of THB seriously based on a victim's history of working in prostitution, origin from a disfavoured country or culture, and/or undocumented status. As a result, these state actors fail to fulfil their obligations to investigate, prosecute, and punish THB with due diligence, provide protection and assistance to the victim, and prevent THB (due to the risk of re-trafficking and the likelihood that the victim's trafficker will victimize others).

Fifth, participation and inclusion mean that all stakeholders, including those who are vulnerable and marginalized, must have active, free, meaningful, and informed involvement in decisions, policies, and interventions that affect their lives (OHCHR 2004: 18-19; OHCHR 2006b: 14-15; UNDG Human Rights Working Group 2003: 2; see also Goonesekere and De Silva-De Alwis 2005: 2). In order to satisfy these principles, states must engage vulnerable and disadvantaged groups, which usually requires both organizational capacity-building and the realization of other human rights, including the right to information and the right to a subsistence

²⁶ State actors' biases against certain groups interfere with the ability of members of those groups to claim their rights (see, e.g., MacKay 2013: 61 (females and indigenous peoples); OHCHR 2006b: 10 (the poor)).

standard of living²⁷ (Darrow and Tomas 2005: 510; OHCHR 2004: 19-20). Goodey (2005: 116-117) highlights the problematic but common situation in which the principles of participation and inclusion are neglected and crime victims are not consulted regarding interventions that directly affect them (and are even meant to be ‘victim-centred’). Under a HRBA to THB, states must facilitate victims’ meaningful participation in the development and assessment of measures aimed at fulfilling states’ legal obligations towards them, such as the duty to provide them with protection and assistance. Moreover, participation must be inclusive of victims with a wide range of backgrounds and experiences, and not only involve those with the most sympathetic narratives or those who are easiest to reach (e.g. due to their proficiency in a state’s official language). These principles are also implicated in judicial processes, as victims have a right to participate in criminal proceedings against their traffickers.²⁸ As explained earlier with respect to the principles of inter-dependence and inter-relatedness, victims’ enjoyment of their right to be heard during criminal proceedings typically depends upon their realization of other rights, such as their rights to information, interpretation and translation services, and special measures.

Sixth, the principles of accountability and rule of law reflect the status of human rights as legal entitlements belonging to rights-holders with corresponding mandatory legal obligations imposed upon duty-bearers, rather than as matters of discretionary charity (Darrow and Tomas 2005: 511; see also UNDG Human Rights Working Group 2003: 2). Monitoring the extent to which duty-bearers carry out their human rights obligations and providing avenues for rights-holders to redress violations are key components of these principles in practice (Darrow and

²⁷ Darrow and Tomas (2005: 510) rightly point out that ‘[i]t is doubtful that people struggling to satisfy the minimum daily requirements of existence will be particularly interested in attending workshops, meetings, focus group sessions, and other such distractions’.

²⁸ Directive 2012/29/EU Art. 10.

Tomas 2005: 512; OHCHR 2006b: 170-19). Accountability mechanisms can generally be categorized as judicial (e.g. independent judiciary with jurisdiction over human rights claims against duty-bearers), quasi-judicial (e.g. international human rights treaty bodies), administrative (e.g. publication of human rights impact assessments) or political (legislative processes) (OHCHR 2004: 16; OHCHR 2006b: 17), but there are also informal accountability structures, such as an independent press (Darrow and Tomas 2005: 512) and a strong civil society presence. Regardless of type of mechanism, a HRBA requires it to be effective, transparent, timely, and accessible to all rights-holders (Darrow and Tomas 2005: 512; OHCHR 2004: 16). Within the THB sphere, formal accountability mechanisms include domestic courts with jurisdiction over victims' human rights claims against the state (and its agents), the European Court of Human Rights' (ECtHR) jurisdiction over claims against state parties to the European Convention on Human Rights (ECHR) for violations of Article 4,²⁹ the European Commission and the Court of Justice of the EU's (CJEU) jurisdiction over Member State failures to implement EU law on THB, the Group of Experts on Action against Trafficking in Human Beings's (GRETA) country monitoring work, and the U.S. Department of State's Trafficking-in-Persons (TIP) reports. In spite of the breadth of these mechanisms, duty-bearer accountability and compliance with the rule of law are still a concern due to enforceability challenges. For example, there have been serious compliance issues with ECtHR judgments, which is not surprising 'given that the Court and the Council of Europe (of whose institutional architecture the Court forms a part) have no means of enforcement [or] any material incentives at their disposal' (von Staden 2018: 6, 23). As another CoE body, GRETA, which is responsible for monitoring compliance with the Convention on Action against Trafficking in Human Beings,

²⁹ For a discussion of the ECtHR's Article 4 jurisprudence, see Chapter 2.

lacks the ability to hold states to account. This may explain why it frames its country reports in terms of ‘recommended’ actions when it determines that a state has violated the Convention even though this instrument constitutes binding law (see GRETA 2018: 4).

Seventh, the concept of empowerment is inextricably linked to the foregoing core principles of a HRBA. Universality, inalienability, equality, and non-discrimination empower disadvantaged, marginalized, and vulnerable individuals and groups by recognizing their status as rights-holders on an equal plane with those who are more visible and powerful. Indivisibility, inter-dependence, and inter-relatedness empower rights-holders to legitimately claim their full range of entitlements from duty-bearers. Participation and inclusion empower those who have been traditionally excluded from decision-making processes with a voice in and influence over measures that directly affect their lives. And accountability and the rule of law empower rights-holders to seek redress when duty-bearers fail to meet their legal obligations towards them. Thus, empowerment is a fundamental feature of a HRBA (Darrow and Tomas 2005: 494, 509-510, 513-514, 537; OHCHR 2006b: 4).

States, as duty-bearers, must comply with the aforementioned tenets while carrying out their substantive obligations towards rights-holders. As noted in the Introduction, these obligations can be broadly categorized as requiring states to (1) criminalize THB, (2) investigate, prosecute, and punish traffickers with due diligence, (3) assist and protect trafficking victims, and (4) address the root causes of THB (see Obokata 2006: 381; Rijken 2009: 216).³⁰ These duties reflect the well-established principle of international law that ‘states do not merely have negative obligations’ (i.e. duties to refrain from violations) with respect to human rights, ‘but have positive obligations as well[,]’ such that they must take affirmative steps to protect and

³⁰ Specific obligations towards trafficking victims within these broad categories are set out in Chapter 2.

defend them (Rijken 2009: 216; see also Cerone 2001: 62-63; 81-86; OHCHR 2002: 1). This principle is embodied in Shue's (1980: 52) tripartite framework for human rights obligations, now referred to as duties to 'respect, protect, and fulfil' human rights (Darrow and Tomas 2005: 529; OHCHR 2006b: 11). First, duty-bearers' obligation to 'respect' human rights requires them to refrain from interfering with the enjoyment of rights and generally corresponds with the concept of 'negative' obligations (ibid.). Second, the obligation to 'protect' means that duty-bearers must prevent third parties from infringing on others' enjoyment of their rights (ibid.). This can take the form of negative duties, such as refraining from adopting laws that make third party interference possible, or positive duties, such as criminalizing third party behaviour that prevents rights-holders from claiming their entitlements (see Mégret 2014: 102). Third, the obligation to 'fulfil' requires duty-bearers to take concrete steps towards the full realization of human rights and is a quintessentially positive obligation (ibid. 103; OHCHR 2006b: 11). It encompasses both a duty to facilitate the realization of human rights through an enabling environment and a duty to provide the specific resources to which rights-holders are entitled when they cannot access those resources by themselves due to reasons beyond their control (ibid.; UN CESCR 1999: para. 15). States' four key obligations concerning THB generally constitute positive duties to protect and fulfil human rights. However, it should be noted that, '[i]n practice, the obligations to "respect", "protect", and "fulfil" are closely interrelated and it may not always be easy to make a clear-cut distinction between these different aspects' (Mégret 2014: 103).

A HRBA promotes a victim-centred approach to THB (Obokata 2006: 384). Goodey (2005: 7) posits that the term, 'victim-centred', refers to an approach that is 'sensitive to victims, and works "for" and sometimes "with" victims, as important actors in criminal and social

justice’. This vague definition does not go far enough; under a HRBA, victim-centredness refers to placing victims, as rights-holders, at the heart of state responses to THB. However, Goodey (2004: 44) helpfully points out that ““victim-centred” justice can imply the redirection of justice towards victims’ needs and rights’. Indeed, since the 1970s, when victims were ‘viewed as the forgotten party of the criminal justice process’ (Pemberton 2014: 32) and Christie (1977: 7-8) highlighted state misappropriation of their conflicts, there have been a number of measures across international, regional, and domestic levels aimed at repositioning the victim towards the centre of criminal justice policies and processes³¹ (Letschert and van Dijk 2011: 4, 307-308; McGarry and Walklate 2015: 102-105). This trend towards victim-centredness is a step forward in terms of both empowering victims and enhancing the legitimacy of criminal justice responses³² (van Dijk 2011: 107; van Dijk and Letschert 2011: 315). However, while this approach has been recognized as the gold standard within the THB context (see GRETA 2012: 11, 22; GRETA 2018b: 2; Rijken and Römken 2011: 91; U.S. Department of State 2018a), it is important to ensure that the concept does not become a political tool used to garner support for measures that fail to further victims’ rights and interests in practice. In determining whether this is the case, Goodey (2005: 131) asserts that it is useful to assess whether a measure that is framed as victim-centred ‘is really for the benefit of victims, to assist their recovery in the aftermath of crime and help them through the criminal justice process, or whether it is envisaged primarily as an aid to obtaining useful witness information and testimonies’.

³¹ In line with Goodey (2005: 7), I take the position that ‘victim-centred’ does not mean ‘anti-offender’. While recognizing that, at times, the interests of victims and defendants may come into conflict, providing victims with rights, such as the right to information, assistance, protection, participation, and restitution, generally does not impinge upon defendants’ rights.

³² Van Dijk (2011: 107) argues that public perception of criminal justice as at least partially serving victims’ interests bolsters its legitimacy.

Goodey (ibid. 116-117) also critically points out that ‘too often victims’ views are not sought either when developing so-called victim-centred criminal justice interventions or when assessments of practice initiatives are undertaken’, resulting in ‘victim-centred justice programmes often evolv[ing] without or with very little direct critical input from victims’. It is a patronizing yet common assumption that victim service providers or the police can ‘speak’ on behalf of victims with respect to their best interests and that victim input is unnecessary (ibid. 117). This notion embodies a false equivalence between the perceptions of these institutions and the perspectives of victims themselves, based on their lived experiences. This is dangerous, as it can lead to the implementation of policies and interventions that do not meet the needs or honour the wishes of the very people they are intended to help. Trafficking victims themselves are the best source of information about their needs, interests, and values³³ (see Surtees 2007: 16). They are a heterogeneous population about whose diverse needs we have ‘little systematic knowledge’ (Rijken and Römken 2011: 82-83, 94, 97-98; see also Dunn 2007: 256). Therefore, further empirical research involving victims themselves is necessary to fully identify the range of these needs, particularly those concerning protection and assistance, in order to inform victim-centred measures aimed at addressing them (Rijken and Römken 2011: 97-98; see also Rijken et al. 2013: 145).

It is important to note that victims’ needs play a significant role in the development of a victim-centred HRBA largely because today’s needs inform tomorrow’s rights. In other words, victims’ (unfulfilled) needs often drive lobbying for and the development of legal instruments granting victims rights that respond to these needs (see Goodey 2005: 127, 149-150; Letschert

³³ ‘[E]vidence based policy making has to consider not only the evidence and needs of the population but also the values of that population’ (Muir Gray 2004: 988).

and van Dijk 2011: 9). For example, during the process of developing Directive 2012/29/EU on crime victims' rights, the EU Commission researched victims' needs and built its proposed directive upon the results of this research (Ezendam and Wheldon 2014: 53). Furthermore, NGOs dedicated to helping crime victims, such as Victim Support Europe, lobbied the Commission and gave 'expert input' regarding what the content and range of rights in the directive should be (Victim Support Europe 2011: 4; see also Letschert and van Dijk 2011: 9). Thus, victims' needs, including those which are not currently addressed by formal rights, are relevant to a HRBA and should not be overlooked. The qualitative data from interviews with trafficking victims discussed in later chapters provide important insights into both the substance of victims' needs and the realization of their rights in the aftermath of their victimization.

VI. Prosecuting Traffickers and Protecting Victims

There is often tension between states' obligation to investigate, prosecute, and punish traffickers and their duty to protect trafficking victims (see Rijken and Römken 2011: 74, 91). This is because states have a strong interest in prosecuting traffickers to enforce their criminal laws (Konrad 2008: 162; Rijken and Römken 2011: 97), but doing so can be harmful to victims, as their testimony is usually necessary to obtain convictions (Kara 2009: 38; Laczko and Gramegna 2003: 183; Rijken and Römken 2011: 92; Segrave, Milivojevic, and Pickering 2009: 72) but their participation in the criminal justice process often increases the risk of reprisals (Reeves and Mully 2000: 129; Surtees 2007: 167) and secondary victimization³⁴ (Orth 2002: 321; Jorge-Birol 2008: 176; Segrave, Milivojevic, and Pickering 2009: 136-147). These risks are particularly serious in jurisdictions lacking a victim-centred HRBA to THB, which Letschert and

³⁴ Secondary victimization 'occurs when a victim of crime feels they have been subjected to inadequate, insensitive or inappropriate treatment, attitudes, behaviour, responses and/or practices by criminal justice and social agencies that compound their original trauma' (Gekoski et al. 2013: 308).

van Dijk (2011: 10-11) identify as the main reason for many victims' reluctance to participate in criminal investigations and prosecutions (and which consequently contributes to low global conviction rates for THB (see UNODC 2016: 4)). When states foreground their prosecutorial interests and, for example, coerce victims who do not wish to exercise their rights to press charges or participate in the criminal justice process into doing so—a practice experienced by a participant in the present study (see Chapter 5) and which has also been noted elsewhere in the THB literature (Bjerkan and Dyrliid 2006: 9; Jorge-Birol 2008: 176)—victims are disempowered and suffer negative consequences.³⁵ Given that trafficking victims are already highly vulnerable to developing post-traumatic stress disorder (PTSD) (especially those trafficked for sexual exploitation) (Lugris 2013: 232; Oram 2012: 8-9) and secondary victimization is also associated with PTSD symptoms (Wemmers 2013: 227-229), there are special risks that states must account for when carrying out its obligations towards this population.

However, the relationship between investigating, prosecuting, and punishing traffickers and protecting victims is complex as participating in the criminal justice process can also be beneficial for victims. Victims' participation can assist them with processing trauma and associated feelings, which can foster an increased sense of control, dignity, and self-worth (Obokata 2006: 394 citing Roht-Arriaza 1995: 19; see also Doak 2005: 312). McGarry and Walklate (2014: 127) agree that affording crime victims a 'voice' within criminal justice processes provides them with an 'opportunity of healing' from the harms of their victimization. Furthermore, Muraszkiewicz (2016: 341) contends that meaningful participation in criminal

³⁵ State coercion can be explicitly targeted towards individual victims, as was the case in the examples cited, or structurally embedded within legal and policy frameworks. Regarding the latter, requiring victims to cooperate with authorities in investigations and prosecutions in order to access certain assistance and protection measures beyond the reflection period, as is the case in most jurisdictions (see Wijers 2015: 64-65), is inherently coercive because many victims are in serious need of protection and assistance due to threats to their safety and/or an inability to meet their basic needs. For further discussion of this legal issue, see Chapter 2.

proceedings can help to restore victims' agency following the disempowering experience of trafficking victimization (see also Doak 2005: 312; Doak 2008: 117), but this is likely only to be the case when their participation is wholly voluntary and their wishes are respected.

Adding to the complexity of the relationship, the fulfilment of victims' rights to protection and assistance can also enable them to realize their rights to press charges and participate in the criminal justice process, reflecting the principles of inter-dependence and inter-relatedness. It is often emphasized that victims who feel safe and supported will be more likely to be comfortable acting as witnesses and informants (see, e.g., Dinan 2008: 76; Konrad 2008: 175; UN.GIFT 2008a: 2, 4). This makes sense because, just as in the development context '[i]t is doubtful that people struggling to satisfy the minimum daily requirements of existence will be particularly interested in attending workshops, meetings, [and] focus group sessions' to participate in their own development processes (Darrow and Tomas 2005: 510), trafficking victims whose basic needs are not met would likely find it challenging or even impossible to participate meaningfully in the criminal justice process. Moreover, effective protection for victims and their loved ones against retaliation from traffickers can enable victims to press charges and participate fully in investigatory and prosecutorial processes safely. Thus, different rights belonging to victims are inter-dependent and inter-related, as are states' corresponding obligations.

Yet, states can exploit this inter-relatedness to further their own criminal justice goals, such that their 'concern for justice is driven not by a desire to achieve justice *for* victims, but to achieve justice for the state' (Segrave, Milivojevic, and Pickering 2009: 68). This is problematic because it incentivizes states to only provide victims with the level of protection and support necessary to enable their cooperation with criminal justice authorities and to do so only until

state prosecutorial goals are achieved, rather than to provide the type and duration of services necessary to empower them and fully protect them from secondary and repeat victimization.³⁶ Furthermore, taking a state-centred rather than victim-centred approach leads to legal regimes in which victims whose full cooperation with authorities does not further prosecutorial goals (e.g. due to a lack of evidence or an inability to identify the perpetrators) lose access to benefits, such as residence permits, welfare support, and accommodation in specialized shelters (see Chapters 2 and 5; see also Segrave, Milivojevic, and Pickering 2009: 80-83). In doing so, states instrumentalize victims in contravention to a HRBA.³⁷

Given the complex and often fraught relationship between states' obligations to investigate, prosecute, and punish THB and to protect and assist victims, rights to 'special' or 'protective' measures are significant due to their potential to mitigate some of the aforementioned tension. These measures are steps and procedures 'aimed to protect victims as well as their families and witnesses from any further form of violence and re-victimisation or secondary victimisation' (European Institute for Gender Equality 2011). Examples of special or protective measures include court familiarization programs, the provision of communication aids such as intermediaries and interpreters, screening off the defendant from the witness's view, and allowing testimony to be given from outside of the courtroom via live television link (Ellison 2002: 33-36; Hoyle 2012: 409; Sanders, Young and Burton 2010: 734). Empirical research has demonstrated the benefits of special measures for many vulnerable and intimidated witnesses,

³⁶ Preventing re-victimization likely requires states to protect victims from the impact of structural and proximate factors that create vulnerability to THB.

³⁷ 'All human rights derive from the dignity and worth inherent in the human person' (Vienna Declaration and Programme of Action 1993; see also McCrudden 2008: 723) and this inherent dignity prohibits the use of humans 'merely as a means' (Kant 1996: 209 § 38). Furthermore, central to the concept of human dignity is the notion that the state exists for the sake of individuals and not vice versa (McCrudden 2008: 679). Thus, centring the state rather than the individual is inconsistent with a HRBA.

including improved psychological well-being (Murray 1995: 66, 71, 75; Sas et al. 1991: 1, 10-14, 83, 116-117; see also Cashmore and De Haas 1992: 78; Davies and Noon 1991: 72, 74; Goodman et al. 1992: 85) during and greater satisfaction with the criminal justice process (Hamlyn et al. 2004: 101-103). Hamlyn et al. (2004: 78) also found that many vulnerable and intimidated witnesses who had used special measures would not have been willing and able to participate in criminal proceedings without them, demonstrating the inter-dependence and inter-relatedness of these rights. However, not all vulnerable and intimidated victims wish to use special measures and failing to elicit and honour their preferences regarding the application of these measures can have negative consequences for both victims (Hall 2007: 33, 42, 51; Wade 2002: 231; see also Cashmore and De Haas 1992: 87-88) and for the effectiveness of the criminal justice system (e.g. due to the loss of key witness testimony (Hall 2007: 33, 42)). Hall (ibid. 42) rightly observes that forcing victims to use special measures against their wishes violates the principle of participation and is contrary to a victim-centred approach to criminal justice.

Both inside and outside of the context of criminal proceedings, a victim-centred HRBA to victim protection and assistance avoids compromising victims' agency by allowing them to exercise control over the type and manner of services, aid, and interventions they receive (Pescinski 2015; Rijken and Römken 2011: 81, 94). It emphasizes empowerment and seeks to help victims regain control over their lives (Jordan 2002: 30), as being victimized may lead to deprivation of a sense of self-control and autonomy (Obokata 2006: 384 citing Roht-Arriaza 1995: 19). To achieve this, states must incorporate flexibility into their approach, as trafficking victims comprise a heterogeneous group with varying sets of needs, which can change over

time³⁸ (Goodey 2005: 122, 149; Rijken 2018: 242-249; Rijken and Römken 2011: 82-83, 94, 97). Individual victims' needs influence their decisions to exercise, or not to exercise, particular rights. Fundamentally, honouring these decisions is a key part of respecting victims' agency and is central to a victim-centred approach.

Honouring victims' decisions includes respecting their right to participate in the criminal justice process even if, as Segrave, Milivojevic, and Pickering (2009: 159) contend, the process is 'clearly limited[,] relatively ineffective[,] . . . reinforc[es] stereotypes, . . . and maintain[s] a focus on short-term measures rather than addressing crime in its social context'. Furthermore, they assert that it 'expose[s] trafficked women to various forms of abuse and ill-treatment by those who are supposed to protect them' (ibid. 157). Yet, rather than circumscribing victims' agency and paternalistically pressuring them to decline participation, concrete measures should be taken to make the process victim-centred and respectful of their human rights. In addition to making special measures available to them in accordance with their preferences, victims' rights to information,³⁹ a reflection period,⁴⁰ legal counsel,⁴¹ and other forms of support and assistance⁴² should be fulfilled (and not made contingent upon their assistance with investigations and prosecutions, even after the reflection period expires) to empower them to make free and informed decisions about their participation. Moreover, criminal justice authorities and other actors responsible for carrying out state obligations towards victims must

³⁸ Rijken (2018: 242-249) uses Maslow's hierarchy of needs as a theoretical framework for analysing how the needs of trafficking victims evolve as time passes from the point at which they leave their exploitative situation.

³⁹ Convention Art. 12(1)(d); Directive 2004/81/EC Art. 5; Directive 2011/36/EU Art. 11(5)-(6); Directive 2012/29/EU Arts. 3-6; Palermo Protocol Art. 6(2)(a), (3)(b).

⁴⁰ Convention Art. 13; Directive 2004/81/EC Art. 6.

⁴¹ Convention Arts. 12, 15; Directive 2004/81/EC Art. 7(4); Directive 2011/36/EU Art. 12(2); Directive 2012/29/EU Art. 13; Palermo Protocol Art. 6.

⁴² Convention Art. 12; Directive 2004/81/EC Art. 7(1); Directive 2011/36/EU Art. 11; Directive 2012/29/EU Art. 9(1)(c); Palermo Protocol Art. 6.

do so in compliance with established human rights principles, such as universality, equality, non-discrimination, and empowerment, and treat victims with the dignity accorded to rights-holders. A step that can facilitate this is reconceptualising the relationship between criminal justice authorities and victims from one of ‘cooperation’, which is the prevailing term used in law (see, e.g., Convention Art. 13(1); Directive 2004/81/EC Art. 6(1)) and in much of the literature (see, e.g., Dinan 2008: 76; Gallagher and McAdam 2018: 193), to one of ‘collaboration’. In the criminal justice context, victim ‘cooperation’ connotes mere compliance with the wishes and requests of the relevant authorities, such as law enforcement and prosecutors, which tends to position victims as tools to be utilized in furtherance of state goals in the criminal justice process. In contrast, ‘collaboration’ among victims and criminal justice authorities suggests partnership, mutual respect, appreciation of individual and shared goals, and recognition of the vital contributions that each party makes, rather than unilateral submission on the part of victims. A collaborative approach in which victims and criminal justice actors view each other as coequal partners in THB investigations and prosecutions has the potential to empower victims, prevent them from being objectified as criminal justice instruments, and significantly reduce the risk of secondary victimization.

VII. Conclusion

The human rights and THB literature underscore both the significant promise of a HRBA to THB and the challenges to implementing it. Positioning victims as rights-holders allows them to legitimately claim certain entitlements and treatment from states as duty-bearers, which empowers victims, guards against secondary and repeat victimization, and recognizes them as important stakeholders in policies, processes, and other state action that directly impact upon their lives. However, states’ desire to advance their criminal justice and immigration control

interests, combined with harmful proximate factors and dominant notions about the characteristics of ‘real’ trafficking victims, often puts the realization of a HRBA to THB out of reach. As a result, victims are silenced, their interests are discounted, and states fail to fully honour their legal obligations. A key part of evaluating the extent to which this is the case is gaining an understanding of victims’ perspectives and experiences, and victims themselves are the best source of this information. This thesis seeks to contribute to this enquiry while also mitigating the considerable gap in the literature with respect to primary research with trafficking victims. On a broader level, this gap must be addressed because ‘if women are to overcome abuse, control or oppression, whether at the hands of individual men or of the state, feminist academics must create knowledge of *their* experiences and *their* viewpoints, not simply report the voices of those charged either with supporting or punishing them’ (Bosworth, Hoyle, and Dempsey 2011: 773). The voices of women who have experienced sex trafficking will be heard following an analysis of the specific legal obligations that states have towards them and a discussion of the research methodology in Chapters 2 and 3, respectively.

CHAPTER 2

Sources and Content of Human Trafficking Victims' Rights and State Duties under the THB Legal Framework

I. Introduction

Under a HRBA to THB, states are required to act in accordance with the core human rights principles and to fulfil their obligations under the positive legal framework. These legal obligations with respect to THB broadly require states to: (1) criminalize THB, (2) investigate, prosecute, and punish traffickers with due diligence, (3) assist and protect trafficking victims, and (4) address the root causes of THB (see Obokata 2006: 381, 387; Rijken 2009: 216). International and regional legal instruments and jurisprudence set out specific obligations within these categories. In doing so, they grant rights to trafficking victims, which they can claim from states, who are the duty-bearers under the legal framework. This empowers victims, but there are there significant limits to this empowerment baked into the current state of the law. In light of this paradox, this chapter will highlight both aspects of the legal framework that promote and aspects that hinder a HRBA to THB. Further, as a 'strong national legal framework around trafficking is widely recognized as the foundation and scaffolding of an adequate and appropriate criminal justice response' (Gallagher and Holmes 208: 321) and national legal frameworks impact on victims' post-trafficking experiences, domestic law and policy on THB in the Netherlands, as the research setting, will be explored.

This chapter focuses on binding legal obligations towards victims of THB within international, regional, and Dutch law, rather than on soft law. Soft law sources will only be referenced to the extent that they can aid in the interpretation of hard law, rather than discussed as standalone sources of law in and of themselves. While soft law often facilitates the development of legal norms and influences the content of hard law (Shelton 2009: 7-8), it does

not possess the authority of binding legal instruments and jurisprudence. Due to this distinction as well as to space constraints, this chapter centres around states' binding legal obligations towards trafficking victims. These obligations, contained in treaties, legislation, and case law, have the potential to more powerfully impact state behaviour and victims' human rights than non-binding soft law.⁴³ Furthermore, while this chapter addresses all four key state obligations under a HRBA to an extent, the focus is on duties to assist and protect victims, given that these are most related to the empirical data on victims' experiences and views analysed in later chapters and are particularly significant under a victim-centred approach.

II. International Law

In the first half of the twentieth century, a number of international agreements were concluded in an attempt to address the issue of 'white slavery', which 'referred to the abduction and transport of white women for [the purpose of] prostitution' (Doezema 2002: 22). These instruments often utilized the term, 'traffic', but this usage is considered distinct from the present-day legal understanding of the term (Gallagher 2010: 55). Accordingly, this chapter does not cover these early 'anti-trafficking' treaties.

Prior to 2000, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC)⁴⁴ were the only two contemporary international human rights treaties that explicitly referred to human trafficking (Gallagher 2010: 65). However, both instruments only contain brief and vague references to

⁴³ Examples of soft law in the area of human trafficking are the United Nations *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002), the United Nations Children's Fund *Guidelines for the Protection of Child Victims of Trafficking* (2006), and the Council of Europe (CoE) *Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation*.

⁴⁴ The remainder of this chapter will not discuss legal instruments and provisions relating only to children due to space constraints and the fact that the present research was conducted entirely with adults.

THB, which fail to impose obligations upon state parties beyond preventing and suppressing the practice generally (CEDAW 1979: Art. 6; CRC 1989: Arts. 34-36). Furthermore, neither the Committee on the Elimination of Discrimination against Women (CtEDAW) nor the Committee on the Rights of the Child (CtRC), the treaty bodies tasked with monitoring state party compliance with the respective treaties, have issued substantive jurisprudence on THB; the two cases concerning it brought before the former treaty body were ruled inadmissible prior to reaching the merits (*Zhen Zhen Zheng v The Netherlands* 2009; *N. v The Netherlands* 2014) and the latter treaty body has not yet been seized with this type of case. However, the CtEDAW has provided a small amount of interpretive guidance on state parties' obligations under CEDAW with respect to THB. In its General recommendation No. 19 (1992: 3), the CtEDAW indicates that, in order to comply with Article 6 of CEDAW, state parties must provide prostitutes with equal protection under laws against rape and other forms of violence and implement 'specific protective and punitive measures' against THB in conflict zones. It also implies that practices such as sex tourism and organized marriage between women from developing countries and foreign nationals are not permitted under CEDAW. Furthermore, in its General recommendation No. 32 (2014: 5), the CtEDAW suggests that state parties must take steps to protect female refugees and asylum seekers from becoming trafficking victims. Yet, this scant guidance appears within the context of non-binding recommendations, much like the CtEDAW and the CtRC's responses to state parties' periodic reports, thus providing little information about the content of state parties' obligations regarding THB under the treaties.

It was not until 2000 that a treaty wholly dedicated to the contemporary form of THB was developed. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

Organized Crime (‘Palermo Protocol’ or ‘Protocol’) is now the primary binding international instrument addressing human trafficking. It was drafted in 2000, entered into force in 2003, and currently has 175 state parties (United Nations Treaty Collection, 2019). One of the stated purposes of the Palermo Protocol is ‘[t]o protect and assist the victims of . . . trafficking with full respect for their human rights’ (Art. 2(b)). However, commentators have noted that this treaty is substantively a criminal law rather than human rights law instrument because of its much greater focus on combating traffickers as compared to assisting victims (Allain 2014: 121-122; Gallagher 2015: 19; Jordan 2002: 2-3). The Protocol’s law enforcement provisions⁴⁵ employ mandatory language (Arts. 5, 10-13; see also Wijers 2015: 67-68) while the victim assistance and protection provisions (Arts. 6, 7, 8(2)) are largely ‘conditional and qualified’ (Gallagher 2010: 82-83), ‘offer[ing] only limited assistance with rather nebulous, aspirational obligations that leave much to the State’s discretion’ (Piotrowicz 2008: 244). Yet, Heinrich (2010: 3) argues that ‘State Parties should not dismiss the Protocol’s protection measures as discretionary’ because they are ‘critical, integral components of the Protocol’s mandatory law enforcement requirements’. Since the Protocol requires states to criminalize THB, which implies an obligation to prosecute those who perpetrate it, and victims who receive support and protection are likely to be more helpful to prosecutions than those who do not, state parties are arguably obligated to provide services to victims (ibid.). While the link between victim protection and the success of prosecutions has been recognized (Dinan 2008: 76; Konrad 2008: 175; Williams 2008: 150; UN.GIFT 2008a: 2, 4), Heinrich’s conclusion is a stretch. In contrast with Heinrich (2010), Gallagher (2010: 83) concludes that ‘a State will not be breaching either the letter or the

⁴⁵ These provisions require state parties to criminalize THB (Art. 5), cooperate with other state parties by exchanging information about THB (Art. 10(1)) and verifying the validity of travel or identity documents (Art. 13), ensure that their travel and identity documents cannot be easily falsified or misused (Art. 12), train state agents on 3P methods (Art. 10(2)), and take border control measures aimed at preventing and detecting THB (Art. 11).

spirit of the Convention [against Transnational Organized Crime] if it decides to provide no material, medical, or other assistance whatsoever to any victim of trafficking within its territory’.

In light of the contents of the Protocol and the Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (‘Legislative Guide’), Gallagher’s (2010) interpretation is most compelling.

An illustration of the Protocol’s tentative language with regard to victim assistance and protection is provided by the statement that state parties ‘shall consider’ providing measures to assist victims with their physical, psychological, and social recovery, such as housing, counselling and information, medical and psychological care, material assistance, and access to educational and vocational opportunities (Article 6(3)). According to the Legislative Guide, ‘the high costs of these benefits and the fact that they apply equally to all states parties in which victims are found, regardless of the level of socioeconomic development or availability of resources, precluded these [support measures] from being made obligatory’ (2004: Part Two, para. 62). The same permissive language (i.e. ‘shall consider’) appears with respect to the adoption of legislation or policy that would permit victims to remain in the territory of a state party on a temporary or permanent basis, ‘in appropriate cases’ (Art. 7(1)). While Article 8(2) states that repatriation ‘shall preferably be voluntary’, the plain meaning of this language and the *travaux préparatoires*⁴⁶ (explaining that this phrase is ‘understood not to place any obligation on the State party returning the victims’ (2006: 388)), combined with Article 7(1), make clear that the Protocol does not impose any duty upon states to allow victims to reside within their territory for any length of time. With regard to victims’ physical safety, the Protocol only requires state

⁴⁶ The published *travaux préparatoires* includes interpretative notes on the content of the treaty and its protocols, which were approved by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (UNODC 2006: vi).

parties to ‘endeavour’ to protect victims while they are within their territory, which provides states with considerable latitude (Art. 6(5)). The Legislative Guide indicates that state parties must take ‘at least some steps’ to protect victims’ safety in order to comply with Article 6(5), but it does not specify the nature of the steps required (2004: Part Two, para. 59). It also instructs that Article 6(5) be interpreted in light of Articles 24 and 25 of the Convention on Transnational Organized Crime (concerning protection of witnesses and assistance to and protection of victims, respectively), for which the Guide states that ‘effective protection’ is only mandatory when a state party deems it appropriate and possesses the resources and technical capabilities to provide it (2004: Part One, paras. 355-356, 366). Thus, state parties possess a wide degree of discretion and it would be very difficult to hold them accountable under the Protocol for failing to protect victims’ physical safety.

The lack of firm state duties to protect victims from retaliation and to provide them with the services and benefits (including residence permits) typically necessary for their recovery and avoidance of repeat victimization is contrary to a victim-centred HRBA. The principle of empowerment requires states to enable victims to regain control over their lives following the disempowering experience of being trafficked and to protect them from further harm, whether from re-trafficking or reprisals from their traffickers. To the extent that states provide services to assist victims, the principles of inter-dependence and inter-relatedness require states to recognize that foreign victims need legal residency in order to access them,⁴⁷ and the principles of equality and non-discrimination call for equal access to services, regardless of immigration status. Moreover, the principle of accountability is undermined by the weak language in the Protocol’s victim protection and assistance provisions, which renders them matters of discretionary charity

⁴⁷ Deported victims obviously cannot access services existing in destination countries, and fear of deportation can act as a barrier to accessing services for undocumented victims in destination countries.

rather than concrete rights that victims can legitimately claim (see Darrow and Tomas 2005: 511).

A few Protocol provisions concerning victim assistance, however, contain somewhat firmer language. For example, Article 6(2) states that state parties ‘shall ensure’ that their domestic systems provide victims with information about relevant court and administrative proceedings and assist them with the presentation of their views and concerns during criminal proceedings. Yet, this obligation is tempered by the addition of the phrase, ‘in appropriate cases’—though it would be difficult for state parties to credibly argue that there are simply no instances in which providing victims with case information or enabling them to participate would be appropriate (particularly given the HRBA principles of participation and inclusion). Another example is Article 6(6), which asserts that state parties ‘shall ensure’ that their domestic systems allow victims ‘the possibility of obtaining compensation for damage suffered’. The Legislative Guide explains that this provision requires state parties that do not already have schemes allowing victims to receive compensation in place to enact legislation creating them (2004: Part Two, para. 60). However, as Jordan (2002: 23) points out, the ‘possibility’ language is weaker than the language of rights. Indeed, states that provide only a small or remote possibility for victims to receive compensation would still be in compliance with this provision. Further, Jordan (*ibid.* 23, 25) correctly notes that the omission of ‘restitution’ from Article 6(6), unlike Article 25(2) of the Organized Crime Convention, is problematic. This is because the Protocol provision does not require state parties to allow victims to recover ill-gotten gains from their traffickers and states can still be in compliance by only providing victims with limited compensation from victim compensation funds (see *ibid.*). In contrast, a victim-centred approach would provide victims with the specific rights to be ‘made whole’, whether through

restitution and/or other forms of compensation, and also to receive damages for pain and suffering.

Article 8 contains obligatory language regarding the repatriation of trafficking victims, requiring state parties to facilitate victims' return to their country of citizenship or permanent residence, such as by issuing necessary travel documents and verifying victimhood status.

However, these provisions are only beneficial to the subset of foreign victims who wish to be repatriated and appear to primarily serve states' interests in removing undocumented migrants from their territory. This article also includes certain vague terms which are not defined. For example, state parties are required to pay 'due regard for the safety of [the victim]' (Art. 8(1), (2)) and 'for the status of any legal proceeding related to the fact that the person is a victim of trafficking' (Art. 8(2)), but it is unclear what 'due regard' actually requires in practice.

Gallagher (2010: 350) contends that 'due regard' with respect to legal proceedings must be read in light of state parties' obligation, pursuant to Article 6(2) of the Protocol and Article 25(3) of the Organized Crime Convention, to enable victims' participation in criminal proceedings. The Legislative Guide supports this interpretation with its assertion that establishing 'adequate links' between criminal justice and immigration authorities can address the concern over victims being repatriated before they can assist with prosecutions and otherwise participate in the criminal justice process (2004: Part Two, paras. 90-91). While enabling victims to exercise participatory rights is important under a HRBA, creating 'links' between prosecutorial and immigration authorities lay the groundwork for the dominant, problematic trend whereby benefits are made 'conditional to [victims'] participation in the prosecution of a criminal proceeding in which they are simultaneously the necessary and expendable/deportable victim[s]' (Miller and Zivkovic 2018: 336).

Furthermore, though the aforementioned Article 8 language stating that victim repatriations ‘shall preferably be voluntary’ and with ‘due regard for the [victim’s] safety’ may be somewhat ambiguous on its face, the principle of *non-refoulement*, which constitutes customary international law⁴⁸ (Ministerial Meeting of State Parties 2001: para. 4) and is referenced in the saving clause contained in Article 14, is quite clear. This principle precludes states from returning a refugee⁴⁹ to a territory ‘where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’ (Convention Relating to the Status of Refugees 1951: Art. 33) and from returning an individual to a territory ‘where substantial grounds can be shown for believing that . . . [he] would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment’ (Lauterpacht and Bethlehem 2001: 86). Originating within the context of refugee law (Hampson 2007: 161), the principle of *non-refoulement* has reached customary international law status within both refugee and general human rights law spheres (Lauterpacht and Bethlehem 2001: 71-87). Therefore, states must take care to avoid violating the principle even when the individual concerned does not meet the ‘refugee’ definition. While exceptions based upon ‘overriding reasons of national security or public safety’ are permitted within the refugee context (ibid. 71-72), no exceptions or limitations are allowed with respect to the principle of *non-refoulement* within the general human rights law context (ibid 85-86). Thus, states cannot

⁴⁸ Customary international law is binding upon all states and is established through state practice and *opinio juris* (states’ belief that a rule is binding). The only exception to the binding nature of customary international law is in the case where a state persistently objects to a rule which does not have *jus cogens* (peremptory norm) status (Bantekas and Oette 2013: 59-62; 68-70).

⁴⁹ A refugee is defined as someone who, ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country’ (Convention Relating to the Status of Refugees 1951: Art. 1; Protocol Relating to the Status of Refugees 1967: Art. 1).

send a trafficking victim, regardless of his or her status or conduct, to a territory where he or she ‘would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment’ under any circumstances (ibid.). Accordingly, the Palermo Protocol’s eschewal of a state obligation to avoid involuntary repatriation of victims is immaterial in cases where doing so would violate the principle of *non-refoulement*.

Despite the general lack of firm obligations towards victims, the Palermo Protocol has been lauded as ‘a significant milestone in international efforts to stop the trade in people’ (UNODC 2016; see also Ezeilo 2015) and as the foundation and impetus for significant action on victims’ rights in the years that followed (Gallagher 2018: 31-32). Much of this action occurred at the regional level, and will be discussed next.

III. European Union Law

The Charter of Fundamental Rights of the European Union (‘Charter’) explicitly prohibits THB (Art. 5(3)⁵⁰). Developed in 2000, the Charter became legally binding upon the EU institutions and Member States⁵¹ with the entry into force of the Treaty of Lisbon in 2009 (European Commission 2016). The Court of Justice of the European Union (CJEU), which is empowered to interpret and enforce the Charter, has not yet weighed in on the scope of Article 5(3) or the extent of Member States’ obligations under this provision (Egan and Keegan 2015: 232). However, since Article 52(3) of the Charter states that the rights it contains ‘which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms’ (ECHR) shall have the same ‘meaning and scope’ as these corresponding rights, and Article 4 of the ECHR corresponds with Article 5 of the Charter, the

⁵⁰ Article 5(3) states: ‘Trafficking in human beings is prohibited’.

⁵¹ The Charter only binds Member States in cases where they are implementing EU law (Art. 51).

European Court of Human Rights' Article 4 jurisprudence⁵² 'may ultimately influence the CJEU to read wider obligations into the text of Art 5(3) than its immediate terms would suggest' (ibid.).

There are three main relevant pieces of EU legislation currently in force that impose obligations upon Member States towards trafficking victims: Directives 2004/81/EU, 2011/36/EU, and 2012/29/EU. As they are directives rather than regulations, they are only binding as to the result to be achieved and Member States have discretion as to the 'form and methods' they use to realize the results contained in the directives (Treaty on the Functioning of the European Union 2012: Art. 288). However, directives set out the ends which must be met in 'considerable detail' and European Court of Justice rulings have increased their force over the years (Craig and de Búrca 2015: 108). 'The Court held that directives have direct effect, enabling individuals to rely on them in actions against the state, and that a Member State can be liable in damages for non-implementation of a directive' (ibid.). Even if a directive is correctly transposed into a Member State's national law, if it is not correctly applied in practice, an individual can rely directly on its provisions against that state (*Marks & Spencer plc v Commissioners of Customs & Excise* 2002: paras. 22-28).

A. Directive 2004/81/EC

EU Council Directive 2004/81/EC sets out a scheme for granting provisional residence permits to trafficking victims who are third-country nationals, allowing them to legally reside in a Member State's territory, on a temporary basis, if they meet certain conditions. These conditions are that victims demonstrate their willingness to cooperate with the Member State's competent authorities, such as law enforcement, prosecutorial, and judicial bodies, that their continued presence in the Member State's territory is useful for the investigations or judicial

⁵² See section on Council of Europe law, *infra*, for an in-depth discussion of this jurisprudence.

proceedings, and that victims have ‘severed all relations’ with their alleged traffickers (Arts. 1, 8). These conditions tie victims’ eligibility for a residence permit, which is often closely connected with their safety, to their willingness and ability to cooperate with criminal justice authorities. This cooperation is likely to be difficult, if not impossible, for ‘the most vulnerable, including the deeply traumatized’ (Gallagher 2010: 102). Furthermore, even if victims do cooperate with authorities, if at some point they no longer meet the condition requiring usefulness to investigations or judicial proceedings (such as if their cases are closed due to lack of evidence or if the proceedings are completed), their residence permit will be withdrawn or not renewed (Arts. 13, 14), and they will become deportable (unless they have some other grounds for legal residency) (see Piotrowicz 2018: 47; see also Obokata and Payne 2012: 310).

Regardless of the personal risk victims assume by assisting with the investigation and prosecution of their traffickers (e.g. by identifying offenders, giving testimony, and providing other evidence), they often fail to maintain their residence permit eligibility due to factors beyond their control that prevent judicial proceedings from going forward, such as prosecutorial discretion, a lack of corroborating evidence or an inability to locate suspects. The directive also permits non-renewal once proceedings are completed as victims’ presence within the territory is no longer useful to the state (Art. 8(1)(a), Art. 13). Notably, ‘trafficked persons who have cooperated in a prosecution are much more likely than others to compromise the safety of themselves and their families’ (Gallagher 2010: 102) because they are vulnerable to reprisals from traffickers and their associates (see also Dottridge 2007: 14). Thus, linking victims’ eligibility for residence permits with their usefulness to state prosecutorial goals is contrary to a victim-centred HRBA (see Rijken 2009: 218). It instrumentalizes victims as tools to advance state interests, discriminates against non-EU citizens, and disempowers them by coercing their

cooperation (given their lack of other viable options) and increasing their vulnerability to reprisals and re-trafficking. Despite the directive's acknowledgment of the vulnerability of third-country nationals who have been trafficked (preamble recital 12), 'the explanatory memorandum accompanying the initial proposal [for the directive] explicitly stated that it is not concerned with either victim protection or witness protection, and that such protection is neither its aim nor its legal basis' (Gallagher 2010: 101).

Despite this orientation, Directive 2004/81/EC prescribes assistance and protection that Member States must provide to non-EU trafficking victims, both before and during the residence permit period (Arts. 7, 9), though many of these provisions are fairly vague and/or contain loopholes. For example, Article 6 requires Member States to grant third-country victims a 'reflection period' intended to enable victims to 'recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities', but leaves the duration and starting point of the period to state discretion.⁵³ Other benefits set out in the directive but subject to Member States' national laws are access to the labour market, vocational training, and education (Article 11), provision of free legal assistance (Article 7(4)), consideration of victims' safety and protection needs (Article 7(2)), and access to existing programmes or schemes, such as those aimed at developing social or professional skills (Article 12). 'Where appropriate', Member States must provide victims with translation and interpretation services (Art. 7(3)) and, 'if provided by national law', psychological services (Art. 7(1)). The latter benefit is referenced as an example of how states can 'attend to the special needs of the most vulnerable', as they are required to do (*ibid.*), though

⁵³ Notably, the CoE Convention addresses this omission by establishing a thirty-day minimum for the reflection period (Article 13(1)).

which types of victims comprise this category is not entirely clear. The mention of psychological assistance indicates that it includes those suffering from mental health issues, and Article 9(2)'s identification of pregnant women, disabled individuals, and victims of sexual or other types of violence as groups having 'special needs' suggests that they are also counted among the 'most vulnerable'. However, the danger of utilizing this term is that only trafficked individuals who fit dominant conceptions of 'ideal' victimhood will be considered 'most vulnerable' and receive the services and benefits accompanying this status (see Christie 1986; Doezema 2000; Tomkinson 2012). Lastly, and employing more mandatory language than the foregoing provisions, Article 7(1) gives victims without 'sufficient resources' the right to a 'subsistence' standard of living and emergency medical treatment.

The provision of these forms of assistance and protection to victims of THB can empower them to focus on their recovery and enable them to claim inter-dependent and inter-related rights, such as their rights to participate in the criminal justice process and to seek compensation (established in other legal instruments). Enabling victims' meaningful participation in the criminal justice process serves the human rights principles of participation and inclusion. Moreover, the right to a reflection period during which they can make an 'informed decision' about whether to cooperate with authorities in the investigation and prosecution of their traffickers (Art. 6(1)) facilitates their ability to exercise agency, which is in line with a victim-centred HRBA (see Uhl 2010: 126). However, as the directive only applies to non-EU nationals and thus excludes EU nationals from claiming its protections and assistance measures, the principles of universality, equality, and non-discrimination are implicated (see Costa 2015: 86).

In its analysis of this directive's application, the EU Commission concluded that it is likely underutilized (European Commission 2014: 10; European Commission 2015: 21). In 2012, twenty-three Member States registered a total of 2,171 trafficking victims who were not EU citizens, but only 1,124 new residence permits were granted to non-citizen victims pursuant to the directive throughout the entire EU (European Commission 2015: 21). These figures raise important questions about whether non-EU victims are being informed about their entitlements under the directive and whether effective mechanisms exist to realize these entitlements within all Member States.

B. *Directive 2011/36/EU*

Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA is the primary piece of EU legislation addressing THB. The preamble underscores the importance of protecting and supporting trafficking victims' human rights as a key objective of the directive (recitals 7, 14, 18, 33). Unlike Directive 2004/81/EC, all trafficking victims within Member States' territory are entitled to the assistance and protection measures set out in Directive 2011/36/EU rather than only victims who are non-EU nationals. In addition, the latter directive generally articulates these measures with greater specificity than the former, though it still allows for a fair amount of state discretion as to how much assistance to actually provide (see Obokata and Payne 2012: 311). In spite of this, Directive 2011/36/EU represents a significant step forward for trafficking victims' rights within EU law, as its predecessor (Framework Decision 2002/629/JHA) failed to provide any meaningful protection (despite the inclusion of an article entitled, 'Protection of and assistance to victims') (see Gallagher 2010: 99; Obokata and Payne 2012: 307, 309, 311). In its Impact Assessment of the 2002 Framework Decision, the European Commission identified

‘victims not receiving adequate assistance, protection or compensation’ as a ‘loophole’ in the EU response to THB (European Commission, 2009: 4).

Article 11(1) of the 2011 directive requires Member States to ‘ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings’. The support and assistance includes safe housing, necessary medical and psychological treatment, material assistance, and access to translation and interpretation services, as well as additional measures for victims with special needs (Art. 11(5), (7)). Importantly, assistance and support measures must be provided on a ‘consensual and informed basis’ (Art. 11(5), preamble recital 21), which comports with a victim-centred HRBA’s promotion of victims’ freedom to exercise agency within their lives (Pescinski 2015; Rijken and Römken 2011: 81, 94). These measures must be made available ‘as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to’ THB (Art. 11(2)), and therefore does not require definitive proof of victimhood as a prerequisite. This provision promotes the principle of universality as it expands the pool of trafficking victims who are able to claim these rights—though it is still likely that authorities will conclude that a ‘reasonable-grounds indication’ does not exist for certain genuine victims (particularly ones who do not comport with dominant conceptions of ‘ideal’ trafficking victimhood (see Brunovskis and Surtees 2008: 57-60; Lobasz 2009: 342, 344)).

Furthermore, the directive states that assistance and support cannot be ‘made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial’ (Art. 11(3)). However, this entitlement is diluted because it operates ‘without prejudice to Directive

2004/81/EC or similar national rules’ and because the preamble⁵⁴ asserts that Member States are not obligated to provide assistance and support to victims who do not reside legally within their territory once the reflection period or the identification process have ended (recital 18). The practical result is that non-EU victims are compelled to cooperate if they wish to remain in the Member State’s territory on the basis of the 2004 directive and continue to receive assistance, and those who do not (or cannot for reasons such as psychological trauma) can be forcibly repatriated. Thus, ‘a trafficked person who is not cooperating may not have the same rights as a trafficked person who cooperates and proves to be “useful” as [a] witness’ (Cuzuioc-Weiss and Lacroix 2010: 113). Borraccetti (2017: 289-293) correctly concludes that this situation within the EU legal order violates the principle of equality because similarly-situated victims have differential abilities to exercise their rights to assistance and protection based on their personal status.

Directive 2011/36/EU also provides for victim support and protection that is directly related to victims’ role in the criminal justice process. Article 12(2) entitles trafficking victims to immediate legal counselling and, if appropriate within the national justice system of the Member State concerned, access to legal representation (both free of charge for indigent victims). The directive also requires sensitivity to victims deemed to be at risk of secondary victimization⁵⁵ through an individual assessment by avoiding ‘unnecessary repetition of interviews during investigation, prosecution or trial’, ‘visual contact between victims and defendants’, ‘the giving of evidence in open court’, and ‘unnecessary questioning concerning the

⁵⁴ It should be noted that preambles of EU directives are not legally binding and do not have any ‘autonomous legal effect’ (Baratta 2014: 9-10). Rather, they may be used to aid with interpreting directives’ substantive provisions and understanding their purpose and legislative intent (ibid.).

⁵⁵ ‘Secondary victimization’ is defined as ‘victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim’ (UNODC 2009: 5; CoE 2006).

victim's private life' (Art. 12(4)). However, these protections are far from guaranteed because they are only applicable 'as far as possible', 'in accordance with grounds defined by national law', and are subject to 'rules of judicial discretion, practice or guidance'. Therefore, there exist multiple grounds upon which Member States can deny these protections to victims. Similarly, the directive states that victims in need of protection, as determined via individual risk assessment, shall be given access to witness protection programmes or similar measures, but only 'if appropriate and in accordance with the grounds defined by national law or procedures' (Art. 12(3)). Muraszkievicz (2016: 344-345) highlights 'state discretion' as a significant limitation of Article 12 but notes the constraints involved in adopting EU-wide legislation in the area of criminal procedure, as it must be workable in both civil law and common law jurisdictions, which generally differ in their approaches to victims' participation in the criminal justice process. She adds that Member States' resource constraints prevent the establishment of an unconditional right to legal representation in Article 12(2) (ibid. 347). This implicates the core HRBA principles of inter-dependence and inter-relatedness because victims with lawyers are often better able to realize their informational, protection, and participatory rights (ibid. 341; Bacik, Maunsell, and Gogan 1998: 17-18). Given the critical importance of the rights contained in Article 12 to victims' empowerment and ability to claim other rights, in addition to their role in states' fulfilment of their obligation to prosecute traffickers,⁵⁶ the margin of appreciation is far too wide.

Related to victims' rights within the criminal justice process is the issue of compensation. Article 17 of the directive obligates Member States to provide trafficking victims with 'access to

⁵⁶ Victims' testimony is typically necessary to successfully prosecute traffickers (Kara 2009: 38; Laczko and Gramegna 2003: 183; OHCHR 2010: 156; Rijken and Römken 2011: 92) and Article 12 rights facilitate victims' participation in criminal proceedings.

existing schemes of compensation to victims of violent crimes of intent'. As raised with respect to the Palermo Protocol, the omission of a right to seek restitution can interfere with victims' ability to be 'made whole', especially as amounts of compensation from government compensation funds are often limited (Jordan 2002: 23). Piotrowicz (2018: 48) criticizes the Article 17 provision as being too narrow, on three additional bases: (1) it does not provide for the establishment of a compensation fund that accounts for victims' particular needs and potentially distributes traffickers' confiscated assets; (2) it fails to obligate Member States without an existing compensation scheme to create one; and (3) it excludes trafficking victims who were subject to psychological rather than physical coercion. Furthermore, Obokata and Payne (2012: 310) argue that this provision should have included a right to residence permits to enable victims to remain in the territory for long enough to access compensation. As written, Article 17 only grants a very narrow subset of trafficking victims the right to receive compensation, which is contrary to the principle of universality under a HRBA.

Directive 2011/36/EU also requires Member States to enable prosecutors and courts to decline to prosecute or impose penalties upon victims for crimes which they were forced to commit as a direct consequence of being trafficked (known as the 'non-punishment' principle (OSCE 2013: 15)) (Art. 8). This provision is particularly significant because '[c]riminalization is the antithesis of a victim-centered approach, inevitably operating to deny trafficked persons the rights to which they are entitled under international law' (Gallagher 2010: 283). Furthermore, '[c]riminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the relevant illegal act' (ibid.; Gallagher and Holmes 2008: 331; see also Heinrich 2010: 4). Notably, however, the directive does not require the exercise of the aforementioned prosecutorial discretion or even

establish a presumption against prosecution or penalization of victims, which may result in the perpetuation of the criminalization problem (see Symeonidou-Kastanidou 2016: 475).

Furthermore, recital 14 of the directive's preamble states that the non-punishment principle should not prevent prosecution or punishment for crimes that the victim 'voluntarily committed or participated in'. This assertion fails to account for the often complex and nuanced dynamic in THB situations, through which traffickers exert coercive control over victims in subtle ways that may not be apparent to outsiders (Haynes 2007: 354; OSCE 2013: 25; Srikantiah 2007: 198, 210). Consequently, victim conduct that appears voluntary may actually be a result of coercion. Recital 14 also treats voluntary and non-voluntary acts as a binary, whereas, in reality, they fall on a continuum (see Husak 2012: 470). Thus, the line between victims' voluntary and non-voluntary conduct is often blurry and the framing of recital 14 can lead to interpretations of Article 8 that prevent victims from accessing their 'right to be free from detention and unfair proceedings' through the application of the non-punishment principle (OSCE 2013: 30).

Directive 2011/36/EU also articulates Member State duties relating to the three key categories of state obligations under a HRBA to THB aside from the obligation to assist and protect victims. First, the directive obligates Member States to criminalize THB (Art. 2) (and attempted THB (Art. 3)), which it defines very similarly to the definition set out in Article 3 of the Palermo Protocol (Art. 2). Second, Regarding the obligation to investigate, prosecute, and punish traffickers with due diligence, Member States are required to establish jurisdiction over THB offences committed in their territory or by their nationals (Art. 10(1)), including entities with legal personhood (Art. 5), and investigate and prosecute cases of THB regardless of whether victims report them (Art. 9(1)). These investigations and prosecutions must be conducted by trained professionals (Art. 9(3)) with effective investigative tools at their disposal (Art. 9(4)).

Member States must also ensure that custodial sentences of up to at least five years are imposable on individuals who have committed THB and custodial sentences of up to at least ten years are available when there are aggravating circumstances (Art. 4). Furthermore, ‘effective, proportionate and dissuasive sanctions’ must be imposed upon legal persons (e.g. corporations) who have committed THB, such as criminal and civil fines, temporary or permanent closure, and/or placement under judicial supervision (Art. 6). Lastly, with respect to the obligation to prevent THB, the directive requires Member States to raise awareness about THB through trainings for state agents likely to come into contact with victims and via educational campaigns (Art. 18). It also encourages them to criminalize knowingly using the services of trafficking victims, which is a clear reference to the buyers of sexual services. However, the impact of the prevention provisions is likely to be limited because they do not require Member States to address the aforementioned structural and proximate factors underlying vulnerability to trafficking victimization.

All four key state obligations under a HRBA to THB are served by the directive’s requirement that Member States establish national rapporteurs (Art. 19), as are the core human rights principles of accountability and the rule of law. The rapporteurs’ tasks include assessing THB trends and measuring the impact of anti-trafficking actions (*ibid.*), which can highlight the extent to which Member States are complying with their obligations to criminalize, investigate, prosecute, punish, and prevent THB, as well as to assist and protect trafficking victims, under the directive. Though not mentioned in the directive, it is important that national rapporteurs (and their staff) remain independent, transparent, and above politics, as governments have strong incentives to underreport the occurrence of THB in their territory and to exaggerate their efforts to combat it (Smith 2011: 278-280).

C. *Directive 2012/29/EU*

A year and a half following the enactment of Directive 2011/36/EU, Directive 2012/29/EU *establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* became law. There is a certain degree of overlap among the directives with respect to Member States' obligation to provide victims with assistance, support, and protection. However, the 2012 directive is not tailored specifically to victims of THB, but rather applies to victims of other types of crimes as well. Nevertheless, the directive does mention victims of human trafficking several times in its preamble and once in its body—mainly recognizing the special support and protection needs of this population, stemming from particular vulnerabilities. For example, Article 22 identifies victims of THB as a category of victims requiring 'particular attention' during individual assessments conducted to determine whether they have 'specific protection needs' and the extent to which 'they would benefit from special measures in the course of criminal proceedings . . . due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation'.

Directive 2012/29/EU was developed in response to the 2011 Council resolution *on a Roadmap for strengthening the rights and protections of victims, in particular in criminal proceedings*, which called for the replacement of Framework Decision 2001/220/JHA with a directive that revises and supplements its principles. The justifications for this are enumerated in the resolution's preamble: the passing of a decade since the Framework Decision's approval, implementation issues with respect to victims' rights, the development of the EU 'area of freedom, security, and justice', and the Commission's findings regarding the Framework Decision's implementation and application (recital 7). In its 2011 Impact Assessment, the

Commission concluded that the Framework Decision had not been adequately implemented and was ineffective due to its vagueness, lack of concrete obligations, and the absence of any enforcement mechanism that could be used against non-complying Member States (EU Commission (Executive Summary) 2011: 2; EU Commission 2011: 6-7). The resulting Directive 2012/29/EU is significantly more comprehensive than its predecessor and represents an important step forward for victims' rights.

The directive's stated purpose is 'to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings' (Art. 1(1)). Its objective also includes requiring Member States to 'ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings' (ibid.). Victims' rights under the directive must be applied to them 'in a non-discriminatory manner, including with respect to their residence status' (ibid.). The emphasis on non-discrimination aligns with core tenets of a HRBA and addresses longstanding issues around differential treatment of 'deserving' and 'undeserving' victims based on how well they comport with pervasive notions of 'ideal' victimhood (Christie 1986). However, an important limitation to the directive's objective lies in the narrow way in which 'the context of criminal proceedings' is defined. Recital 18 of the preamble states that '[t]he moment a complaint is made should for the purposes of this Directive be considered as falling within the context of the criminal proceedings'. This excludes victims' interactions with state actors prior to this moment, which is problematic for two reasons. First, whether these actors, such as police officers, border agents, and labour inspectors, treat victims in a 'respectful, sensitive, tailored, professional and non-discriminatory manner' (Art. 1(1)) initially often plays a major role in

victims' willingness to actually make a complaint (see Rijken 2018: 242; van Dijk and van Mierlo 2009: 62). Second, a HRBA requires state agents to uphold its core principles, including non-discrimination, equality, and universality, in all interactions with victims, and given the preamble's assertion that the directive respects and promotes fundamental human rights (recital 66), placing contacts between victims and criminal justice actors that occur before a complaint is made outside of the scope of Article 1(1) treatment standards is unreasonable. This latter reason also applies to the treatment of victims following the completion of criminal proceedings. Thus, pursuant to a HRBA, the respectful, sensitive, and non-discriminatory treatment requirement should ideally not be limited to the context of criminal proceedings, but as that is the condition set in the directive (Art. 1(1)), this context should be defined more broadly than it is.⁵⁷

A significant segment of the directive is dedicated to victims' rights to receive and convey information (Arts. 3-7). For example, Member States are obligated to provide victims with written acknowledgement of their formal complaints regarding criminal offences (Art. 5(1)), notification of protective measures implemented upon the offender's release or escape (Art. 6(5)), and free interpretation and translation services for victims who do not speak the competent authorities' language when they file a complaint (Art. 5(2)-(3)) and during criminal investigations and proceedings, upon request (Art. 7). Furthermore, Member States must inform victims, without unnecessary delay, of their right to be notified about developments in proceedings related to their complaints (such as decisions not to prosecute, trial schedules, and the issuance of final judgments) (Art. 6(1)-(3)), and about their rights with respect to accessing support, protective measures, legal assistance, compensation, and interpretation and translation

⁵⁷ One hopes that the training on victims' needs, as is required for officials likely to come into contact with victims (Art. 25(1)) (but which is not mandatory for judges and prosecutors for some reason (Art. 25(2))), results in the authorities treating victims in the manner specified in Article 1(1) during all interactions, both inside and outside of the criminal proceedings context.

services (Arts. 4, 9(1)). These provisions recognize the ‘importance of awareness of victims’ rights’ as a ‘pre-condition for victims to claim and benefit from their rights before the national courts or competent authorities’ (Buczma 2013: 249), which promotes the core human rights principles of inter-dependence and inter-relatedness.

Like Directive 2011/36/EU, Directive 2012/29/EU obligates Member States to provide victims with access to support services ‘before, during and for an appropriate time after criminal proceedings’ (Art. 8(1)). For the latter directive, these services include emotional support, psychological support (where available), and advice about victims’ role in criminal proceedings, financial and practical issues stemming from the crime, the risk of secondary and repeat victimization, and relevant specialist support services (Art. 9(1)). Specialist services comprise, at a minimum, safe accommodation and support tailored to victims with specific needs (including trauma support and counselling) (Art. 9(3)). The directive grants the family members of victims access to general and specialist support services as well (in accordance with their needs and the degree of harm they suffered) (Art. 8).

A considerable portion of the directive is devoted to Member States’ obligations to crime victims within the context of prosecutions and court proceedings. Article 10 establishes a ‘right to be heard’ during criminal proceedings for victims, which is an important step towards realizing the principles of participation and inclusion. However, the procedural rules determining the practical exercise of this right are left to the Member States and, accordingly, they are free to determine when, how often, and how easy or difficult it is for victims to be heard in the course of criminal proceedings. Muraszkievicz’s (2016: 345) point about the need for EU legislation concerning criminal procedure to be practicable for both civil and common law jurisdictions applies here (see also Ezendam and Wheldon 2014: 62), but the wide margin of

appreciation risks undermining victims' ability to participate and be heard during criminal proceedings in any meaningful way. The same issue appears with respect to other rights enumerated in the directive, such as victims' rights to a review of decisions not to prosecute the purported offender (Art. 11), to legal aid (Art. 13), to reimbursement of expenses incurred from participating in proceedings, and to the return of their seized property (Art. 15)—Member States determine the applicable procedural rules through their national laws.

Member States also have extensive obligations to protect victims and their family members during the criminal justice process pursuant to the 2012 directive.⁵⁸ This encompasses protection from physical, emotional, and psychological harm, such as that caused by secondary and repeat victimization, intimidation, and retaliation. In order to achieve this level of protection, Member States must prevent victims and their family members from coming into contact with the accused at the site of the criminal proceedings (unless necessary for the proceedings) (Art. 19), minimize the number of interviews with victims and the time spent waiting for them, avoid medical examinations of victims (unless strictly necessary) (Art. 20), and guard the privacy of victims and their families (Art. 21). The directive also recognizes that certain victims may need special protective measures during the course of criminal proceedings due to their personal characteristics or the type, nature or circumstances of the crime committed against them (Art. 22; preamble recital 55). In order to identify victims with these needs, the directive requires Member States to conduct timely, individualized assessments that take victims' wishes regarding the use of special measures into account (Art. 22; preamble recitals 55, 58). The special protective measures include ensuring that only specially-trained professionals conduct interviews with victims during criminal investigations, the interviews occur in premises

⁵⁸ Several of these obligations overlap with those contained in Article 12(4) of Directive 2011/36/EU.

tailored to this purpose, the same individuals carry out all interviews with a particular victim, and victims of sexual or gender-based violence or violence in the context of a close relationship are interviewed by a person of the same sex (unless conducted by a prosecutor or a judge) (Art. 23(2)). Special measures to be made available during court proceedings comprise utilizing communication technology to enable victims to be heard in the courtroom without being physically present and to prevent visual contact between victims and defendants, avoiding unnecessary questioning about victims' private lives, and closing hearings to the public (Art. 23(3)).

However, as expected, the directive grants Member States considerable discretion with respect to individual assessments of victims and special protection measures. The former are to be conducted 'in accordance with national procedures' (Art. 22) and the latter are subject to rules of judicial discretion, operational and practical factors, considerations with respect to 'the good administration of justice', and concerns about prejudice to the defence and to the course of criminal proceedings (Art. 23). Ezendam and Wheldon (2014: 62) point out that Article 23(1)'s exception to the requirement that Member States provide victims with special measures (following their individualized assessments) based on operational or practical constraints 'offers an opportunity for member states to refrain from delivering the measures in practice by claiming it would be too expensive' to do so. Furthermore, Letschert and Rijken (2013: 247) express concerns about Member States' ability and willingness to implement the directive's provisions, particularly the victim protection schemes and individualized needs assessments. Their concerns are largely based on the lack of implementation of the far less ambitious 2001 framework decision (*ibid.*), which Ezendam and Wheldon (2014: 62) argue 'demonstrated that if member states are not interested or willing to allocate the required resources, the rights will not be

fulfilled in practice'. Yet, the directive's preamble asserts that 'there should be a strong presumption' that victims at high risk for intimidation, retaliation, and secondary and repeat victimization, including victims of THB, 'will benefit from special protection measures' (recital 57). Thus, on the one hand is the risk that victims will not be able to claim their rights to the protective measures they need for their well-being and to realize their inter-dependent and inter-related right to participate in the criminal justice process, while on the other hand, there is the concern that the presumption in favour of utilizing these measures for certain types of victims will result in deprivations of their agency. Neither result would be compatible with a victim-centred HRBA.

IV. Council of Europe Law

A. Convention on Action against Trafficking in Human Beings (2005)

The Council of Europe (CoE) Convention on Action against Trafficking in Human Beings ('Convention') was adopted in 2005, entered into force in 2008, and currently has forty-seven state parties (CoE 2018). The Convention is not a statutory act that automatically binds the forty-seven Member States of the CoE; rather, states must consent to being bound via ratification or accession (*ibid.*). States that are not members of the CoE are also permitted to become parties to the Convention, but to date, Belarus is the only non-member to have done so (*ibid.*).

The Explanatory Report to the Convention ('Explanatory Report') notes that it 'does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking' (para. 30). The Report further states that '[t]he main added value of the present Convention in relation to other

international instruments is its Human Rights perspective and its focus on victim protection’ (para. 46). Indeed, when the Convention was adopted in 2005, existing international and regional instruments addressing THB generally embodied a law enforcement approach and only provided victims with very limited and nebulous rights. The Convention’s preamble lists ‘respect for victims’ rights, protection of victims and action to combat trafficking in human beings’ as its ‘paramount objectives’—in that order—underscoring its aim of adopting a HRBA to THB. While the Convention does set out rights to certain assistance and protection measures for trafficking victims, there is certainly scope for it to go much further than it does, particularly in light of the emphasis on promoting victims’ rights and protections in its paramount goals. The accompanying Explanatory Report provides more specific information about victim protection and assistance than the text of the Convention, but notably, though ‘explanatory reports might facilitate the implementation of the provisions of the [CoE] conventions, . . . they do not constitute instruments which provide an authoritative interpretation of them’ (CoE 2016). Therefore, the Report does not confer any binding obligations upon state parties to the Convention and may only be used as an interpretive tool.

Among the rights and benefits provided to trafficking victims in the Convention are protection of their private life (Art. 11), material assistance (Art. 12), medical and psychological treatment (Art. 12), a recovery and reflection period (Art. 13), protection from potential retaliation and intimidation (Arts. 28, 30), free legal aid (Art. 15), and information about their rights and how to exercise them in a language which they can understand (Arts. 12, 15). While these provisions generally impose firm obligations upon states with respect to victims, which is a welcome development in terms of realizing victim-centred HRBA, they also permit certain exceptions and a fair degree of state discretion. For example, the provision requiring each state

party to establish a ‘right to legal assistance and to free legal aid for victims’ is qualified by the phrase, ‘under the conditions provided by its internal law’ (Art. 15(2)). This clause allows for ‘each Party to decide the requirements for obtaining such aid’ (Explanatory Report 2005: para. 196), which can render it difficult for victims to obtain this benefit if countries lay down particularly strict conditions, as they may be incentivized to do given the high costs associated with providing legal aid.⁵⁹

In addition, the Convention only addresses the issue of victim safety and protection during court proceedings in a vague and cursory manner and does not list specific measures to be made available for this purpose (Art. 30). This stands in stark contrast with EU Directives 2011/36/EU and 2012/29/EU, which specify special measures such as preventing visual contact between victims and defendants during the giving of evidence and avoiding unnecessary questioning about victims’ private lives. The Explanatory Report to the Convention confirms the vagueness of this provision and indicates that ‘Parties are at liberty to employ whatever means they consider best to achieve the . . . objectives’ set out in the provision (para. 303). Granting state parties such a high degree of discretion may result in inadequate or inconsistent protective measures for victims during court proceedings, which may also deter victims’ participation in the criminal justice process. Furthermore, regarding the provision’s objectives, the Convention fails to mention the risk of secondary victimization as a concern during victims’ participation in court proceedings and as grounds for special measures (unlike the aforementioned EU directives). Instead, it limits its objectives with respect to court proceedings to ensuring ‘the protection of victims’ private life and . . . identity’ and ‘victims’ safety and protection from intimidation’ (Art. 30). Notably, the Explanatory Report does refer to using special measures, such as allowing

⁵⁹ See earlier discussion of the importance of legal representation to the realization of a HRBA to THB (in section on Directive 2011/36/EU).

victims to testify via video link, as a means of preventing ‘unnecessary stress or disturbance when they give their evidence’ (para. 310). The Report also lists non-public hearings and allowing recorded or anonymous testimony as ways to meet the objectives of Article 30 (paras. 307-326). However, as previously mentioned, the Report is not a binding or authoritative instrument and, thus, state parties are not *obligated* to make these special measures available to victims.

Like EU Directive 2011/36/EU (Art. 8), the Convention contains a non-punishment provision (Art. 26). Despite the criticisms of the provision in the former instrument discussed above (which also apply to the Convention provision), it is arguably stronger than the one in the latter (Piotrowicz 2018: 47). This is because the 2011 directive ‘entitle[s]’ national prosecutors to decline to prosecute or punish victims for compelled criminal activities (Art. 8), whereas the Convention only requires state parties to ‘provide for the possibility’ of not punishing victims in this situation (Art. 26). Thus, the Convention provision employs weaker language and is narrower in scope (as it excludes protection from prosecution) than the corresponding directive provision. Under Article 26 of the Convention, ‘state parties . . . remain technically free to detain and prosecute trafficked victims for compelled involvement in unlawful activities’ (Gallagher 2010: 117-118). Regarding the ‘possibility’ language, Piotrowicz and Sorrentino (2016: 676) argue that the non-punishment of victims for acts that they were compelled to commit is not discretionary as interpreting it as such would ‘contradict the human rights based approach of the Convention’. It is certainly disempowering for a victim to be punished for her coerced conduct, and the same is true for being arrested, charged and/or prosecuted for it—hence, the Convention provision is too narrow by only addressing punishment. State treatment of victims as criminals is a form of secondary victimization and denies them access to assistance

and protection rights they are entitled to under international and regional law (see Gallagher 2010: 283; Piotrowicz and Sorrentino 2016: 681).

In spite of the foregoing criticisms, the Convention does have its merits with respect to victims' rights to protection and assistance. As an initial matter, the Convention requires state parties to take measures to identify trafficking victims, such as by ensuring that individuals trained and qualified in victim identification work with competent authorities and that authorities and support organizations collaborate with each other (Art. 10). Identification of victims is essential both to prevent further harm and to enable them to access their inter-dependant and inter-related rights (see Gallagher 2010: 116). Once identified, Article 28 obliges state parties to provide victims and their family members with 'effective and appropriate protection from potential retaliation or intimidation', as needed. Notably, the Convention is the only THB instrument providing for protection of adult victims' family members, who are also often subject to threats and harm from traffickers (see Brunovskis 2012: 66; Deighan 2010: 91; Jobe 2010: 164, 168, 171). The provision also helpfully lists examples of different types of protection that may be necessary, such as 'relocation' and 'assistance in obtaining jobs' (Art. 28(2)). While the provision focuses on protection needs 'during and after investigation and prosecution of perpetrators' (Art. 28(1)), the obligation to provide protective measures is not limited to this period (Explanatory Report 2005: para. 288). The Explanatory Report also emphasizes the need for authorities to tailor the type and period of protection to the specific circumstances surrounding a threat and the individuals at risk (*ibid.* paras. 286, 288).

Article 12(1)(a) – (f) of the Convention obligates state parties to provide victims with 'standards of living capable of ensuring their subsistence', information and counselling about their legal rights and services available to them, assistance with asserting their rights and

interests during criminal proceedings against their traffickers, and access to emergency medical treatment, translation and interpretation services, and education for children. The Explanatory Report underscores the mandatory nature of these provisions, asserting that ‘the Party in whose territory the victim is located *must ensure* that the assistance measures specified in subparagraphs a. to f. are provided to him or her’ (emphasis added) (para. 148). The imposition of firm duties upon states that give rise to concrete entitlements for trafficking victims is critical for the development and promotion of a victim-centred HRBA. Yet importantly for victims’ empowerment and agency under this conceptual framework, Article 12(7) emphasizes that they must be provided on a ‘consensual and informed basis’ (akin to Art. 11(5) of Directive 2011/36/EU). Moreover, state parties must ‘ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness’ (Art. 12(6)). On its face, this provision also fosters victims’ agency and empowerment. However, like the similar provision contained in Article 11(3) of EU Directive 2011/36/EU, this protection does not extend beyond the reflection period for victims without an independent right to remain in the state’s territory. While Article 13 entitles victims to the Article 12 assistance measures and prevents them from being deported during the reflection period, after this period expires, states are free to only issue residence permits to victims whose ‘stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings’ (Art. 14(1)). Moreover, the Explanatory Report (para. 148) makes clear that ‘[w]hen the victim leaves that Party’s territory the measures referred to in Article 12 no longer apply as Parties are responsible only for persons within their jurisdiction’. Therefore, for victims without an independent right to residency, their assistance following the reflection period is typically conditional on their willingness to act as a witness and otherwise cooperate with authorities, despite the contents of Article 12(6). This does

not bode well for the Convention's internal consistency: in addition to conflicting with the premise in Article 12(6), this situation contravenes the non-discrimination principle contained in Article 3, which prohibits discrimination in the Convention's implementation, 'in particular [with respect to] the enjoyment of measures to protect and promote the rights of victims', on the basis of national origin. It is also problematic for the realization of a victim-centred HRBA more generally (see Brunovskis 2012: 24) as it is contrary to the principles of empowerment, equality, and universality, in addition to non-discrimination.

A positive aspect of the Convention's approach to the 'recovery and reflection period' is that state parties are required to provide it 'when there are reasonable grounds to believe that the person concerned is a victim' (Art. 13(1)), which is very similar to the 'reasonable-grounds indication' language in Article 11(2) of Directive 2011/36/EU. Like the latter provision, not requiring individuals to definitively prove that they were trafficked before empowering them with rights to assistance and protection measures promotes the principle of universality, but this benefit may likewise be limited to an extent by the dominant discourse concerning the characteristics of 'real' trafficking victims who merit help (see Brunovskis and Surtees 2008: 57-60; Lobasz 2009: 342, 344)). Another positive point is that the Convention specifies that the recovery and reflection period must be a minimum of thirty days in duration, making it the only instrument in the international and regional legal framework on THB to stipulate a minimum length of time for this period (Art. 13(1)). This is significant because it will prevent state parties from establishing even shorter periods in which victims must decide whether or not to cooperate with investigative, prosecutorial, and judicial authorities. Though thirty days arguably provides insufficient time for trafficking victims to recover to the point where they are able make an 'informed decision' about their cooperation (a stated goal of the period (Art. 13(1)) (Brunovskis

2012: 49), establishing a minimum number of days and acknowledging that victims do require time to recover from physical and psychological trauma is an encouraging start (Convention Art. 13(1)). However, the Convention grants state parties permission to deny a trafficking victim access to a recovery and reflection period on ‘public order’ grounds (Art. 13(3)), which is a broad and rather vague term that could be employed as a means to justify discrimination against ‘unwanted’ victims.⁶⁰ In addition, the Explanatory Report (para. 172) states that the reflection and recovery period is intended for victims who are undocumented or only possess a short-term residence permit, which Piotrowicz (2018: 43) argues is problematic because victims who are citizens or have long-term residence permits would also benefit from the recovery assistance offered during this period. However, the Convention’s assistance and protection provisions do not state that they are applicable only to victims who are entitled to or in the reflection period (Arts. 12, 28), and the Explanatory Report does not support this interpretation either (paras. 146-171, 280-291). Thus, under the Convention, recovery assistance measures should be provided to citizens and long-term residents of state parties as well, in a non-discriminatory and universal manner.

As noted above, following the reflection period, the Convention gives state parties the option of only issuing residence permits to only foreign victims whose stay they deem necessary for criminal investigations or proceedings (Art. 14(1)). While the Convention opens the door to state parties issuing residence permits to victims whose ‘personal situation’ calls for it, it does not obligate them to do so (*ibid.*). Piotrowicz (2018: 43) points out that this could result in states ‘declin[ing] to issue a residence permit to someone who, despite having a very difficult personal

⁶⁰ ‘Unwanted’ victims may include those with special needs, who would require expensive care, and members of ethnic, racial or religious groups that are disfavoured in a particular culture. Moreover, in a state that criminalizes and stigmatizes sex workers, victims who willingly engaged in prostitution but whose labour was exploited are likely to be ‘unwanted’ in the eyes of the state.

situation, is not considered necessary to assist with an investigation or prosecution’ in spite of it being ‘contrary to the human rights-based approach of the Convention’. Another issue facing victims without citizenship or legal permanent residence in the destination state is the spectre of repatriation against their will. As in the Palermo Protocol, the Convention permits non-voluntary repatriation (Art. 16), but states must still avoid violating the principle of *non-refoulement* (discussed above). In fact, the first four sub-paragraphs of the Convention’s Article 16 echo the language in the first four sub-paragraphs of the Palermo Protocol’s Article 8. The only material difference is that the former requires the repatriating and receiving states to act with ‘due regard’ for victims’ ‘rights, safety and dignity’ during the repatriation process (Art. 16(1), (2)), whereas the latter only requires ‘due regard’ for victims’ safety (Art. 8(1), (2)). Moreover, the Convention also goes further than the Protocol, in subsequent sub-paragraphs, by requiring state parties to establish repatriation programmes aimed preventing re-victimization and to provide victims with contact information for authorities and organizations which offer victim assistance in the country to which they are returned (Art. 16 (5)-(6)).

The provision concerning victim compensation in the Convention is considerably stronger than the ones in EU Directive 2011/36 (Piotrowicz 2018: 48) and in the Palermo Protocol. First, the Convention’s provision explicitly establishes a right for victims to seek compensation from their traffickers (Art. 15(2)). The Explanatory Report (para. 197) makes clear that this compensation includes restitution, actual damages (e.g. medical treatment costs) and indeterminate damages (e.g. mental anguish, pain, and suffering). Second, the Convention requires state parties to ‘guarantee’ compensation for victims (though subject to conditions set in their domestic law), such as through the establishment of victim compensation funds or social assistance programmes (Art. 15(4)). This is significant particularly given traffickers’ tendency to

hide their assets (Bjerkan and Dyrliid 2006: 7; Williams 2008: 134-135) and the fact that traffickers themselves often evade detection (Explanatory Report para. 198). The stronger ‘guarantee’ language of the Convention, as compared with the language regarding victim compensation in the 2011 directive and the Palermo Protocol, is more consistent with a victim-centred HRBA because it recognizes the harms to trafficking victims and responds to victims’ needs, regardless of whether their traffickers have been located, have accessible assets, and have used physical violence against them.

The Convention rights and obligations discussed up to this point mainly concern state parties’ obligation to protect and assist trafficking victims, but the Convention also imposes duties upon state parties that fall within and/or overlap with the other key categories of obligations under a HRBA. First, the Convention requires the criminalization of THB (Art. 18) (including attempts and aiding and abetting (Art. 21)), which is defined very similarly to the way it is in the Palermo Protocol (Art. 3) and Directive 2011/36/EU (Art. 4). Second, the Convention contains a number of provisions aimed at establishing concrete obligations to investigate, prosecute, and punish traffickers with due diligence. For example, state parties must establish the jurisdiction needed to hold both natural and legal persons liable for THB offences committed in their territory (or on a vessel registered under their laws), committed against one of their nationals or committed by one of their nationals or a stateless person habitually resident in their territory (Arts. 18, 22, 31(1)).⁶¹ Furthermore, investigations and prosecutions of THB offences wholly or partially perpetrated in state parties’ territory must be conducted even when there is no complaint from a victim (Art. 27(1)). State parties are also required to train and provide

⁶¹ However, reservations are permitted regarding jurisdiction over THB offences committed by or against state parties’ nationals, or by a stateless person habitually resident in their territory, when these offences occur outside of state parties’ territory (Arts. 31(2), 45).

sufficient resources to their authorities charged with investigating and prosecuting THB (this also applies to those responsible for preventing THB and protecting victims), and facilitate their coordination with each other (Art. 29; Explanatory Report paras. 292-298). With respect to punishment, the Convention requires the imposition of ‘effective, proportionate, and dissuasive’ sanctions upon traffickers (Art. 23(1)-(2)). Third, regarding the obligation to address the root causes of THB, the Convention obligates state parties to establish and/or strengthen initiatives aimed at, among other things, ameliorating the social and economic conditions in source countries that contribute to THB (Art. 5(2); Explanatory Report para. 103). In addition, they are required to ‘take appropriate measures, as may be necessary, to enable migration to take place legally’ (Art. 5(4)). However, this does not by any means obligate state parties to permit legal immigration for those most vulnerable to exploitation at the hands of traffickers due to harmful structural and proximate factors in their home countries.

Importantly, the Convention prohibits state parties from making reservations with respect to any of its provisions, with the exception of those contained in Article 31 that establish jurisdiction over human trafficking offences occurring outside of a state party’s territory (Art. 45). This is significant because it prevents states becoming parties to the Convention from diluting their obligations to victims by exempting themselves from or limiting the effect of certain provisions, while still getting credit for being an official state party to the treaty.

In addition to setting out obligations, the Convention established the Group of Experts on Action against Trafficking in Human Beings (GRETA) to monitor compliance with its provisions (Arts. 36, 38). This body regularly publishes both general and country-specific reports evaluating implementation of the Convention and highlighting areas in need of improvement. By establishing a dedicated monitoring body, the Convention provides an

incentive for state parties to comply with its obligations and promotes the HRBA principles of accountability and the rule of law. This is particularly significant in light of the notoriously low compliance levels among parties to human rights treaties (Hathaway 2002: 1978; Posner 2014).

B. *European Court of Human Rights*

The CoE established the ECtHR in 1959 to rule on cases alleging violations of the European Convention on Human Rights (ECHR) (1950). The cases are filed against High Contracting Parties (i.e. state parties) to the ECHR and the ECtHR's judgments constitute binding law, which makes it an important mechanism for promoting the core human rights principles of accountability and the rule of law. Cases concerning THB implicate Article 4 ECHR, which prohibits slavery, servitude, and forced labour.

The ECtHR has developed a body of case law on states' obligations towards victims of THB. In 2005, the ECtHR was seized with a case involving THB for the first time (European Commission 2016). *Siliadin v France* involved a Togolese national who was forced to work in France as an unpaid domestic servant for four years, starting when she was fifteen years old (paras. 10-20). Though the Court considered both hard and soft law addressing THB as 'relevant law' (paras. 46-50), it did not explicitly state that the applicant in this case had been subjected to THB. Rather, it concluded that she had been a victim of forced labour (para. 120) and had been held in servitude (para. 129) within the meaning of Article 4 ECHR. With respect to France, the Court held that it had violated its obligations under Article 4 because it lacked 'practical and effective protection against the actions of which she was a victim' in its criminal code (para. 148). It further concluded 'that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in

such a situation' (para. 112). Therefore, in order to fulfil their Article 4 obligations, state parties must not only criminalize the practices that this article prohibits, but also properly prosecute and impose punishment upon offenders. As will be seen, this obligation unequivocally extends to THB, which the Court held falls within the ambit of Article 4 in the 2010 case of *Rantsev v Cyprus and Russia* (para. 282).

In 2010, the ECtHR elaborated on states' positive obligations toward trafficking victims in *Rantsev*. In this case, a Russian national and suspected victim of THB, Ms Rantseva, who was in Cyprus on a cabaret 'artiste' work permit, died after falling from an apartment window (paras. 13, 15, 25, 28, 29). The Court held that Cyprus had breached its obligations pursuant to Articles 2 (right to life), 4 (prohibition of slavery, servitude, and forced labour), and 5 (right to liberty and security) and that Russia had done so with respect to Article 4. In its opinion, the Court articulated specific legal obligations that parties to the ECHR owe to victims, which marks significant progress in promoting a victim-centred HRBA.

The ECtHR's discussion of Article 4 is ground-breaking, particularly in light of the paucity of prior case law concerning this provision (paras. 200, 279; Stoyanova 2016). The Court first determined that THB, as defined in the Palermo Protocol and the Convention, falls within the scope of Article 4 ECHR (para. 282) (an issue it had dodged just a few years earlier in *Siliadin*). It largely based this conclusion upon the ECHR's status as a 'living instrument which must be interpreted in light of present-day conditions', including the recent rise in THB and the corresponding development of international law to address it⁶² (paras. 272-282). Then, building on *Siliadin*, it emphasized that, in order to comply with Article 4, state parties' domestic

⁶² See Allain (2010: 550-557) and Stoyanova (2012) for a detailed critique of the ECtHR's reasoning and conclusion in *Rantsev* with respect to THB and Article 4 ECHR. Regardless of the merits of these scholars' criticisms, however, *Rantsev* remains binding law.

legislation must ‘ensure the practical and effective protection of the rights of victims or potential victims of trafficking’, which necessarily extends beyond criminal law measures (para. 284). The judgment specifies an obligation to regulate businesses, which are often used as a cover for THB operations, and to ensure that immigration laws do not foster or tolerate trafficking (ibid.). Stoyanova (2012: 176-177) criticizes this latter requirement on the grounds that, in practice, it is likely to lead states to eliminate certain legal migration channels, as it did with Cyprus and its artiste visa scheme. She further argues that closing legal channels will not prevent abuse because individuals will still migrate but with even greater vulnerability to exploitation and other forms of ill-treatment, due to their undocumented status (ibid.). While curtailing certain groups’ legal freedom of movement in an attempt to prevent THB is not in line with a HRBA (see Kapur 2007: 242-243; Wijers 2015: 65, 70), immigration policies that give employers immense power over migrant workers, such as by tying employees’ visas to their work for a particular employer, are not either. Immigration regimes like these are disempowering for potential victims and undermine states’ fulfilment of their obligation to address the root causes of THB under a HRBA. Thus, the Court’s holding regarding immigration rules is not inherently problematic, but care must be taken to ensure that it is applied in accordance with core human rights principles.

In a landmark move for the rights of trafficking victims, the ECtHR in *Rantsev* imposed concrete positive obligations upon state parties to take initiative in rooting out THB and affirmative steps to identify, protect, and assist suspected and potential victims (Rijken and Römkens 2011: 89). The Court asserted that ‘Article 4 . . . entails a procedural obligation to investigate situations of potential trafficking (*Rantsev* 2010: para. 288). The requirement to investigate does not depend on a complaint from the victim or next-of-kin: ‘once the matter has come to the attention of the authorities they must act of their own motion’ (para. 288). In order

to fulfil this duty, states are obligated to cooperate and collaborate with authorities from other states when suspected cases of THB have a cross-border element (para. 289). Furthermore, all investigations must be conducted promptly and with ‘reasonable expedition’, but ‘must be undertaken as a matter of urgency’ when there exists a possibility of removing a victim from a trafficking situation (para. 288). The ECtHR clarified states’ positive obligations to protect and assist victims as follows (para. 286):

In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities 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 of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.⁶³

There are, however, certain limits to these positive obligations. The Court cautioned that they must be ‘interpreted in a way which does not impose an impossible or disproportionate burden on the authorities’, in view of modern policing challenges and resource limits (para. 287). Yet, this qualification does not operate as an excuse for state parties to shirk their responsibilities under Article 4; the Court held both Cyprus and Russia accountable for their failings in this case. It concluded that Cyprus had breached its Article 4 obligations because its ‘artiste’ visa scheme did not provide ‘practical and effective protection against trafficking’ (para. 293) and because the Cypriot police officers who had come into contact with Ms Rantseva had failed to investigate whether she was a victim of THB, despite indications that this may have been the case (paras. 296-298). With respect to Russia, the Court held that it had committed a procedural violation of

⁶³ In 2012, the ECtHR applied this ‘credible suspicion’ test in its determination that the United Kingdom had a positive obligation to investigate the applicant’s complaints of domestic servitude in *C.N. v United Kingdom* (paras. 71-72).

Article 4 by neglecting to investigate the recruitment of Ms Rantseva, which had occurred on its territory and potentially constituted a trafficking offence (paras. 308-309).

The ECtHR should be commended for articulating clear and firm obligations towards victims of THB for the 47 High Contracting Parties to the ECHR in *Rantsev* and for holding Cyprus and Russia accountable for violating these obligations. The Court was able to accomplish this in large part because, unlike the drafters of international treaties or legislation, it does not rely on states to ratify or vote on its judgments. Accordingly, international courts present an effective and efficient means by which firm legal obligations to protect and expand victims' rights can be conferred upon states.

However, in a surprising turn of events, the ECtHR was presented with an opportunity to apply its THB case law in the 2012 case of *M. and Others v Italy and Bulgaria*, but declined to do so (para. 155). Due to a factual dispute among the parties and a dearth of evidence, the Court held the applicants' Article 4 complaint inadmissible and maintained that it could not determine whether the case involved THB, though it acknowledged the possibility that it did (para. 154). Notably, this lack of evidence is directly connected with the Italian authorities' failure to conduct an effective investigation into the applicants' allegations, which the Court held constituted a violation of Italy's procedural obligations under Article 3⁶⁴ (paras. 106-108,152). It reasoned:

the Court cannot exclude that the circumstances of the present case, as reported by the first applicant to the Italian authorities . . . , had they been proved, could have amounted to human trafficking as defined in international conventions . . . , which undoubtedly also amounts to inhuman and degrading treatment under Article 3 of the Convention. In consequence, the Italian authorities had an obligation to look into the matter and to establish all the relevant facts by means of an appropriate investigation which required that this aspect of the complaint be also examined and scrutinized (para. 106).

⁶⁴ The Court concluded that its analysis and conclusions in this case regarding Article 3 procedural obligations rendered it unnecessary to examine applicants' Article 4 procedural claims (paras. 157-158).

Therefore, as a result of committing a procedural violation, Italy avoided facing potential liability for a violation of its positive obligation under Article 4 ‘to penalise and prosecute trafficking in the ambit of a proper legal or regulatory framework’⁶⁵ (para. 155). This is not the only worrisome aspect of the judgment; the Court appears to reverse course from *Rantsev* by refusing to apply this Article 4 positive obligation to the case because the evidence had not ‘established’ that THB had occurred ‘beyond reasonable doubt’ (*M. and Others* 2012: paras. 106, 111, 154-155, 163). This decision is deeply inconsistent with its *Rantsev* judgment from just two years earlier, in which the occurrence of THB was far from established beyond reasonable doubt by the evidence, but the Court invoked the Article 4 positive obligation regarding an adequate legislative and administrative framework with respect to both respondent states (*Rantsev* paras. 290-293; 301-303). The only apparent difference in the state of the evidence among the two cases is that in *Rantsev*, the parties agreed that THB may have occurred, whereas in *M. and Others*, the parties disagreed about this. Yet, the Court’s decision about whether Article 4 positive obligations come into play should not depend upon the extent to which the parties agree on the facts. By requiring applicants to establish, beyond reasonable doubt, that THB occurred before the Court will deem the obligation to address it within the context of an adequate legislative and administrative framework relevant to a case is a very high threshold that can act

⁶⁵ The Court maintained that its analysis and conclusions with respect to Article 3 rendered it unnecessary to examine compliance with positive operational and procedural obligations under Article 4 (paras. 156-158). If this had not been the case, it is likely that the Court would have applied the Article 4 operational obligation because *Rantsev* clearly established that it only requires ‘that the State authorities 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 of being, trafficked or exploited’ for the obligation to arise (para. 286), which is a relatively low threshold that was undoubtedly met in this case. It is also likely that the Court would have applied the Article 4 procedural obligation to investigate situations of potential trafficking, as *Rantsev* instructs that the obligation exists ‘once the matter has come to the attention of the authorities’ (para. 288), and the applicants had communicated trafficking allegations to the Italian police. However, this is mere speculation and the Court may have reversed course on these aspects of *Rantsev* as well, though *L.E. v Greece, infra*, suggests otherwise (*L.E. v Greece* paras. 66, 68, 78, 86).

as a barrier to the vindication of their Article 4 rights. Thus, *M. and Others* sets a ‘dangerous precedent’ (Jovanovic 2013) for the protection of victims and discourages states from conducting thorough investigations.

The ECtHR has had several opportunities to apply Article 4 and to elaborate on state parties’ positive obligations towards victims of THB since *M. and Others*. Fortunately, in *L.E. v Greece*⁶⁶ (2016), the Court takes ‘a positive step forward’ (Stoyanova 2016). It appears to backtrack from *M. and Others*’ requirement that the existence of THB be proven ‘beyond reasonable doubt’ in order for a state’s positive obligation to implement an appropriate legislative and administrative framework to apply (paras. 70-72). The Court also does not allow the respondent state’s breach of its duty to effectively investigate to shield it from a potential substantive violation of Article 4 (paras. 70-72, 79-86), as it did in *M. and Others*. However, as there was no dispute over whether L.E. was, in fact, a victim of THB (para. 58), this case does not make it clear that the ECtHR has wholly abandoned its high evidentiary threshold from *M. and Others*, particularly as it did not explicitly reject, or even discuss, this standard in the *L.E.* judgment.

The case involved a Nigerian woman, L.E., who was trafficked to Greece for the purpose of sexual exploitation (ECtHR 2016). The Court held that Greece had breached Articles 4, 6, and 13 ECHR (ibid.). Regarding Article 4, the Court concluded that the approximately nine months that elapsed between the point when L.E. had expressly informed Greek authorities that she was a victim of THB and the formal recognition of her victim status was an unreasonably long time period (ibid.). Furthermore, the Court noted failings on the part of the Greek criminal

⁶⁶ The judgment is only available in French and therefore I relied largely upon secondary materials in my discussion of this case.

justice system that amounted to violations of Greece’s procedural obligations under Article 4 (ibid.). Specifically, the police neglected to include a key witness statement in L.E.’s case file, which resulted in the prosecutor’s dismissal of L.E.’s original complaint, and judicial authorities failed to renew proceedings on their own motion once this witness statement was added (ibid.). In addition, the Greek police authorities did not take adequate steps to locate L.E.’s trafficker—they failed to follow up on available information relevant to his whereabouts, neglected to contact the Nigerian authorities,⁶⁷ and did not make sufficient inquiries (ibid.). There were also significant delays and periods of inactivity during the preliminary inquiry and investigation of the case (ibid.). With respect to Article 6, the Court held that the length of the Greek criminal court proceedings (in which L.E. sought civil damages), lasting over five years and two months, violated the ‘reasonable time’ requirement contained in Article 6(1)⁶⁸ (ibid.). As there was no domestic remedy available to enforce the right to a hearing within a reasonable time period, the ECtHR found Greece to have breached Article 13⁶⁹ as well (ibid.). Thus, in terms of the key obligations under a HRBA to THB, the Court held Greece liable for violations of their duties to investigate and prosecute THB with due diligence and to assist and protect trafficking victims.

⁶⁷ In *Rantsev*, the Court maintained that states must ‘co-operate effectively’ with one another in investigations of cross-border trafficking (para. 289). However, in contrast to *Rantsev* (para. 241) and *L.E.* (para. 85), in *J. and Others v. Austria* (2017), the Court concluded that Austria had not breached its Article 4 procedural obligation to investigate THB even though it had not requested legal assistance from the United Arab Emirates (UAE) (the victims’ original destination country) (para. 117). It reasoned that doing so would not ‘have had any reasonable prospects of success’ as Austria and the UAE did not have a mutual legal assistance agreement and the UAE had refused even Austria’s simple requests for legal assistance in the past without justification (ibid.). The likelihood that a request for legal assistance to the UAE would have been futile appears to account for the discrepancy between the Court’s holding concerning the respondent state’s relevant procedural obligations in this case and that in *Rantsev* and *L.E.*

⁶⁸ Article 6(1) states, in relevant part: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

⁶⁹ Article 13 provides: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’.

Continuing on from *L.E.*, the ECtHR has not mentioned the ‘beyond reasonable doubt’ standard when determining whether states’ substantive obligations under Article 4 apply (see *Chowdury and Others v. Greece* (2017); *J. and Others v Austria* (2017), *S.M. v. Croatia* (2018)). This was even the case in *S.M. v. Croatia* (2018), where there was a lack of evidence that THB had occurred likely due to the respondent state’s breach of its procedural obligation to adequately investigate, as had been the case in *M. and Others*. Although the respondent state had officially given the applicant status as a trafficking victim in *S.M.* (para. 12), unlike the circumstances in *M. and Others*, the Croatian criminal court had acquitted the defendant based on a lack of evidence that he had trafficked the applicant. Despite this, the ECtHR concluded that the full spectrum of Croatia’s positive obligations under Article 4 still applied (paras. 54; 61-80), signalling a welcome departure from its approach in *M. and Others*. Another significant aspect of *S.M.* is the Court’s conclusion that the Croatian courts had erred in dismissing the applicant’s testimony as unreliable (because they had considered it incoherent, ‘she had been unsure and . . . she had paused or hesitated when speaking’), without considering the potential impact of psychological trauma upon her ability to communicate the details of her victimization clearly and the possible impact of having seen the defendant in the courtroom prior to his removal⁷⁰ (para. 80). Recognizing that the symptoms of trauma are not indicative of a victim’s credibility as a witness is an important part of a victim-centred approach, particularly given that attacks on credibility are a common way that victims of sexual offences are secondarily victimized (Condry 2010: 239-242).

V. Best Practices under International and Regional Law

⁷⁰ The defendant was removed from the courtroom after *S.M.* told the trial judge that she feared him (para. 15).

Best practices under the foregoing legal framework involve honouring the rights and fulfilling the obligations it establishes in line with a HRBA to the greatest extent possible. While the content of the law is limited in various significant ways (as highlighted in this chapter) and could certainly be improved upon, there is a wide spectrum of state conduct on THB that falls within compliance, so it is useful to articulate best practices within this, albeit limited, international and regional legal framework. These practices will be set out in accordance with the four key categories of state obligations under a HRBA to THB, with a focus on duties to assist and protect trafficking victims.

First, states must criminalize THB, including attempts and aiding and abetting, under their domestic law.⁷¹ Second, they are obligated to take concrete measures to investigate, prosecute, and punish traffickers with due diligence. Under best practices, these include establishing jurisdiction over natural and legal persons committing THB offences (including acts committed outside of states' territory but by or against their nationals),⁷² ensuring that the authorities conducting investigations and prosecutions are well-trained⁷³ and well-resourced,⁷⁴ conducting all investigations into THB expeditiously,⁷⁵ and doing so as a matter of urgency when there is the possibility of removing a victim from a THB situation.⁷⁶ Investigations and prosecutions of THB must be conducted regardless of whether there is an accusation or complaint from a victim.⁷⁷ Furthermore, states must cooperate with each other efficiently and

⁷¹ Convention Arts. 18, 21-22; Directive 2011/36/EU Arts. 2-3, 5; Palermo Protocol Art. 5; *Rantsev* 2010: para. 282; *Siliadin* 2005: paras. 112, 148.

⁷² Convention Arts.22, 31; Directive 2011/36/EU Arts. 5, 10.

⁷³ Convention Art. 29; Directive 2011/36/EU Art. 9(3); Palermo Protocol Art. 10(2).

⁷⁴ Convention Art. 29(1); Directive 2011/36/EU Art. 9(4).

⁷⁵ *Rantsev* para. 288.

⁷⁶ *Ibid.*

⁷⁷ Convention Art. 27(1); Directive 2011/36/EU Art. 9(1); *Rantsev* para. 288.

effectively in THB investigations with cross-border elements.⁷⁸ Regarding punishment, states are obliged to impose ‘effective, proportionate, and dissuasive’ sanctions upon traffickers.⁷⁹ For natural persons, judges should be authorized to impose custodial sentences of at least five years, and where there are aggravating circumstances, of at least ten years.⁸⁰

Third, states are required to take a number of steps in order to fulfil their duty to assist and protect trafficking victims. In sum, these rights and obligations generally fall into the categories of access to information, social services, residence permits, legal assistance, and compensation, protection measures, and participation in the criminal justice process. At a foundational level, states must ensure that its authorities who are likely to come into contact with trafficking victims are qualified and well-trained in identifying, protecting, and assisting them, while treating them in a manner consistent with the core principles of a HRBA.⁸¹

Under best practices, at the first indication that an individual is a victim of THB, authorities should provide her with information about her rights and how to claim them, in a language that she can understand.⁸² Free translation and interpretation services should be provided to victims who need them while this information is being communicated, as well as at other important times, such as when they are making a complaint and during criminal proceedings.⁸³ Victims should be afforded a reflection and recovery period of a length that is

⁷⁸ Convention Art. 27(2); Directive 2011/36/EU; *L.E.* para. 85; Palermo Protocol Art. 10(1); *Rantsev* para. 241.

⁷⁹ Convention Art. 23; Directive 2011/36/EU Art. 4; see also *Rantsev* para. 285.

⁸⁰ Directive 2011/36/EU Art. 4(1), (2).

⁸¹ Convention Art. 10(1); Directive 2011/36/EU Art. 18(3); Directive 2012/29/EU Art. 25; Palermo Protocol Art. 10(2).

⁸² Convention Art.12(1)(d); Directive 2004/81/EC Art. 5; Directive 2011/36/EU Art. 11(5)-(6); Directive 2012/29/EU Arts. 3-6; Palermo Protocol Art. 6(2)(a), (3)(b).

⁸³ Convention Art. 12(1)(c); Directive 2004/81/EC Art. 7(3); Directive 2011/36/EU Art. 11(5); Directive 2012/29/EU Arts. 5(2)-(3), 7.

sufficient for them to process the information communicated to them and take an informed decision about whether or not to cooperate with authorities in the investigation and prosecution of their traffickers.⁸⁴

In order to follow best practices under the law, social services for victims should include sufficient material assistance for a subsistence standard of living, appropriate and safe housing, access to medical and psychological treatment, and employment, educational, and training opportunities.⁸⁵ This assistance should be provided to victims without delay, on a consensual and informed basis, and never be made conditional upon their willingness to cooperate in the investigation or prosecution of their traffickers.⁸⁶ Regarding legal assistance, victims should promptly be afforded free legal counselling and representation in order to protect and facilitate their rights and interests, including their right to claim compensation.⁸⁷ They should be guaranteed access to compensation for damages suffered, either from the perpetrators or, if not possible, from state compensation schemes or funds.⁸⁸ Furthermore, they should be notified of information necessary for their ‘active participation in the criminal proceedings’ and should also be offered prompt notification for when their traffickers have left custody and for other developments related to their case).⁸⁹ If victims choose to actively participate, their rights to be

⁸⁴ Convention Art. 13; Directive 2004/81/EC Art. 6.

⁸⁵ Convention Art. 12; Directive 2004/81/EC Art. 7(1); Directive 2011/36/EU Art. 11; Directive 2012/29/EU Art. 9(1)(c); Palermo Protocol Art. 6.

⁸⁶ Convention Art. 12(6)-(7); Directive 2011/36/EU Art. 11(2)-(3), (5).

⁸⁷ Convention Arts. 12, 15; Directive 2004/81/EC Art. 7(4); Directive 2011/36/EU Art. 12(2); Directive 2012/29/EU Art. 13; Palermo Protocol Art. 6.

⁸⁸ Convention Art. 15, Directive 2011/36/EU Arts. 12(2), 17; Directive 2012/29/EU Art. 16; Palermo Protocol Art. 6(6).

⁸⁹ Directive 2012/29/EU Art. 6.

heard and to provide evidence during criminal proceedings should be facilitated pursuant to best practices.⁹⁰

Foreign victims without an independent right to residency should be provided with legal residency when their personal circumstances create a need for it and/or their stay will aid in the investigation or prosecution of their traffickers.⁹¹ In deciding whether the former situation exists, authorities should consider ‘humanitarian and compassionate factors’⁹² and must not return a person to a territory where he or she would be in danger of persecution based on his or her race, religion, nationality, political opinion or membership in a particular social group and/or of being subjected to torture, cruel, inhuman or degrading treatment or punishment (principle of *non-refoulement*).⁹³

Best practices regarding protective measures involve protections for victims’ physical and psychological well-being in various contexts. If state authorities become aware (or ought to become aware) of an individual who is currently or at imminent risk of being trafficked, they must take prompt action to remove the victim or potential victim from the trafficking situation.⁹⁴ Once removed, an individual risk assessment should be conducted, and if it reveals that the victim and/or her family members are at risk for potential intimidation or retaliation, effective protection should be made available to them, such as through relocation, identity change, and other witness protection measures.⁹⁵ Victims should also be protected from secondary and repeat

⁹⁰ *ibid.* Art. 10.

⁹¹ Convention Art. 14; Directive 2004/81/EC Art. 8; Palermo Protocol Art. 7.

⁹² Palermo Protocol Art. 7(2).

⁹³ Convention Relating to the Status of Refugees 1951: Art. 33; Lauterpacht and Bethlehem 2001: 86.

⁹⁴ *Rantsev* 2010: para. 286.

⁹⁵ Convention Arts. 12(2), 28, 30(b); Directive 2011/36/EU Art. 12(3); Directive 2012/29/EU Arts. 9(3)(a), 22; Palermo Protocol Art. 6(5).

victimization during criminal investigations and proceedings.⁹⁶ Under the law, best practices with this aim include avoiding unnecessary repetition of interviews,⁹⁷ having the same trained professional conduct every interview with a particular victim on premises specialized for this purpose,⁹⁸ preventing visual contact between victims and defendants,⁹⁹ and closing court proceedings to the public.¹⁰⁰ Protection of victims' privacy and identity is also required.¹⁰¹ When evaluating the credibility of victims' testimony, courts must account for the potential impact of trauma upon victims' ability to clearly and consistently communicate information about their trafficking.¹⁰² Moreover, victims should not be prosecuted or punished for crimes they were compelled to commit as a result of being trafficked.¹⁰³

Lastly, the fourth obligation under a HRBA requires states to address the root causes of THB. Under best practices, states must make significant investments towards mitigating the structural and proximate factors which underlie vulnerability to trafficking victimization and its status as a low-risk, high-profit crime. Initiatives should include programmes to combat poverty, economic and gender inequality, and lack of opportunity.¹⁰⁴ Furthermore, states should ensure that they have meaningful pathways for legal migration and that they disseminate accurate

⁹⁶ Convention Art. 30; Directive 2011/36/EU Art. 12; Directive 2012/29/EU Arts. 20, 23.

⁹⁷ Directive 2011/36/EU Art. 12(4)(a); Directive 2012/29/EU Art. 20(b).

⁹⁸ Directive 2012/29/EU Art. 23(a), (b), (c).

⁹⁹ Directive 2011/36/EU Art. 12(4)(b); Directive 2012/29/EU Art. 23(3)(a); Explanatory Report paras. 309-310.

¹⁰⁰ Directive 2011/36/EU Art. 12(4)(c); Directive 2012/29/EU Art. 23(3)(d); Explanatory Report 2005: para. 308.

¹⁰¹ Convention Arts. 11, 30(a); Directive 2011/36/EU Art. 12(4)(d); Directive 2012/29/EU Arts. 21, 23(3)(c); Palermo Protocol Art. 6(1).

¹⁰² *S.M.* para. 80.

¹⁰³ Convention Art. 26; Directive 2011/36/EU Art. 8.

¹⁰⁴ Convention 5(2); Palermo Protocol Art. 9(2), (4).

information about them, in order to reduce the risk that individuals seeking to migrate will be victimized by traffickers.¹⁰⁵

VI. Legal Framework in the Netherlands

To a large extent, the Netherlands has incorporated the obligations towards trafficking victims enshrined in international and regional law into its domestic legal order. THB is criminalized under Article 273f of the Dutch Penal Code (GRETA 2018a: 38). This law proscribes the range of conduct covered by the definition of THB contained in international and regional human rights law instruments, and is arguably even wider in scope than this definition. However, in 2016, the Dutch Supreme Court narrowed the scope of Article 273f(1)(3), which states that a person who ‘recruits, takes away or abducts a person with the intention of inducing that person to make him or herself available for sexual acts with or for a third party for payment in another country’ has committed THB (*ibid.* 8, 38). The Court held that exploitation must be regarded as an implicit component of this provision and thus simply recruiting a person to the Netherlands to work in prostitution does not qualify as THB (National Rapporteur 2016: 16-17). This aligns with the ECtHR’s holding in *S.M.* regarding the exploitation of prostitution, but in *S.M.*, the Court did not require a cross-border element (2018: para. 54).

In the Netherlands, entitlements for trafficking victims are largely contained within chapter B8 of the Aliens Circular (Vreemdelingen­circulaire (Aliens Circular) 2000 (B): (B8)) (also known as the ‘B8 regulation’), linking them with foreign nationality as is done in Directive 2004/81/EC. In addition to non-EU nationals, non-Dutch EU/EEA and Swiss nationals can claim the rights and entitlements provided for under the B8 regulation so long as they do not claim rights under Community law (Vreemdelingen­circulaire 2000 (B): B8(3.1)). Under this

¹⁰⁵ Convention Art. 5(4).

regulation, suspected victims are entitled to a one-time, three-month reflection period to consider whether to press charges against their traffickers, and a stay of deportation (ibid.). The reflection period is terminated and the stay ended if the victim indicates that she does not wish to cooperate with authorities in the investigation and prosecution of her trafficker (ibid). GRETA (2018a: 46) has criticized this statutory provision, emphasizing that ‘the reflection period cannot be conditional upon the co-operation of the possible victim with the investigation or prosecution’.

Following the reflection period, if the victim agrees to press charges or otherwise cooperate with authorities in an ongoing criminal investigation or prosecution, then she is eligible for a temporary residence permit (Vreemdelingen­circulaire 2000 (B): B8(3.1)). If the victim does not do so, then the IND will reject her request for a residence permit (ibid). GRETA (2018: 26, 28; 2014: 44) has also strongly criticized this policy linking assistance to foreign victims with a criminal investigation being pursued in both its first and second evaluation round reports on the Netherlands. However, as an exception to this policy, the IND can grant a residence permit to a suspected trafficking victim who is unwilling or unable to assist authorities due to a serious threat and/or a medical or psychological limitation during the reflection period (Vreemdelingen­circulaire 2000 (B): B8(3.1)) and beyond (ibid. B8(3.2), (10)). Yet, civil society representatives reported to GRETA that ‘the authorities do not always accept NGO assessments about victims of THB being too traumatised to participate in criminal proceedings’ (GRETA 2018a: 26). Outside of the exception, the IND only renews a victim’s temporary residence permit if the criminal investigation or prosecution is ongoing and revokes it if the case is closed and the victim has held a residence permit based on the B8 regulation for less than three years, in spite of the victim’s cooperation with criminal justice authorities (Vreemdelingen­circulaire 2000(B): B8(3.2), B9(12)). However, if the latter occurs, the victim can apply for a non-

temporary residence permit based on humanitarian grounds, for which the IND will assess the risk of reprisals against the victim and her family and the ability and willingness of the authorities in the victim's home country to protect them from these reprisals, the risk that the victim will be prosecuted in her home country (such as for having engaged in prostitution), and the likelihood that the victim can be socially reintegrated in her home country (ibid. B9(12)). A permanent residence permit is also available to victims who hold a temporary residence permit through the B8 regulation for three continuous years or if the public prosecutor decides to prosecute the victim's case (ibid.). This law used to require that the defendant be convicted rather than merely prosecuted, but it was relaxed in the latter half of 2018 to only require a decision to prosecute.¹⁰⁶

The B8 regulation directs the police to refer suspected trafficking victims to the National Human Trafficking Coordination Centre ('CoMensha'), which searches for a spot in a shelter in which to place each victim, prioritizing location within the police region conducting the investigation into the victim's case (ibid. 3.4). The responsibility for assisting the victim is then transferred to the appropriate regional coordinator, unless there is no coordinator for a particular region, in which case the responsibility remains with CoMensha (ibid). The regional coordinator must ensure that the victim has appropriate shelter, medical examination and treatment, information about the legal consequences of pressing charges or otherwise cooperating with authorities, and if it appears necessary for the victim to receive legal advice during the reflection period, contact with a legal assistance provider (ibid.). While the victim is permitted to stay in the Netherlands pursuant to the B8 regulation, she receives a financial benefit to cover the cost of living. During the reflection period, this benefit is provided by Centraal Orgaan Opvang

¹⁰⁶ Versions of the law from 20 July 2018 and 8 December 2018 were compared.

Asielzoekers (Central Organ for Reception of Asylum Seekers) (ibid.; Regeling verstrekkingen bepaalde categorieën vreemdelingen (Provision of benefits for certain categories of foreign nationals) Art. 2(1)(a)), and following the reflection period it is paid by the Dienst Werk en Inkomen (Work and Income Service).

As the B8 regulation only applies to foreigners, Dutch and EU victims who claim rights under Community law cannot claim rights and entitlements under it. This includes the reflection period and access to specialized human trafficking shelters. Instead, Dutch and EU adult victims are eligible for accommodation in municipal shelters that also house other categories of victims, such as victims of domestic violence and honour-based violence (GRETA 2018a: 28).¹⁰⁷

In April 2017, a law concerning assistance and protection for crime victims, based closely on EU Directive 2012/29, came into force ('Besluit slachtoffers van strafbare feiten' (Decree on victims of criminal offences)). Among its provisions is the requirement that authorities provide crime victims with standard information about their rights, such as the right to information, legal assistance, press charges, and compensation, during their first contact with victims (Art. 5; Government of the Netherlands 2017). It also entitles crime victims to individualized assessments during or as soon as possible after their first contact with authorities to identify specific protection needs and determine whether and to what extent they should be able to use special measures during criminal proceedings (Art. 10(1)). While options for special measures during criminal proceedings are important for victims to understand, addressing this topic during the first contact they have with the authorities is likely premature for most victims and may be overwhelming in light of the large amount of other information they will receive at

¹⁰⁷ However, in practice, some of these victims are accommodated in the specialized human trafficking shelters (e.g. several Dutch victims were residing at Amsterdam Centrum Mensenhandel (ACM) during the course of the fieldwork for this study).

that time. The special measures which the law specifies are identical to those contained in Article 23 of the EU Directive, except for measures to avoid unnecessary questioning about a victim's private life that is not related to the criminal offence, which is included in the Dutch law only with respect to preliminary examination prior to trial, but not during the trial itself (Arts. 9(1)(c), 11-12). Importantly, the law requires authorities to consider victims' wishes during the assessment, including the preference not to use special measures (Art. 10(5)).

In addition to the information rights applying to their first contact with authorities under the new law, victims also have rights to certain information in the context of criminal proceedings, and the prosecutor is responsible for immediately informing the victims about these rights (Wetboek van Strafvordering (Dutch Code of Criminal Procedure) Art. 51ac). This includes the right to be notified about the nature of the charge, the date, time, and location of hearings, the final verdict, and decisions to terminate an investigation, not to prosecute a criminal offence, and to appeal or not appeal a verdict (*ibid.*).

The Dutch Code of Criminal Procedure also provides crime victims with a number of other rights, including the right to an interpreter if they are not proficient in Dutch (Art. 51c(5)), the right to have a support person of their choosing present during the investigation and trial (Art. 51c(1-2)), and the right to make a statement at trial (Art. 51e(2)). This speaking right was expanded in 2016 to include statements about the guilt of the defendant and what the punishment should be, whereas previously victims were only legally permitted to speak about how the crime affected them personally (Government of the Netherlands 2016b). Regarding sentencing for traffickers, Article 273f(1)(9) of the Dutch Criminal Code specifies that the statutory maximum prison term for THB offences is twelve years (GRETA 2018a: 38). However, if there are aggravating circumstances, the statutory maximum sentence is increased: if THB involves

serious violence that is life-threatening or results in serious physical injury, the offender may be sentenced to up to eighteen years (Art. 273f(4)), and if it results in death, a life sentence is permitted (Art. 273f(5)) (ibid. 39).

Victims who have suffered direct damage as a result of a criminal offence may join criminal proceedings as an aggrieved party with a claim for compensation (Wetboek van Strafvordering Art. 51f(1)). The judge can impose a compensation order on the offender for the benefit of the victim (Wetboek van Strafrecht Art. 36f(1)), and if he has not paid the full amount within eight months of the judgment becoming final, the Dutch government will pay the outstanding amount to the victim (ibid. Art. 36f(7); GRETA 2014: para. 195). This advance payment scheme applies to victims of violent and/or sexual offences, including victims of THB (ibid.). Furthermore, victims of crimes involving serious violence who have suffered severe physical or psychological damage and who do not receive compensation can apply to the Criminal Injuries Compensation Fund (GRETA 2014: para. 197). The Fund's requirement for verification of the injury suffered prior to awarding compensation is waived for victims of THB (ibid.).

VII. Conclusion

'To be sure, research with trafficked victims must start from a belief in our shared common bonds of humanity, as well as their entitlement to protection under international human rights' (Bosworth, Hoyle, and Dempsey 2011: 774). The THB legal framework discussed in this chapter establishes important rights and entitlements for trafficking victims, as well as corresponding state duties. By engaging with concrete state obligations within the four key categories, we gain a clearer understanding of the contents of a HRBA to THB and appreciate the significant progress that has been made in the past twenty years towards enshrining

trafficking victims' rights in positive law. However, examining the legal framework also highlights the aspects that contravene core principles of a HRBA and threaten to undermine both victims' empowerment as rights-holders and the efficacy of the global fight against THB. Further action is needed on the part of states, international organizations, and international courts to strengthen the existing legal framework and ensure that it comports with the tenets of a HRBA in all respects.

Yet, we must recognize that a strong legal framework is only the first step and it means little if not properly implemented in practice. Under a HRBA, states (and their agents) must carry out their substantive obligations in a manner that is consistent with core human rights principles. Moreover, it is essential to understand the extent to which the entitlements contained in the existing legal framework and their implementation are meeting the needs of rights-holders—victims—as this is critical to a victim-centred approach. Against this backdrop, we now turn to the qualitative research with trafficking victims, as the experts on their own needs, perspectives, and lived experiences.

CHAPTER 3

Research Methodology: Navigating Vulnerability and Other Challenges

I. Introduction

Conducting primary research with vulnerable and hard-to-reach populations raises complex and challenging methodological issues. The nature of these issues ranges from ethical to practical and logistical, and most require a high level of flexibility, creativity, and patience on the part of the researcher. This chapter sheds light on a number of these methodological concerns and explains how they impacted on and were addressed in the research.

II. Research Setting

The fieldwork for this study was conducted in the Netherlands over the course of eight months in 2014 and 2015. This country is an important and fascinating context for sex trafficking research. Prostitution was legalized in the Netherlands in 2000, which made it a focal point for discussion and debate around sex trafficking. While the existence and nature of a relationship between sex trafficking and prostitution policy remains in question,¹⁰⁸ Amsterdam is a major destination for trafficking, often involving Eastern European criminal gangs (van der Zee 2017).

The fieldwork was primarily carried out at Amsterdam Centrum Mensenhandel (ACM), a government-funded shelter for human trafficking victims run by HVO-Querido, a Dutch NGO. A few interviews were conducted with victims receiving services from ACM but not residing there. One of these participants had formerly lived at ACM, another had lived in a shelter for trafficking victims in Rotterdam, and two others had never lived in a shelter. Two additional interviewees were unaffiliated with ACM and had never lived in any shelter. One was recruited

¹⁰⁸ For an in-depth discussion of this topic, see Chapter 1.

through Not For Sale, a global anti-trafficking NGO with a branch in Amsterdam providing victim services such as job skills training. The other was recruited through an anti-trafficking activist in Amsterdam who informally assisted a number of victims and went on to found Share Network, an NGO focused on victim support and empowerment.

III. Research Sample

I interviewed 39 female victims of sex trafficking from 19 countries (see Figure 1 below for a regional breakdown of the sample). The size of the sample was guided by the principle of ‘saturation’ which is ‘the point when new interviews seem to yield little additional information’ (Bachman and Schutt 2017: 273). The interviewees ranged in age from 18 to 55, with most concentrated at the lower end of the spectrum. The average length of time the 34 participants residing at ACM had lived there when they were interviewed for this study was approximately 3.5 months (including the length of stay in the shelter for one woman who had resided there previously and was living in shelter-affiliated housing when she was interviewed). Of the five interviewees who had never resided at ACM, three were from non-EU countries (one of whom had resided in a shelter in Rotterdam) and two were from EU countries other than the Netherlands.

At the time they were interviewed, none of the participants were still in their trafficking situations or in contact with their traffickers. The vast majority of the women residing at ACM during the fieldwork period were victims of sex trafficking, but a small proportion were victims of labour trafficking. Only sex trafficking victims were included in the sample due to concerns that the experiences and characteristics of these two categories of trafficking victims diverge in significant ways. The sample was largely representative of human trafficking victims in the Netherlands detected from 2013 through 2016 as approximately 80 percent of presumed victims

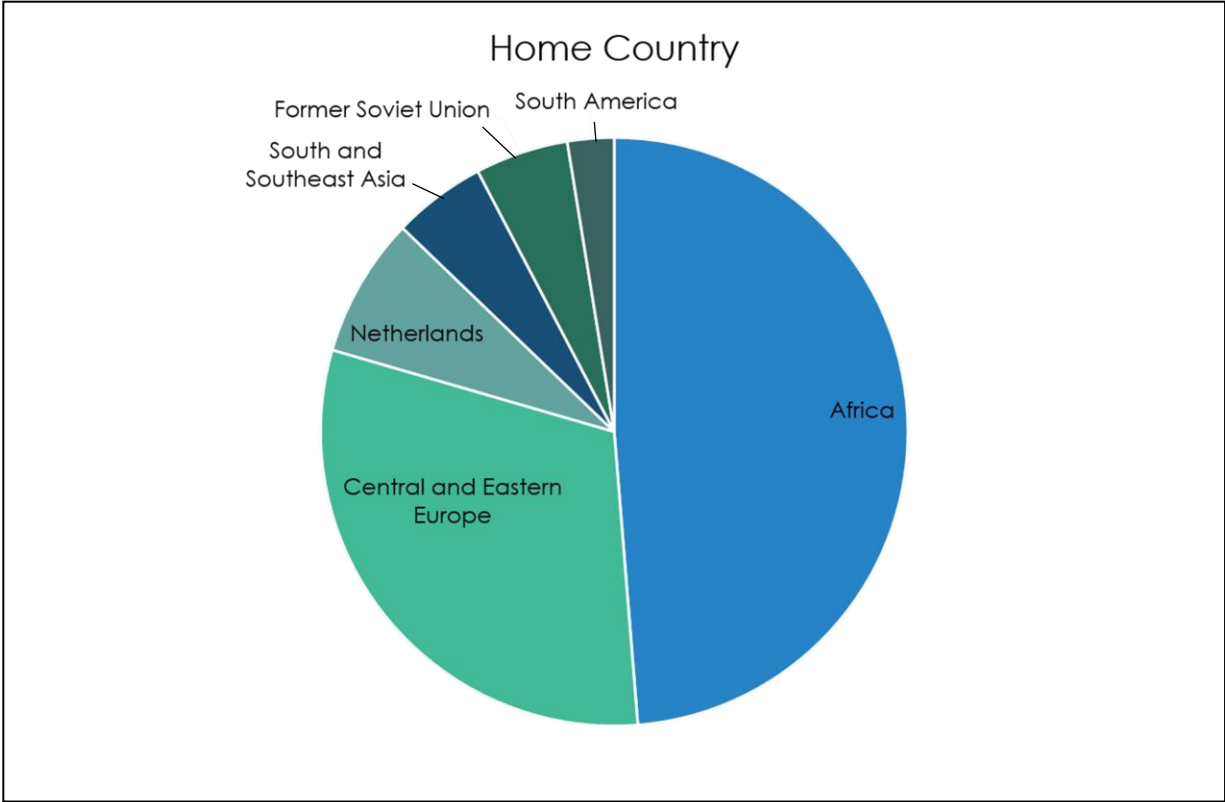
were female and about 75 percent were trafficked for the purpose of sexual exploitation (GRETA 2018a: 8). Though I did not ask the participants about how they had ended up in their trafficking situations, the most of those who volunteered this information had either accepted deceptive job offers abroad or had been coerced or manipulated into doing sex work by romantic partners, which have both been identified as common routes into sex trafficking victimization (Dettmeijer-Vermeulen 2012: 286; Crawford 2017: 107-108; UNODC 2014: 32). In the Netherlands, the latter situation has been referred to as the ‘loverboy’ phenomenon (Dettmeijer-Vermeulen 2012: 286).

Nearly all participants were in the early stages of the criminal justice process when they were interviewed for this study. In the Netherlands, after trafficking victims are identified, they are given a three-month reflection period, during which time they must decide whether they want to “press charges” against their traffickers. Victims who agree to do so are then interviewed by the police for the investigation of their case. The police then provides the Public Prosecution Service (OM), which oversees criminal investigations and has authority over the police, with information about the case (Hein van Kempen 2009: 11). The prosecutor can then request that an investigative judge initiate a judicial preliminary investigation (ibid.9). The investigative judge has the power to question witnesses, including victims, during this pre-trial investigation (ibid.). However, only the prosecutor has the power to decide whether to file charges against the suspect (ibid. 9, 11). If he or she decides to do so, then the case proceeds to court before a trial judge, who can also order the prosecutor to summon witnesses to appear in court (ibid. 10, 26). Yet, a prosecutor can close a case without prosecuting the suspect if he or she does not believe that a conviction can be reached (e.g. due to a lack of evidence) or for “reasons of public interest” (ibid. 11), which is a common occurrence in THB cases (GRETA 2018a: 24). Among

the research sample, nearly half were in the reflection period, while more than a third were either in the investigation stage (several for over a year) after having pressed charges or whose cases had been closed while in this stage. Only one participant's case had reached conviction by the time of the research interview. Another interviewee had been brought back to the Netherlands from her home country to testify (though it was unclear whether this was before an investigative or trial judge).

Fortunately, the shelter staff did not restrict who I could invite to participate in my study and therefore I could largely avoid the selection bias that often occurs when gatekeepers hand-pick research participants (Brunovskis and Surtees 2010: 16). I was able to roam the shelter freely and could approach any person I saw. I could even knock on women's doors to introduce myself and inform them about my research (though there was no guarantee they would answer). I made an effort to invite all sex trafficking victims who were sufficiently stable and had resided at ACM for at least one week to participate. However, the aforementioned selection bias was an issue with respect to the 15 percent of participants not residing at ACM, whom I had relied on gatekeepers to recruit. Some gatekeepers may primarily recruit 'successful cases' in an attempt to cultivate positive impressions of their organization among outsiders (ibid.) or only invite potential participants whom they think are good communicators, which can skew results. In the present study, there were no indications that this was the case and selection bias only potentially impacted a very small proportion of the research sample.

Figure 1. Regional Breakdown of Sample.



IV. Data Collection

A. Methods

I utilized the qualitative methods of ethnography¹⁰⁹ and semi-structured interviews to collect the data. A significant advantage of these methodologies is that ‘[i]n-depth, qualitative research . . . allows “individual women’s understandings, emotions, and actions in the world [to] be explored in those women’s own terms”’ (Bosworth, Hoyle, and Dempsey 2011: 773 citing Jayaratne and Stewart 1995: 217). Furthermore, ‘[q]ualitative research allows the careful investigator to obtain a richer and more intimate view of the social world than can be achieved with more structured methods’ (Bachman and Schutt 2017: 281). Immersing myself in shelter life afforded me an unobstructed and ‘intimate’ view into the structure and everyday dynamics of women’s post-trafficking experiences. As a ‘participant observer’, I openly acknowledged my role as a researcher but also participated in group activities and other facets of shelter life (ibid. 258). Within this ethnographic context, I was able to lay the groundwork for interviews with women residing in the shelter. Semi-structured interviews enabled me to explore a ‘sequence of themes’ with participants while allowing for the flexibility to follow up on their answers and adapt my questions to their specific situations (Kvale 1996: 124). The major themes covered in the interviews correspond with the results chapters in this thesis: experiences with criminal justice actors and institutions, decision-making with respect to participating in the criminal justice process, and testifying, protective measures, and sentencing. The semi-structured interview guide is contained in Appendix A. The questions contained in this guide are rooted in

¹⁰⁹ While I spent substantial time at the shelter interacting with residents and staff and participating in activities alongside them, some may contend that I did not conduct ‘true’ ethnography because I did not reside at the shelter and, in their view, the amount of time I spent there was not sufficient to count as ethnography. Whether this research comprises ‘real’ ethnography or simply embodies elements of the ethnographic approach does not detract from my confidence in the findings.

elements of the HRBA to THB and tailored to the types of lived experiences the sample was likely to have. For example, as the vast majority of participants resided at ACM or affiliated housing, they were very likely to have had contact with police and lawyers (which I learned during my scoping visit), and of course, shelter staff. Furthermore, in accordance with the HRBA values of participation, inclusion, and empowerment, I included questions aimed at eliciting participants' ideas about how to improve the criminal justice process and post-trafficking support system for victims.

B. *Gaining and Maintaining Access*

Gaining research access to trafficking victims is often challenging, as is the case with many vulnerable and hard-to-reach populations (Bosworth, Hoyle, and Dempsey 2011: 769-773, 775; Brunovskis and Surtees 2010: 13-15; 17; Segrave, Milivojevic, and Pickering 2009: 27). Barriers to access include victim and gatekeeper mistrust of the researchers (Brunovskis and Surtees 2010: 14-15; 17) and gatekeepers' concern that trafficked individuals would be re-victimized through participation in research (Bosworth, Hoyle, and Dempsey 2011: 772) or that their safety would be otherwise jeopardized (Segrave, Milivojevic, and Pickering 2011: 27).

The process of gaining access in the present research started well before I commenced my DPhil studies and was years in the making. In 2011, while I was working as an attorney at a large law firm in New York, I was offered the opportunity to join the team representing a new *pro bono* client: Not For Sale (NFS). While I was insecure about my ability to handle a transactional matter as my experience and skills were primarily litigation-focused, I had an interest in human trafficking (based on the little I knew about it) and wanted to learn more. After

a moment's hesitation, I agreed to be staffed on the matter.¹¹⁰ Little did I know then that this would lead to a newfound passion and forever alter the course of my career.

Shortly after commencing work on the matter, our *pro bono* team was invited to attend NFS's Global Forum on Human Trafficking in Sunnyvale, California. It was there that I met the head of NFS Netherlands, Toos Heemskerk-Schep. She drew on her two decades of experience working with women trafficked to Amsterdam's Red Light District. Having spent significant time in Amsterdam, I was shocked to learn the extent of the trafficking problem there. The stories she related brought me back to my semester abroad at the University of Amsterdam, during which I exchanged smiles with the 'women in the windows' countless times while walking to and from my law and Dutch language classes. I had always made an effort to make eye contact with these women and smile as I was passing by to express my respect for them as human beings. I felt a strong urge to acknowledge their humanity, particularly in the midst of gawking tourists and leering customers. While I often wondered about their stories, it never occurred to me that many, if not most, of them were not sex workers by choice.

I approached Toos, following her presentation, to introduce myself and let her know how much I had learned from her talk. We spoke for a few minutes and then parted ways to attend the next session. I did not see Toos again during the Global Forum, but left the two-day event with significantly more knowledge about human trafficking and a renewed appreciation for the opportunity to work with NFS on a *pro bono* basis. Over the course of the next year, I engaged in a great deal of research, reflection, and soul-searching, and concluded that I should pursue this doctoral research. I reached out to Toos about my proposed study and she agreed to meet with

¹¹⁰ The phrase, 'staffed on the matter', means that an attorney has been made a part of the team responsible for representing a client in a particular case, transaction or other legal matter.

me when she was next in New York. In the meantime, she reached out to the leaders of NFS, with whom I had been working in a legal capacity, to find out more about the quality of my work and my character. She revealed to me during our in-person meeting that their positive feedback about me had increased her willingness to help me with my research. Toos also had many questions for me concerning my motivations for wanting to conduct the study and the logistics of carrying out the fieldwork. She listened very intently and I was nervous that my answers would not convince her that I was up to the task and could be trusted to interview vulnerable and traumatized women. It is true, at least in the case of this research, what Bosworth, Hoyle, and Dempsey (2011: 776) assert: '[i]f academics are to obtain access to victims of trafficking, then they need to persuade victim advocates to trust them'. Thankfully, I managed to achieve this: after I had answered all of Toos's questions, she responded that she thought my research was worthwhile and would facilitate my access to participants.

In October 2014, I travelled to Amsterdam for a 'scoping' visit to work out logistics with Toos as I was ready to commence fieldwork. While there, Toos arranged for me to meet with other 'gatekeepers' working directly with victims, including the head of the human trafficking unit in the Amsterdam police and the Care Coordinator at ACM. Trafficking victim service providers are a tight-knit community in Amsterdam, which facilitates collaboration with respect to victim assistance and also benefitted my research. Since NFS in Amsterdam only held activities for victims a couple of times a week (it was more focused on outreach to *suspected* victims), Toos suggested that I base my fieldwork at ACM, as I would have greater opportunity to gain access to victims there. I agreed, and she liaised with the Care Coordinator at ACM, Mill Bijnen, on my behalf. When Mill and I met to discuss my research, I could tell that Toos had

already ‘vouched’ for me. Toos’s endorsement proved invaluable; Mill quickly granted me access to the shelter and I began fieldwork the following month.

While being granted access via ‘gatekeepers’ was a relief, it was no guarantee that any trafficking victims would be willing to participate in my research. As Bilger and van Liempt (2009a: 10) point out, researchers are ‘naturally viewed with suspicion’, particularly by vulnerable individuals, and must ‘find ways to “gain access” to their subjects’. I experienced this suspicion first-hand; for example, one participant revealed that she had believed I might be an undercover police officer when we had first met. Bilger and van Liempt (2009b: 121-122) further argue that a ‘prerequisite for every successful qualitative interview is the building up of a trustful relationship between interviewer and narrator’, particularly when the research concerns sensitive topics, as is the case with the present study. I took seriously the necessity of building up trust and rapport with the women (not merely to gather the best data, but also because I respected and cared about them). To accomplish this, I spent significant time in the shelter making myself visible to and engaging with the women residing there, such as by attending group activities and assisting with English classes. I also made an effort to be open about myself as ‘[s]elf-disclosure and its ensuing response formulate the core process in the construction of trust’ (Weber and Carter 1998: 16). I find Oakley’s (1981: 41) argument that ‘in most cases, the goal of finding out about people through interviewing is best achieved when the relationship of interviewer and interviewee is non-hierarchical and when the interviewer is prepared to invest his or her own personal identity in the relationship’ compelling. However, unlike Oakley, I did not decide to answer all questions the participants posed to me ‘as fully as was required’ (ibid. 47). Specifically, I made a conscious effort not to reveal any opinions or hypotheses for the study that could lead participants to provide particular answers to the interview questions. For

example, I did not share my opinion about appropriate sentences for traffickers as doing so may have influenced their answers to my questions about this topic. Though Oakley (ibid. 51, 58) does not seem concerned about the spectre of bias, I was and took steps to guard against skewing the results. In addition to withholding certain opinions both within and outside of the interview context, I sought to provide neutral yet non-judgmental and supportive responses to participants' answers to interview questions. General examples are 'I understand what you mean' and 'thank you for sharing that with me'. When an interviewee related a negative experience, I expressed my understanding that it was very difficult for her. Overall, I communicated genuine interest and compassion through my responses, facial expressions, and body language while avoiding the impression that the participant was giving the 'right' or 'wrong' answers. This was challenging at times, especially when an interviewee's answer took me by surprise. For instance, when asked how she felt about testifying against her trafficker in court, one woman exclaimed that she will 'give her a slap and . . . will tell the police to get her arrested' (Interview #7). My first instinct was to laugh at the image of her slapping the defendant in the middle of court proceedings that popped into my head, but I managed to contain myself as I did not want her to think that I was laughing at her or not taking her views seriously.

In general, I found that women who I had spent more time getting to know and building rapport with prior to interviewing were more forthcoming with me than those with whom I had had little interaction beforehand. I also had my doubts about the truthfulness of certain responses from a couple of interviewees in the latter group. Urada and Simmons' (2014) research with female sex workers in the Philippines speaks to these concerns. The participants in their study emphasized that 'they could offer truthful answers' to interviewers that they knew and with whom had rapport (ibid. 33). In contrast, participants expressed serious concerns about

confidentiality in cases where they were not familiar with the interviewer (ibid. 34). This highlights the importance of taking time to engage with potential interviewees and build rapport prior to conducting interviews, which I was able to do with most of the women in my study. Though this is a time-consuming process, it is worth the investment as it increases the likelihood that participants will trust the interviewer and feel comfortable during the research process. On the whole, I believe that I was successful in building rapport with the participants. This is supported by the finding that a third of the interviewees reported that they chose to participate in the study due to their positive perception of me as the researcher.

It was challenging to simultaneously manage my relationships with both the shelter staff and residents. At times, I felt like I was torn between two opposing teams. I believe this was tied to the power relations within the shelter: the staff controlled significant portions of residents' lives, and many residents resented this control.¹¹¹ In addition, it appeared that these two groups generally considered themselves categorically different from one another—likely rooted in differences in background, access to resources, and life situation. In the beginning of my fieldwork, I felt that the staff 'team' members considered me to be more aligned with them, but by the end, I felt greater acceptance from the residents. This may be attributable to the comparatively greater amount of time I spent with residents for ethnographic purposes.

*C. Linguistic Challenges*¹¹²

I did not want to limit the representativeness of my sample by only including English speakers, but I knew that using interpreters would pose its own set of challenges, not least of which was my limited funds as a doctoral student. I decided whether or not to use interpreters on

¹¹¹ For an in-depth discussion on this issue, see Chapter 4.

¹¹² The bulk of this section was published on the Border Criminologies blog on 26 July 2016.

a case-by-case basis, in view of potential participants' English language abilities and interest in taking part in my research. I chose to use interpreters with some participants who spoke a moderate amount of English and may have been able to participate in an English interview because I wanted to ensure that they could express themselves in a nuanced manner.

Furthermore, I wanted these participants to be able to focus on the substance of the interview rather than on finding the right words to articulate their thoughts in a language in which they were not entirely comfortable.

During the fieldwork, 14 of the interviews involved interpreters and 25 were conducted in English. The non-English interviews were carried out in 11 different languages. While the rhythm of the English interviews differed from the ones involving interpreters, the data that emerged from both types tended to be similar in quantity and depth. The primary difference was procedural: interviews involving interpreters tended to be much longer due to the repetition of all communications in another language. This required stamina, patience, and focus from everyone involved.

When selecting interpreters, it is important to consider the characteristics of the research sample, particularly when dealing with vulnerable populations. As most of the participants in my study had experienced trauma at the hands of men, I made every effort to find female interpreters and was successful in doing so in all but one case. I also sought interpreters who had had previous experience working with human trafficking victims and were familiar with the level of patience and sensitivity that is often required when communicating with them.

I observed that having the interpreters physically present during interviews appeared to facilitate their rapport with the participants, as compared with involving the interpreters via telephone or Skype. This is likely attributable to factors such as increased eye contact and

opportunity for chit-chat prior to the interview when interpreters are physically present. Moreover, poor telephone or Internet connections, which can negatively impact the clarity and quality of communication, are not an issue during in-person interpretation.

Recruiting and arranging interviews for non-English speakers was particularly challenging, as I did not want to risk exhausting my goodwill with interpreters by calling them into the research site outside of the actual interviews. While gestures, body language, and drawings (of clocks, calendars, etc.) are quite useful for building initial rapport and scheduling interview appointments, such techniques are not sufficient to explain the substance of the research study. For purposes of explaining my research to potential participants, I found it helpful to have interpreters translate a short blurb about the study into the relevant languages. Doing so allowed for greater accuracy and precision than using Internet translation mechanisms, such as Google Translate. However, using written materials only works with potential interviewees who are literate. In the few cases in which they were not, I arranged for interpreters to read the blurb to them over the telephone (to ensure correct pronunciation), which required a bit more coordination.

Whilst offering clear benefits, using interpreters in qualitative research does raise certain concerns. One of the most significant is the risk that meaning will be lost during the interpretation process. I took precautions against this by asking the interpreters to translate word-for-word as closely as possible (rather than summarizing), requesting that participants pause during longer answers to allow for interpretation, and asking participants to repeat themselves or clarify if there was any uncertainty about what was said. At times, I needed to remind interpreters or participants of these procedures during the interviews, which occasionally disrupted the flow, but was important for data accuracy.

Another issue is confidentiality. Participants may fear that the confidentiality of their responses could be compromised if a third party is listening to the interview and may be less forthcoming as a result. If an interpreter is from the same village or local area as the participant, the latter may be concerned that his or her personal information could be communicated to family, friends, or neighbours, leading to gossip and potential stigma. Yet, this concern must be counterbalanced with the need to use an interpreter who speaks the same dialect as the participant, in the interest of accurate and precise interpretation. This issue can often be addressed by using an interpreter from the same general region as the participant but from a different village, town, or city. Furthermore, I discussed the importance of maintaining confidentiality with interpreters prior to beginning any interview and obtained their verbal agreement to do so.

A third concern is cost. Hiring interpreters can be prohibitively expensive, particularly if they must travel a long way to the research site. Luckily, my fieldwork was mainly conducted in Amsterdam, which is a diverse city that is home to many interpreters covering a wide array of languages. I was also fortunate enough to find several interpreters who were supportive of my research and were willing to assist with interviews at no cost (or in one case, in exchange for editing her English writing). Nearly all were professional interpreters and the two who were not still had had considerable interpretation experience.

Overall, I am satisfied with the quality of my data and believe that the thought and effort I put towards communication and interpretation issues were well worth it. The invaluable assistance I received from interpreters has enabled my research to paint a far richer and more representative picture of sex trafficking victims' experiences with the criminal justice process than would otherwise have been possible.

D. *Other Challenges*

Another challenge I encountered during fieldwork was that women residing in the shelter often missed, cancelled or rescheduled our interview appointments. This could be due to the effects of trauma, as Jenkins (2013: 391-392) notes that missing and arriving late to appointments are common behaviours among trauma survivors. Another possibility could be that they were anxious about the interview and engaged in avoidance tactics. Prior to rescheduling missed interview appointments, I reminded the women that participation was voluntary and they did not have to reschedule if they no longer wished to participate. Most of the women who missed or cancelled appointments ended up participating in my study eventually, but at times this took several scheduling attempts. I was careful not to reveal any frustration I felt about this issue to participants to avoid the possibility of guilt-tripping them into participating or sounding insensitive about their situations.

A couple of the participants had difficulty providing relevant information in response to my interview questions. It is unlikely that this was intentional as these women appeared to be genuinely trying to engage with me during their interviews. One woman in particular was intent on communicating her full 'trafficking story' chronologically regardless of what I asked her. Perhaps she thought that this was what interviewers wanted to hear, since victims must answer interview-like questions about their trafficking situations from staff when they first arrive at the shelter, and then from police officers and lawyers if they decide to press charges. I listened attentively to her answers, even though they did not include much information relevant to my study, as I wanted her to feel 'heard' and remain true to the principle that interviewees were in control of the information conveyed during the interviews.

E. *Limitations*

As with most empirical research, the research methods and study design for this project have certain limitations. One such limitation is that the sample may not be entirely representative of sex trafficking victims in the Netherlands because randomization was not used and the participant pool did not cover all trafficking destinations in the country. However, a variety of trafficking destinations (as well as regional institutions such as police departments) were represented as victims were often placed in shelters located in a different city or region from where they had been exploited due to safety concerns (namely, to reduce the risk that their traffickers would find them). Further, there are likely differences between assisted and unassisted sex trafficking victims (Brunovskis and Surtees 2007: 151; Brunovskis and Surtees 2010: 7). For example, Brunovskis and Surtees's (2007: 8-10, 64-72, 87-90, 113-133) findings suggest that victims who decline assistance may be less trustful of police and service providers (e.g. due to negative experiences with them in the past), have greater access to other sources of support such as strong family or community relationships, desire more tailored services than are available, and/or have a greater fear of social stigma related to identification as a trafficking victim, as compared with those accepting assistance. Moreover, there are likely differences between victims who are and victims who are not offered assistance in the first place (whether or not they accept it). Since all of the participants in the present study had received at least some type of assistance (though a few had declined certain forms offered to them), the results are unlikely to be wholly generalizable to unassisted victims.

Another limitation potentially impacting on representativeness and generalizability is possible self-selection bias. The victims who chose to participate in the study may differ in certain respects from those who did not, and, if so, these differences may have impacted the results. For example, victims who are extremely distrustful of others may have declined to

participate on this basis and may also have had different experiences with criminal justice actors from those who had participated in the study due to the former group's reluctance to communicate information about themselves and their situations.

In addition, the generalizability of the results may be limited because I drew most participants from ACM. Victims receiving services from another shelter or provider may have had different experiences, support, and information. Yet, if these discrepancies do exist, their impact would likely have been limited to results regarding shelter and legal services, and not have coloured information about other topics, such as victims' experiences with police, opinions about testifying and protective measures, and views on punishment. This is likely to be the case because almost all participants had interacted with the police outside of the shelter and opinions about testifying and sentencing are not typically discussed among shelter staff and residents (most residents' cases do not even get close to reaching these stages while they are residing in the shelter, or ever). As for generalizability of the results beyond the Netherlands, this is possible, at least to a certain extent, as the vast majority of participants were trafficked from common 'source' countries whose citizens are often trafficked to other destination countries as well. Thus, there are certain vulnerabilities, experiences, and perspectives that the participants are liable to share with others from their home country and culture, which render the results generalizable beyond the Netherlands, albeit with a certain degree of caution.

Lastly, the research is limited by issues related to the stage of the criminal justice process participants were in at the time they were interviewed for this study. First, the fact that interviewees had had differing degrees of exposure to the criminal justice process is an issue because victims' opinions about the process and its actors may change over time and depend upon the extent of their exposure. Second, most participants were in early stages of the process

(or had had their cases closed at a relatively early stage), and therefore had not had experiences with certain criminal justice actors, including prosecutors, investigative judges, and trial judges. On one hand, it would have been more helpful to have been able to interview victims following their final contact with the criminal justice system so that they could reflect upon their entire experience with the process, but this was not logistically possible given the abruptness with which many had had to leave the shelter and the difficulty of successfully contacting them following their departures.¹¹³ In addition, most of my attempts to make contact with victims whose trafficking cases had already gone to trial in the Netherlands were unsuccessful. On the other hand, given the lengthiness of the full criminal justice process, which typically takes years, there are benefits to interviewing victims while their initial experiences with criminal justice actors and service providers, as well as their thought processes during the early stages, are fresh in their minds. Furthermore, victims' perspectives on testifying and other aspects of participation in the criminal justice process can feed into their decisions during the reflection period, and thus there is additional value in capturing their perspectives at an early stage, when they are more likely to recall the nuances of their decision-making processes.

In spite of the foregoing limitations, the data is valuable and significantly increases our understanding of sex trafficking victims' perspectives and experiences in the aftermath of their victimization. This, in turn, allows us to analyse the extent to which a victim-centred HRBA is employed, and ways to further develop its application in the future.

V. An Ethical, Feminist Approach

¹¹³ I attempted to contact several participants after they had left the shelter and found that mobile phones were quickly disconnected or emails unanswered.

Primary research with vulnerable populations is fraught with complex ethical concerns. Thus, it is unsurprising that the University of Oxford Interdivisional Research Ethics Committee for the Social Sciences and Humanities (SSH IDREC) required a detailed description of the research approach and assurances that I had anticipated and considered appropriate responses to a wide array of ethical concerns prior to approving my study. I therefore had to persuade the Committee that I had in place measures to protect confidentiality and anonymity, to secure data storage, to ensure my own safety and well-being in the field, and to mitigate the impact of vulnerability on participants' ability to give free consent. After providing such assurances and detailed information about the research plans, I received approval for my study and was able to begin fieldwork.

The interviews were planned and conducted in accordance with the guidelines and principles contained in the *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women* (Zimmerman and Watts 2003). These recommendations represent basic standards for interviewing women who have experienced or are currently experiencing trafficking victimization (ibid. 1). Some of them overlap with more general social science research ethics standards, such as the necessity of obtaining informed consent and maintaining participant confidentiality and anonymity (ibid. 4). Others apply specifically to conducting primary research with trafficking victims and other vulnerable and at-risk populations. Examples include avoiding re-traumatization, preparing for emergency interventions should a participant reveal that she is in imminent danger, and ensuring that research results have beneficial practical applications for trafficking victims (ibid. 4, 23-27).

This doctoral study embodies the second-wave feminist approach to research, which seeks 'to restore dignity and humanity to those . . . studied by eschewing imbalances in power

between the scholar and subject, levelling hierarchy, and letting women themselves speak as authorities about their own lives' (Rock 2007: 44 citing Oakley 1981). I reflexively engage with my own positionalities to explore and challenge embedded power dynamics in the research relationships throughout this study. Moreover, I embrace the feminist criminological 'methodology and epistemology that restored a voice to those whom it studied' (Rock 2007: 46). '[R]ecognizing participants as the experts on their own experiences' promotes their 'agency' (Bilger and van Liempt 2009a: 6), which is also a cornerstone of the human rights approach (see Jordan 2002: 30; Pescinski 2015; Rijken and Römken 2011: 81, 94). In this regard, feminist criminological and human rights frameworks converge to reject the conceptualization of trafficking victims as 'passive objects' (Jordan 2002: 30) and to recognize them as agentic beings possessing significant self-knowledge.

Throughout this study, I have embraced the feminist principle that research should not solely be undertaken for the sake of knowledge, but should also benefit women individually and/or collectively (Bilger and van Liempt 2009a: 6; Nencel 2014: 77; Wasserfall 1993: 26). On an individual level, I took the time to attentively listen and provide support to women who wanted to talk to me, both within and outside of the interview context. I also assisted the shelter residents with English tuition, informed them about the existence of resources (e.g. the computer room in the shelter, NFS's cooking lessons), and organized clothing donations for those without adequate clothing. On a collective level, I am advocating for the research results to be used as a springboard to inform the development of human rights-based, victim-centred law and policy. Trafficking victim perspectives remain under-researched and are generally insufficiently accounted for in state responses to the issue. For example, the Bureau of the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, the body

responsible for evaluating and recommending policies on human trafficking to the Dutch government, conducts extensive research on trafficking in the Netherlands, but none of it involves primary research with victims. Through the wide dissemination of my research, I can draw policymaker and public attention to victims' experiences, needs, and rights within the criminal justice process in order to foster the development of law and policy that is truly victim-centred.

A. *Vulnerability*

Some researchers have avoided conducting primary research with trafficking victims on ethical grounds, arguing that it 'can be intrusive and unsettling for people in vulnerable situations' (Coghlan and Wylie 2011: 1517). However, there is 'evidence in the academic literature that victims of even serious violence [including human trafficking victims] want their voices heard, even though they themselves acknowledge that telling their stories might be painful' (Bosworth, Hoyle, and Dempsey 2011: 773; see also Brunovskis and Surtees 2010: 19). Moreover, Brunovskis and Surtees (2010: 19) found that participating in research interviews can be empowering and provide an emotional release for trafficking victims. There is support for this finding in a number of participants' explanations of why they chose to be interviewed for the present study. Regarding emotional release, one woman explained, 'what I've learned here [in the shelter] is that when you talk about your problems, it feels like a relief' (Interview #39). Similarly, another interviewee asserted, 'well, it's good, I need to talk, it's good when I talk to people like you' (Interview #12). Approximately a third of interviewees explained their participation as a means of empowerment, through which their voices could be heard and promote change that could benefit other victims. For example, one woman stated that she chose to be interviewed for the study '[b]ecause maybe I'm the voice that help[s] others. Yeah, I

believe in everything happened with a reason, you know. Maybe this happened to me to get a conversation with you. You never know. Maybe I'm the one that will help the other girls' (Interview #30). Another participant felt empowered by the opportunity to communicate her views about the need for institutional change:

It was nice, like I said, to express my ideas about this because yeah, there is—at least maybe it's gonna help in certain ways in the future or just—it's just nice to express 'cause I'm disagreeing with the system *a lot* but I don't know what to do about this, so maybe you will know in the future or somebody else will know who will read your ideas. (Interview #37).

In the present study, participants were not asked to share the details of their trafficking situations, but rather interviewed primarily about their post-trafficking experiences. Explaining this distinction to potential participants appeared to put some of their minds at ease and facilitate participation. Brunovskis and Surtees (2010: 20) also found this to be the case in their research involving interviews with victims. This makes sense as 'many victims of trafficking may be reluctant to relive their trafficking experience (or issues related to it), a concern which appears to be particularly acute for victims who are in assistance at the time (particularly the early stages of assistance)' (ibid. 17-18). In light of this higher level of vulnerability at the start of assistance, and the often disorienting adjustment period immediately following victims' exit from a trafficking experience, I refrained from interviewing anyone residing at the shelter who had arrived less than one week earlier. Very few of the participants staying in the shelter had been there for less than one month at the time they were interviewed, and for those in this category, I took special care to assess their stability and vulnerability on a case-by-case basis prior to proceeding with their interviews. More generally, I refrained from pursuing interviews with women who exhibited signs of emotional and/or psychological instability as the risk of re-traumatization and other harm would have been too great. This course of action comports with

the WHO recommendations of ‘do no harm’, ‘know your subject and assess the risks’, and ‘do not re-traumatize a woman’ (Zimmerman and Watts 2003: 4-12; 23-24).

The participants in the study were also very economically vulnerable. The vast majority lacked legal permission to work in the Netherlands and all but one was reliant on a small government benefit that barely covered their basic necessities. Many were also concerned about the poor financial situation of their families back in their home countries. Indeed, desperation to escape from poverty and improve the economic situation of oneself and one’s family is often the main catalyst for trafficking victimization in the first place (Cameron and Newman 2008: 22-23). Although I lacked the funding to offer financial incentives to potential participants, I would not have chosen to do so even if it were possible as I would not have wanted to take advantage of trafficking victims’ economic vulnerability to secure participation in my study, which could amount to ‘inducement’.¹¹⁴ I put a great deal of thought and effort into guarding against forces and situations that may have undermined victims’ exercise of agency with respect to their genuine participation preferences.

B. *Informed Consent*

“‘[I]nformed consent’ is a central concern of research ethics as an expression of human agency’ (Hugman, Bartolomei, and Pittaway 2011: 656). Ethical research principles require researchers to respect the agency of potential participants by facilitating their ‘exercise of choice and control over their involvement’ in the study (ibid. 657). The issue of informed consent is particularly complex when carrying out research with vulnerable populations (ibid. 659-661), including trafficking victims. Reasons for this may include barriers to understanding the full

¹¹⁴ ‘Inducement’ occurs when ‘people might be encouraged to participate [in research] because of a type of personal gain in a way that cannot be accepted as informed consent’ (Hugman, Bartolomei, and Pittaway 2011: 667).

implications of giving consent (e.g. communication difficulties and post-traumatic stress), offering consent based upon “gratitude” towards someone from the sort of background that researchers represent [for] paying attention to [their] plight’ (ibid. 667), and vulnerability to inducement (ibid.). With the foregoing considerations and principles in mind, I approached the issue of informed consent in this study.

I spent significant time carefully reviewing the consent form (see Appendix B) and participant information sheet (see Appendix C) with each potential participant and obtaining her informed consent prior to commencing an interview. I brought copies of the two forms in both English and French, as a number of victims residing in the shelter spoke French. Interestingly, when I asked participants if they preferred to read the forms on their own or have me summarize and explain their contents verbally, most chose the latter. I suspect that in many cases this was due to poor literacy skills, which several of these women had indicated. At times, it was difficult to find a pace and level of detail while reviewing the documents that both conveyed sufficient information and kept the participant’s attention. This was especially challenging when there was an interpreter involved, as this added complexity and time to the process. I found it helpful to vary my intonation and maintain eye contact as much as possible, as well as to make my explanation interactive rather than a monologue, such as by regularly asking the participant if she understood or had any questions.

Whether the participant read the consent form herself or I explained it to her, I made certain to emphasize that she could refuse to answer any question and withdraw from the study at any time without explanation. I also raised this option at any point during an interview when the interviewee appeared hesitant, emotional or stressed. Establishing that the participant was in control of the information she conveyed during the interview—the nature of the information as

well as the level of detail—shifted the balance of power from myself, as the researcher, towards the researched.

In one case, I concluded that I could not ethically proceed with an interview despite having received consent from the potential participant. Though this woman had appeared stable, yet slightly hyperactive, during the several times I had interacted with her previously, she seemed quite distressed at our interview appointment. She explained that she was upset because she had misplaced her money, but that we should still do the interview. To avoid the risk of adding to her stress, I asked the interpreter to convey that it would be no problem to reschedule the interview for another day instead, when she was feeling better. After several attempts to convince us to proceed with the interview, the woman agreed. A moment later, she burst into tears, told us how lonely she was, and said she wanted to call her mother in her home country. I persuaded her mentor to allow her to do so. In the following days and weeks, I observed this woman behaving erratically. I concluded that I was unsure of her ability to give informed consent and that there was a risk that her participation would harm her precarious mental state. Thus, I declined to reschedule her interview for ethical reasons.

C. Confidentiality and Anonymity

Confidentiality and anonymity are serious issues that implicate participant safety and privacy when conducting research with trafficking victims. For example, if it became known that a particular woman had participated in my study, her traffickers may have been able to track her down at ACM and harm her. Furthermore, participants often conveyed highly sensitive and personal information to me and thus maintaining confidentiality and anonymity was essential to their privacy.

In accordance with the assurances contained in the consent form and participant information sheet, I took steps to ensure the confidentiality and anonymity of the participants. All interviews were conducted privately in a room with the door closed. Other than interpreters (with whom I had discussed confidentiality requirements), there was only a third party present during three of the interviews, at the explicit request of the participants (one woman's psychologist and two women's friends).

There is only one copy of each signed consent form and it is securely stored in a locked filing cabinet. For the most part, the interview recordings do not contain participants' names, and during transcription, each interview was assigned a number and all potentially identifying information (such as hometown names) was redacted. All recordings and transcriptions are saved on two password-protected devices, which only I can access.

D. *'Turning in upon Ourselves' (Chiseri-Strater 1996): Reflexivity*

'Embedded within the research process are relationships of power that all researchers must face' (Pillow 2003: 182). Reflexivity is essential in this regard as 'the ability to lay open, understand and manage equitably relationships between the researcher and the researched' (Ward and Wylie 2014: 251; see also Nencel 2014: 76). It is a key component of feminist research that enables power inequalities among the researcher and the research subjects (which typically favour the former) to be understood, questioned, and addressed (Nencel 2014: 81; Ward and Wylie 2014: 251-253). While there is some disagreement about how reflexivity should be conceptualized and carried out (Nencel 2014: 76; Pillow 2003: 180; Ward and Wylie 2014: 253; Wasserfall 1993: 24-25), 'the careful monitoring of one's own subjectivity . . . is at the core of any use of the term' (Wasserfall 1993: 25; see also Ward and Wylie 2014: 253). In addition to recognizing the 'influence of self', Ward and Wylie (2014: 253) place appreciating the

‘dynamics between self and others’ at the heart of reflexivity. In doing so, the researcher is able to foster ‘egalitarian, non-authoritative and intersubjective’ research relationships (Nencel 2014: 77).

1. Reflections on my ‘Positionalities’

The most common form of reflexive analysis among feminist researchers ‘deconstructs the researcher’s positionality’ (Nencel 2014: 76). ‘Positionality’ is defined as one’s ‘situatedness’, including ‘given attributes such as race, nationality, and gender which are fixed or culturally ascribed’ as well as ‘subjective-contextual factors such as personal life history and experiences’ (Chiseri-Strater 1996: 116-117; 119). According to Nencel (2014: 77), a ‘researcher’s positionality unintentionally reveals cultural meanings and gives glimpses into the intersubjective research relations’. I am keenly aware that my position as an educated, Caucasian, American, Jewish, feminist woman in her mid-thirties with a middle-class upbringing impacted my interpretation of the data, my interactions with victims, as well as their perceptions of me. I endeavoured to maintain this awareness while engaging with participants and dedicated considerable space in my fieldwork diary to reflections on my positionalities. The following are highlights from my reflexive journey.

I believe that the differences in my appearance and presentation from that of the mentors helped me to convince potential participants of my ‘outsider’ status and to trust they could be forthcoming with me about their experiences at the shelter. In addition, women residing there may have felt less comfortable declining participation in my study had they believed that I worked for or was affiliated with the shelter. Brunovskis and Surtees (2010: 19-20) contend that trafficking victims may feel compelled to participate in research when service providers ask them to do so in order to ‘pay back’ the assisting organization or out of fear of losing access to

services. Superficial differences between myself and the shelter staff may have helped to avoid this issue. Most of the mentors looked stereotypically ‘Dutch’, as they were tall with blond hair and blue eyes. In contrast with the mentors, I have brown eyes, dark brown hair, and prominent features—what would be characterized as an Ashkenazi Jewish ‘look’. Coupled with my American accent, my presentation made clear that I was somehow different from the staff and I believe that this fostered impressions of me as an independent outsider rather than as part of the shelter system.

Another issue with ‘insider/outsider’ perception implications was access to keys. As the doors to the offices, activity rooms, staff lunch room, and even some of the toilets¹¹⁵ were usually locked, it was useful for me to borrow a set of keys (with permission) belonging to one of the mentors not working that day, which some kept in their mailboxes. After a few days of wearing keys around my neck as the staff do, I realized that this may give the impression to the residents, particularly the newer ones, that I work for the shelter. At that point, I decided to carry the keys in my bag instead so as to reduce the chance of being perceived as an ‘insider’. In addition, possession of staff keys may be viewed as a status symbol (as residents’ keys do not work on many locked doors in the shelter) and this would be undermine the development of non-hierarchical research relationships.

The fact that I am from New York was surprisingly helpful in building rapport with the women in the shelter. Regardless of where they were from, almost every woman I spoke with responded with intrigue upon learning this about me. None of them had been to New York, but all had heard of it. When beginning to speak with a potential participant for the first time, my

¹¹⁵ The shelter residents primarily used the toilets in their rooms with the exception of a few whose rooms were not en-suite. These residents used a shared toilet in their hallway.

New York roots often came up quite early in the conversation. This turned out to be a useful icebreaker. Many women asked about what it was like there (e.g. whether it was really the way it is portrayed in movies) and/or expressed a desire to visit someday. It was clear they were referring to New York City and though I had grown up outside of the city (but within New York State), thankfully I had lived in the city for several years and could provide detailed answers to their questions about it.

I do not believe I would have been able to conduct this research effectively if I were not a woman. A number of participants expressed their preference for speaking with women and/or their discomfort with men. This is likely a result of trauma they experienced at the hands of men (their clients and most of their traffickers were men), empathy tied to a shared gender experience, and/or cultural factors (e.g. limitations on acceptable interactions with members of the opposite sex). For example, one woman revealed, ‘ever since that [trafficking] experience I really feel uncomfortable around men’ (Interview #34). In explaining why she chose to participate in my study, another woman stated, ‘you are woman like me so I think you can understand what I’m going through’ (Interview #2). My female identity and presentation facilitated my ‘gaining access’ (Bilger and van Liempt 2009a: 10) to the perspectives, opinions, and experiences of the participants. Likewise, I believe that my age assisted in the gathering of the data. I was in my early thirties while conducting fieldwork for this study—though somewhat older than most of the participants, the age gap was small enough that most of the younger ones still appeared to find me ‘relatable’ while the older ones seemed to view me as old enough to be taken seriously as a researcher.

My positionalities no doubt influenced my translation of the data into this thesis. One way I attempted to minimize bias was through the inclusion of a significant number of interview

excerpts, thereby allowing the reader access to original data as a form of ‘textual validity’ (Chiseri-Strater 1996: 129). Moreover, ‘[b]y drawing on the multiple . . . spoken texts of our informants, the narrator can avoid to some degree colonizing or dominating the ethnographic narrative’. In doing so, they can ‘speak for themselves’ to ‘create a polyphony of informant voices’ (ibid. 128). However, Wasserfall (1993: 25-26) rightly points out that, even in ‘multivocal’ works, the researcher ultimately wields the power over how the participants are represented. The researcher’s positionality acts as a lens through which she not only makes observations and attributes meaning, but also determines which voices to highlight and give space to in the final text. For example, my position as a feminist lawyer/social scientist with a longstanding interest in assisting marginalized populations and who has only lived in developed countries influenced my decision to highlight issues of injustice and concrete ways to improve the criminal justice process for trafficking victims. My background and education have empowered me to create change in a considered and methodical way. An individual without experience with (relatively) well-functioning and independent criminal justice institutions and an awareness of the work of human rights organizations may be resigned to accepting certain injustices and feel less capable of creating institutional, legal, and policy change—and, in turn, highlight different aspects of the data instead.

2. Impact of Research upon the Participants

Interviewing participants for this study may have impacted them in a number of ways, particularly with respect to prospective interview questions. For instance, asking victims about their decision-making processes while they are still in the reflection period may help them to organize their thoughts and come to a decision, which they may have been struggling with or avoiding. I spent significant time asking them about this topic, as I wanted to ensure that I

understood the full range of factors they were considering, which increased the likelihood of an impact upon them (though I was careful not to bias them towards or away from any particular decision).

Although the interviews did not cover the details of victims' trafficking experiences, the questions were related to their status as trafficking victims and, at times, certain participants became emotional. Thus, the interviews could have caused them to experience negative feelings and/or provided them with a cathartic sense of release. I made a concerted effort to convey compassion and understanding (both within and outside of the interview setting) and I hope that, in doing so, the positive effect of feeling that another person cares about one's suffering outweighed any negative impact resulting from the recall of painful experiences.

3. Researcher's Experience of the Study

'Feminist research admits that researchers who are caught in emotionally laden research should not only look at the impact of their research [on] participants but also [on] themselves' (Bilger and van Liempt 2009: 7). Though I had had previous experience listening to and writing about individuals' traumatic life events in detail during the course of my legal representation of asylum seekers and domestic violence victims, this did not prepare me for the intensity of an immersive ethnographic experience with trafficking victims. By nature, the suffering of others has always affected me on a deep emotional level. This attribute enables me to more fully understand others' experiences and perspectives (which is helpful in qualitative research) but has also caused me a great deal of personal suffering. Knowing this about myself, I took steps to guard against secondary and vicarious traumatization. Jenkins (2013: 390) contends that, though '[e]mpathy . . . puts us a greater risk for developing vicarious trauma', it 'is an asset, not a flaw, in that we can use this skill to understand and manage our own feelings'. I endeavoured to do

this by reflecting daily upon my experiences and emotions in my fieldwork diary while I was in the field. This exercise provided me with both insights into myself as well as a sense of release. I also leaned on a strong support network, including my partner, close friends, my supervisor, and my ‘therapy cat’ (the sweet feline belonging to my friend who allowed me to stay at her apartment while I conducted my fieldwork). Additionally, I only spent two weeks in the field at a time due to a medical condition requiring fortnightly treatments. While this issue frustrated me during the fieldwork planning stage, it turned out to be a blessing in disguise. Regularly stepping out of the field gave me much-needed time and space to process my emotions, reactions, and experiences.

Still, conducting this research was a powerful emotional experience. For many of the victims I came into contact with, their suffering was apparent. I watched them struggle to deal with the physical, psychological, and emotional wounds from their trafficking experiences. Unsurprisingly, I did notice some symptoms of vicarious trauma start to creep in: I felt sad and angry more often and my ‘world view [began to] shift from hope to hopelessness’ (ibid. 392). I was still able to function in my daily life, but I also felt the strain of negative emotions weighing on me. This sapped my energy and left me distracted, often hearing the women’s voices in my head and picturing them in violent, disturbing, and exploitative situations. I also felt guilty for feeling this way—these were not *my* traumas to overcome. I was not a victim; I was a privileged white woman researching a subject that interested me under the auspices of an elite university. Granted, I had had painful experiences in my life, but nothing rising to the level of those my participants have had to endure. What right did I have to feel traumatized?

Regardless of whether my feelings were legitimate, I did experience some degree of vicarious trauma during and after my fieldwork. I found that one of the most useful strategies to

address this was to focus on the incredible resilience of many of the victims I had met. I was amazed by the determination of many of them to set goals and plan for their futures; to build relationships with others; to open up about themselves; to simply smile and laugh. For the women I saw on multiple fieldwork trips, I found joy in watching their confidence and self-esteem grow over time. While I knew that the system would eventually crush the progress many of them made by denying them permission to remain in the Netherlands (one reason underlying my feelings of hopelessness), I tried to appreciate the beauty of the individual moments. Witnessing resilience increased my ability to hope, feel inspired, and experience other positive emotions.

VI. Data Analysis

I approached the data analysis methodically but with an open mind. ‘Qualitative data analysis is a reflexive process that begins as data are being collected rather than after data collection has ceased’ (Bachman and Schutt 2017: 418 citing Stake 1995). I analytically engaged in this process throughout fieldwork by reflecting upon interviews and observations in my fieldwork diary shortly after I had conducted them. I focused on noting and interpreting non-verbal cues, reactions to various lines of questioning, key concepts, relationships between issues, and potential avenues to explore in future interviews.

Following the fieldwork’s completion, I first listened to each interview carefully and summarized the data according to the topics that arose in a spreadsheet, with additional notes and comments so as not to exclude data that did not fit neatly into a specific category. This document allowed me to switch easily between bird’s-eye and detailed views of the data, facilitating the identification and development of themes and sub-themes. Following an NVivo training course, I began utilizing this software package to code interview transcripts, but soon

realized that it was easier for me to use Microsoft Word documents to group interview excerpts by theme, colour-code sub-themes, and add comment boxes with analysis to specific portions of text. I found NVivo's "Coding Stripes" sidebar visually cumbersome once I had created more than a dozen or so nodes and sensed that it was difficult to catch coding errors. By utilizing the spreadsheet and Word documents to organize the data, as well as continuously returning to the original recordings, I was able to thoroughly review it at various stages and verify my analysis.

After reviewing, organizing, and analysing the data, a natural and logical structure for the thesis emerged. Within this structure, I emphasized the strongest and most prevalent themes but was also careful to avoid overlooking minority views and outliers, which Bachman and Schutt (2017: 419) call 'the windows to insight'. I conducted this analysis against the backdrop of a HRBA to THB, drawing out connections between the underlying principles and legal obligations and participants' testimonies. Doing so provided necessary context and theoretical grounding, and set the stage for the development of evidence-based policy recommendations.

The feminist principle of maintaining the authenticity of women's voices played a key role in data analysis and the presentation of the results. The importance of reporting issues related to serious crime upon victims and their family members by using their own words and interpretations of their experiences has been recognized in the academic literature (Bosworth, Hoyle, and Dempsey 2011: 773 citing Rock 1998: 2010). I took the following steps at various stages in the research to preserve the authenticity and integrity of participants' voices: recording the research interviews (to ensure accuracy), requesting clarification during interviews to prevent potential misunderstandings, carefully transcribing words, tone, and emotions, featuring many interview excerpts prominently in the results chapters, and refraining from correcting grammar or diction in these excerpts (unless strictly necessary for comprehension). The resulting

polyphony of women's voices richly imparts their perspectives and experiences while maintaining the threads connecting the 'data' to the original communicators. This connection reminds us that research participants are not mere data points, but human beings entitled to a voice, dignity, and rights. In this way, feminist and human rights frameworks again converge to promote an ethical and empowering approach to the production of knowledge.

VII. Conclusion

Ethical and effective research with vulnerable and hard-to-reach populations requires the researcher to devote considerable time, effort, and reflection to methodological aspects of the study. These include not only initial hurdles such as university ethics boards and institutional access, but also anticipating and preparing for challenges that may arise after the fieldwork begins. The importance of building and maintaining trustful relationships with gatekeepers, participants, and other key actors to overcoming these challenges cannot be overstated. Furthermore, taking a feminist, rights-oriented approach enabled me to meaningfully address the numerous ethical issues accompanying primary research with sex trafficking victims. This methodological orientation also informed my analysis of the data as well as the discussion of results in the ensuing chapters.

CHAPTER 4

Post-trafficking Assistance and Protection: Victims' Perspectives on their Experiences with Police, the Shelter, and Lawyers

I. Introduction

‘A human rights approach to trafficking demands that priority be given to protecting and supporting individuals who have been trafficked’ (OHCHR 2010: 127). This normative principle is reflected in the obligations imposed upon states regarding victim assistance and protection through international and regional legal instruments and jurisprudence. However, the direct effect¹¹⁶ or faithful transposition of these laws into the domestic sphere are not a guarantee that they will be fulfilled in practice. Furthermore, under a HRBA, the law on the books must be implemented in line with the core principles of universality and inalienability, indivisibility, inter-dependence and inter-relatedness, equality and non-discrimination, participation and inclusion, accountability and rule of law, and empowerment. Thus, understanding the extent to which a HRBA is realized also requires information about the interactions on the ground between agents tasked with carrying out a state’s obligations and individual rights-holders (Doyle et al. 2019: 233, 245). Indeed, ‘if governments are serious about practically implementing the broad-brush obligations imposed by international, EU and domestic law, they must have access to information on the background, lived experiences and needs of trafficked persons’ (ibid. 233).

With regard to THB, the Netherlands refers to these agents as ‘chain partners’ (Dutch National Rapporteur 2007: 61). The ‘Chain Partners Approach to Trafficking in Human Beings’

¹¹⁶ The European Court of Justice has held that ‘directives have direct effect, enabling individuals to rely on them in actions against the state, and that a Member State can be liable in damages for non-implementation of a directive’ in practice (Craig and de Búrca 2015: 108). In the Netherlands, treaty provisions have direct effect and are self-executing if they are ‘binding on all persons’ (Dutch Constitution: Art. 93).

emphasizes cooperation and collaboration among the various stakeholders responsible for combating THB and assisting victims (ibid.; see also Dutch National Rapporteur 2013: 73, 183, 229, 232, 248, 279). For victims of sex trafficking, the most important chain partners in Amsterdam have previously been identified as the police, the (women's) shelter, lawyers, the Public Prosecution Service, the IND¹¹⁷, the Municipal Health Service, the International Organization for Migration (an inter-governmental organization), and Slachtofferhulp Nederland¹¹⁸ (an NGO) (Stichting tegen Vrouwenhandel 2007: 33). This chapter focuses on victims' experiences with and perspectives on the first three of these chain partners.¹¹⁹

II. Police

In the Netherlands, police officers have a 'central chain partner role' as the 'primary identifiers of human trafficking cases in the Netherlands' (Musto 2012: 386). In this role, Dutch police are the state agents tasked with respecting and fulfilling the human rights of individual victims. More generally, police are responsible for carrying out the key state obligations to investigate THB with due diligence, protect and assist trafficking victims, and address the root causes of THB (e.g. by tackling transnational organized crime). While performing their duties, 'law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons', according to the UN Code of Conduct for Law Enforcement Officials (UN General Assembly 1979: Article 2). Furthermore, a human rights-based approach

¹¹⁷ 'IND' stands for 'Immigratie- en Naturalisatiedienst', which translates to 'Immigration and Naturalization Service'.

¹¹⁸ The English translation is 'Victim Support Netherlands'.

¹¹⁹ At the time of their interviews, few participants in the sample had had direct experience (or awareness of direct experience) with the latter five chain partners in a way that would have allowed them to meaningfully comment about them.

to policing¹²⁰ ‘acknowledge[s] the significant harm experienced by victims’ (Mason et al. 2017: 98).¹²¹ As an analogy to the common situation in which the police cannot locate a victim’s trafficker, an insightful participant noted, ‘for example, if someone steal from you something, then you go to the police and then police couldn’t find the thief, it doesn’t mean that you didn’t lose anything’ (Interview #33). This focus on harm rather than on usefulness of the victim as a witness or investigative tool underscores key tenets of a victim-centred HRBA. As emphasized in Chapters 1 and 2, instrumentalizing victims is an affront to their inherent dignity as rights-holders (see Kant 1996: 209 § 38; McCrudden 2008: 723). In contrast, recognizing the harms that victims have endured and providing them with the assistance and protection measures to which they are entitled in response, on an informed and consensual basis, empowers victims in the face of these harms and facilitates the realization of their rights.

Nearly two-thirds of the participants in this study reported that they had had a positive experience with the Dutch police. Another quarter described mixed experiences and only a few indicated that their experiences with the Dutch police had been wholly negative. A similar proportion of interviewees from EU countries and from non-EU countries was represented in each category (positive, negative, mixed). There were only three Dutch participants; two of whom reported having had positive experiences with Dutch police and one of whom described her experiences as entirely negative.

A. *Victim-centred Responses*

¹²⁰ Neyroud and Beckley (2001: 64-67) identify legality, proportionality, necessity, and accountability as the principles underlying the human rights-based approach to policing.

¹²¹ Although Mason et al. concerns the policing of hate crime, the principles of human rights-based policing are applicable to police responses to human trafficking as well.

The interviewees who reported having positive experiences with the Dutch police described officers treating them with respect, kindness, compassion, and being sensitive and responsive to their needs. These reports suggest considerable compliance with Directive 2012/29/EU's requirement that Member States 'ensure that victims . . . are treated in a respectful, sensitive, tailored, professional and non-discriminatory manner' [.]. This type of treatment is key to a victim-centred HRBA because it is empowering, facilitates the satisfaction of victims' particular needs, fulfils their Article 1(1) right, and fosters the realization of their inter-dependant and inter-related rights. It does so primarily by engendering victims' trust in and positive feelings towards police (Holmberg 2004: 165, 168; Jordan 2001: 687-688, 692, 698; Jordan 2008: 710, 713, 716; Stephens and Sinden 2000: 540-541; 545-546), which is critical for an accurate needs assessment (as this is largely dependent upon information shared by victims) and a willingness on the part of victims to accept assistance from police in claiming their entitlements.

First encounters with law enforcement are especially important in setting the stage for a positive experience because many trafficking victims fear the police, often due to negative impressions of law enforcement in their home countries,¹²² their traffickers telling them that police will arrest or deport them (Jobe 2010: 167-168; Surtees 2007: 59), and/or their traffickers arranging for police officers or people dressed in police uniforms to abuse or betray them.¹²³

¹²² For example, a trafficking victim explained, 'in my country you can never rely on the police. So I didn't have huge expectations that [the case] will be, you know, solved [by the Dutch police]. . . . I didn't run immediately to the police [in the Netherlands] because I was scared' (Interview #37).

¹²³ A participant explained: 'I said "no way I'm gonna go to police station. Just, this will not happen". He said "well, why not?" I said, I'm not gonna go to—because I was so afraid from the police, and this is be what's coming from my country, the fear, because there, the police, they work with the pimps. And they have cases like the police go to a girl and pretend he's a client and stuff, and ask the girls if they have a pimp or stuff, and if the girls say, "yah I need help, I wanna run away", this person go and tell to the pimp and then the pimps beat them and everything and test them if they gonna keep their mouths shut. And second time the girl, even if she have the chance to ask for help

Van Dijk and van Mierlo (2009: 62) emphasize the significance of victims' first contact with police, as a negative experience can undermine their trust in government actors and assistance (see also Nikolic-Ristanović 2005: 103; Segrave, Milivojevic, and Pickering 2009: 76; Rijken 2018: 242). They also note that, in all first encounters, victims want to be treated with respect, taken seriously, and listened to attentively (van Dijk and van Mierlo 2009: 62; see also Jordan 2001: 687-688). These concepts permeate key themes that emerged in participants' perspectives on positive experiences they had had with Dutch police, and not only within the context of initial contact.

Encouragingly, many interviewees reported satisfaction with their first encounters with Dutch police. For example, one participant recounted her very positive first experience with police in Amsterdam. She had seized an opportunity to run away from her traffickers, one of whom had chased her, and had managed to escape by jumping into a police vehicle she saw on the street. The policeman in the car then drove her to a police station. She had only been wearing underwear and a small jacket, and her lack of clothing made her feel 'really terrible' (Interview #11). The policeman was sensitive to this fact and 'he immediately understand that I would be better off in another room where I was isolated' and not in front of windows without curtains. Recognizing that she may be more comfortable explaining her situation to women than to him, he then called two female police officers to interview her. While she was waiting for them to arrive, the policeman 'assured her really that there was no reason to worry anymore, that she was safe, that she could calm down, that they were looking after her' (ibid.). The

and is by the right person they will not do it because then they're suspicious that maybe this person is also sent from the pimp' (Interview #38).

policewomen then arrived and brought a blanket for her. This interviewee was pleased with how they had treated her, which she described in the following manner:

They were really nice, they were really good, they helped also to help me calm down, because they saw that I was so nervous and I was so like, shaking, and they continued telling me, ‘just relax, nothing’s going to happen, pay attention to your breathing’, because I couldn’t breathe anymore. So before they took me here [to the shelter], they really looked after me with affection. (Ibid.).

These police officers responded to this interviewee in a respectful, sensitive, tailored, and victim-centred manner. Like this participant, many others in the sample recounted, in a positive light, how the Dutch police had made efforts to comfort them and calm them down while they were being interviewed about their trafficking victimization. In this sense, police appear to appreciate the value of compassion and emotional support for victims, taking on a hybrid role as law enforcement officers and social workers.¹²⁴

Some participants expressed their belief that the police officers they interacted with genuinely cared about their well-being. When describing her first encounter with a police officer, she explained, ‘I think he really cares about me because . . . he had to work till 11 [p.m.] and he stays¹²⁵ till 4 [a.m.], for me’ (Interview #3). Another woman described how she could rely on the police in Den Haag to help her and felt that they genuinely cared about her:

I really could count on them. Yes, because they also are keeping contact with us also here [at the shelter]. They ask about us. They ask, ‘what can we do for you?’—for us, because the police know all your story and they know the truth about what was going on because the mentors, they don’t know—they don’t know everything. Only if you personally reveal part of your story, but they don’t know the facts of the story of how you lived through it. . . . I was very angry to the shelter and . . . [said] this place has to change, and they actually kept asking me

¹²⁴ Since Banton’s pathbreaking empirical research on the police, published in 1964 (*The Policeman in the Community*), which showed that the police role primarily consisted of non-law enforcement, peace-keeping roles, social scientists have demonstrated that although the police think of themselves as crime fighters, they spend considerable time providing ‘social services’, such as advising, mediating and, comforting vulnerable people (see, e.g., Roberg and Kuykendall 1990; Kappeler and Gaines 2015).

¹²⁵ Grammatical and syntactical errors within interview excerpts have not been corrected unless strictly necessary for clarity, in order to maintain the authenticity of participants’ voices.

about what is going on, and how things are. Then actually—they actually called the staff here at the shelter and I have no idea what they have been talking about, but the things have changed, drastically, after their conversation. . . . In the beginning [the shelter staff] were not very friendly. Sometimes they are acting too strict, like you are the criminal. In the beginning, they are treating you like that. . . . Well [after the call with the police, the shelter staff] paid a lot of attention to me. Now I . . . go to visit psychologist because the police actually explained of what I've been through and what I've had in my life. (Interview #17).

Not only does this woman's experience exemplify effective human rights-based policing in terms of officers' respect for her dignity and focus on the harm she experienced, but it shows how police can serve as an important check on the power that shelter staff hold over victims under their care. The police in Den Haag even went above and beyond by sending this participant a postcard for her birthday, which confirmed her belief that they truly cared about her. She described her reaction to this small gesture in the following way: 'And I was really, really happy. It was very kind. I didn't had a family, you don't expect somebody to greet you for a birthday let alone receive a card for your birthday. For me, it was a really happy moment' (ibid.). Likewise, in her research with rape and sexual assault victims, Jordan (2001: 687) found that '[e]ven small gestures of friendliness [from police] counted for a lot when the women were feeling so vulnerable' [.]

Multiple participants explicitly noted that Dutch police had treated them with respect, while others did so implicitly. One woman specified that she felt respected when an officer who was interviewing her 'all the time said . . . "if you can't answer, you don't wanna answer, you don't need to"' (Interview #36). Recognizing her as an agentic being and providing her with control over the situation made her feel that her experience with this particular police officer had been positive and respectful. This woman and other interviewees also mentioned that officers had used a respectful tone and appropriate language during their interactions with them.

Several women specifically pointed out that they had felt listened to and ‘heard’ during their interactions with police officers in the Netherlands. When discussing her two experiences with Dutch police, one of these women recalled, ‘it was more than fine, and they listened to what I had to say and they were very understanding towards my story’ (Interview #29). In response to being asked whether she was comfortable talking to the police, another interviewee responded, ‘[a]t first place, no, but after that, I saw they listening, you know? They want also to help’ (Interview #30). She later added that while she was detailing her trafficking experience to the police, ‘[t]hey listening good, you know. They . . . cannot feel the same like us but they try to imagine how it is’ (ibid.). A third woman recalled that she felt ‘relieved’ while telling the Dutch police what had happened to her during her first encounter with them because ‘[t]hey did listen to me and . . . [t]hey took my case seriously’ (Interview #10). These women’s perspectives demonstrate that officers’ attentiveness towards and genuine engagement with victims, along with recognition of the harms they suffered, can have a meaningful impact upon their satisfaction with police.

When recounting their positive experiences with the police, several interviewees contrasted the Dutch police with law enforcement in their home countries. For instance, one woman described her experience with police in the Netherlands as ‘[a] hundred times better than in Hungary’¹²⁶ because ‘in Hungary . . . [y]ou can give money to the police and they won’t do anything against you (Interview #1). Similarly, a participant’s mother had convinced her that the Dutch police, unlike the Ugandan police, do not take bribes and are diligent in their investigations (Interview #34). Another interviewee believed that the Dutch police were better

¹²⁶ The names of home countries are not redacted only in cases where there are sufficient numbers of participants from a particular country to preserve anonymity.

than the Nigerian police in part because '[t]hey are more equipped' (Interview #35). A woman with extensive experience with both the Dutch and Bulgarian police stated, 'I trust only here to the Holland police. I don't trust to Bulgarish police' (Interview #5). She explained that while she was in Bulgaria, she had called the police because one of her trafficker's associates had approached her when she was in a café and threatened to break her hands and feet, but the police never came (ibid.). After waiting for forty minutes, she went to the police station to ask why no one had been sent to help her (ibid.). The police responded that they did not have enough cars to send anyone, an explanation of which she was sceptical (ibid.). In contrast, this participant felt that the Dutch police had made efforts to help her and would take action against her trafficker (ibid.).

While these positive experiences are encouraging and should be applauded, the instances of problematic police behaviour towards trafficking victims in this study should not be overlooked. It is important to recognize and examine these negative encounters in order to acknowledge participants' experiences of secondary victimization, to develop means of preventing other victims from being subjected to this type of treatment, and to identify any gaps between a HRBA and state practice.

B. Non-compliance with the Principles of Universality, Non-discrimination, and Equality

Universality, non-discrimination, and equality are three of the core principles underlying a HRBA. State actors must comply with these principles when carrying out obligations towards rights-holders. Doing so is critical to ensuring that all trafficking victims are able to exercise their rights and that their inherent dignity is respected. When these principles are breached, rights-holders are denied the treatment and entitlements they are owed from duty-bearers and are often unable to access inter-dependant and inter-related rights as a result.

Two participants expressed their belief that police officers had discriminated against them on the basis of their race and national origin. One of these interviewees asserted that she had had three negative experiences with Dutch police officers believed that one of these was due to racial bias on the part of a policewoman in Amsterdam. When this participant arrived at the police station with her lawyer for a second police interview, the policewoman shook her lawyer's hand but refused to shake hers, explaining she was worried about contracting Ebola. However, this participant had already been in the Netherlands for approximately a year and a half by this point and had not been in her home country during the Ebola crisis, a fact which she asserts that the policewoman 'of course . . . knew' as she had been sent a copy of the first interview. She explained:

[R]ight from the beginning when she didn't shake my hand I was already scared. I didn't know what was happening next. I was just thinking that anything can happen. 'Oh my God I'm not leaving this place' or 'maybe she's going to listen' because that's why it took me a very long while to accept to go to [the police], because I felt like they will listen, but they won't do anything. Or maybe take my story like I don't know, like something that it can happen, like the way it is in my country. . . . The feeling I got that maybe she didn't like me because I'm black. Because you know some people have different opinions when they meet people, especially us. Maybe when she saw me and knew that [Ebola was in] my country . . . [the policewoman] at least [could] have asked me, or maybe, 'have I been there'. (Interview #34).

Another participant expressed her belief that members of the Dutch police are racist and xenophobic. She explained, 'Here in Holland I see too much. [Some of the police are] [r]acist [against] Moroccanish, Turkish, Albanish, Bulgarish, you know? Racist' (Interview #28). In support of her assertions, this interviewee gave the example of when she had called the police in Rotterdam for help because a Dutch man had threatened to traffic her and her friend and had given them drugs, on which her friend had overdosed. When the police arrived, she told them, 'he give me ecstasy, he want to make business with me'. The officers then spoke in Dutch with

the man this participant had accused. She recounted, ‘the police see he Hollandish no make nothing for Hollandish and me and my girlfriend put in the street’. In other words, she believed that the officers had decided not to take action against the man because he was Dutch and they were foreigners from Eastern European countries. She also recounted how the police had not made any efforts to assist her friend, who had clearly overdosed:

And for one moment she was not good you know. Really, I think now she dead . . . I look one woman with bicycle, I say, ‘Sorry, please help me, my girlfriend’s not good’ . . . And she called the ambulance, come ambulance, and police still there, only look! Only look. [N]ot make nothing to take me and to bring [her] with a car in the hospital. (Ibid.).

These participants’ beliefs about the existence of racial and xenophobic bias within the Dutch police force is supported by the observations of one of the mentors who had worked at the shelter for a number of years. She asserted that some police officers are ‘friendlier’ to European victims than they are to Africans victims (Field Notes, February 2015). This suggests that, in the Netherlands, the former occupy a higher position in the ‘hierarchy of victimization’ than the latter. These findings are consistent with research documenting racialized and anti-migrant discourse (Bonnet and Caillault 2015: 1190-1195; Mutsaers 2014: 841) and conduct (Mutsaers 2014: 844) among Dutch law enforcement. Notably, Bonnet and Caillault (2015: 1193) found that ‘Dutch police officers do not see themselves as racist’. A lack of awareness and acknowledgement of the problem renders it unlikely to be addressed. The issue of racial bias among police and its impact on trafficking victims is certainly not limited to the Netherlands; more broadly, Segrave Milivojevic, and Pickering (2009: 89) found that trafficking victims in Thailand, Serbia, and Australia ‘highlighted the racist attitudes of law enforcement in countries of destination’. When police, as state actors, treat victims inequitably based upon their race or national origin, they violate the core human rights principles of equality and non-discrimination.

The principle of universality is also breached when certain types of trafficking victims are not able to realize their rights, whether that be based on their race, national origin, immigration status or another characteristic. Given that law enforcement often mistake THB for illegal migration and treat victims as criminals (Turek 2013: 83 citing Lankford 2010: 14; see also Bernat and Winkeller 2010: 187; Kneebone 2010: 149; Lobasz 2009: 331), access to the rights owed to trafficking victims is far from universal for trafficked individuals. Indeed, van der Leun and van Schijndel (2016: 38-39) found significant markers of exploitation among human smuggling cases in the Netherlands, which were not treated as even potential cases of THB. As a result of their cases being categorized as involving smuggling instead of trafficking, the irregular migrants involved were unable to exercise the rights they would have been provided access to had authorities recognized their exploitation.

Several participants in the present study reported that law enforcement officers had treated them poorly when perceiving them as undocumented migrants and had treated them well upon learning that they were victims of THB. One of these women maintained that the police had treated her ‘so bad’ and ‘as if I was a murderer’ when they had learned that she was undocumented but did not know that she was a trafficking victim (Interview #35). Though she was afraid of the police, she had gone to a police station in Heemskerk to report her concern that a neighbour may have passed away in his home and, while there, the police had asked to see her papers. When she could not produce them, they detained her at the police station overnight and then transferred her to an immigration detention centre near Alkmaar, where she was held for thirteen days.¹²⁷ This participant did not tell the police in Heemskerk or anyone at the immigration detention centre about her trafficking victimization, and did not report it to the

¹²⁷ Rijken (2018: 243) notes that it is common for trafficking victims from third countries lacking residence permits to be placed in alien detention.

police for some time following her release. She explained, '[s]o that was my first encounter with the politie, so it made me to be more afraid to tell them about what I'm—my situation' (ibid.). She also revealed that she felt too ashamed of being sexually exploited to tell the police at that point, asserting that '[t]here's no pride in telling that thing' (ibid.). When she eventually reported her trafficking victimization to the police,¹²⁸ the way they treated her sharply contrasted with the earlier treatment she had received when she was thought to be an undocumented migrant but not a trafficking victim. She described her second experience with the Dutch police in the following way, while noting the impact of her first experience on her state of mind:

[The police treated me] *very* nice. Very, very nice. . . . They made me feel like, [one of the officers] told me, I should not be afraid. He tried to make me to be strong. Then he said, 'I could understand', because I want to narrate my story to politie, the first time they [detained me]. I'm afraid, maybe you put me in detention again. Because that place they put me before was horrible. No window, nothing. . . . Toilet and bed, [in] the same place. Jesus. . . . And so I narrated my story . . . After that, the man said I should not worry, that they will help me. They will help me then, that very day—I just came with my handbag, I was not—they just took me to the shelter. (Ibid.).

Another example of this differential treatment based on undocumented migrant vs. trafficking victim involved an interviewee who had escaped from her trafficking situation. After fleeing from her traffickers for four days, she had asked police near Amsterdam's Central Station, on Warmoesstraat, for help. It is clear that the police officer she spoke to simply assumed that she was an undocumented migrant and/or refugee because she gave her a map and told her to go to Ter Apel, where the Netherlands's largest asylum seeker reception centre is located, without even inquiring about her situation. The police officer then asked her if she had any money, and when she replied that she did not, the officer responded that she could not assist her in that case. Feeling helpless, the participant began to cry, and other people who were

¹²⁸ She reported it to police in Alkmaar.

waiting in the police station (who she believes were there to report lost luggage) gave her money. Interestingly, she seemed to excuse this police officer's lack of assistance by explaining that, after four days of running from her traffickers, she 'looked like a madwoman, that's why the police drive me away' (Interview #4). When she then approached police officers in Central Station to ask for assistance in buying a ticket for the train to Ter Apel and explained that the officer from the nearby police station had instructed her to go there, they assumed that the other officer had given her a train ticket and asked to see it. She informed them that she had not been given one and the officers accused her of lying to them. They then called the police station to check. She did not understand what they said on the call, but she gave them the money donated by the individuals in the police station and they used it to buy her a ticket. In contrast, when she was known to the police as a trafficking victim and officers interviewed about her victimization in Dronten and Almere, she felt that they were kind to her and cared about her. She recalled:

They treat me nicely. . . . They helped me. They helped me a lot so I don't think there is anything that they can do more than that. . . . Because even so at some point they calm me down . . . They ask me if I want to go free, if I want hot water or soup. (Ibid.).

While it is certainly positive that these participants felt that law enforcement authorities had treated them kindly and respectfully once their trafficking victimhood status became known, it is troubling that they experienced poor treatment prior, when they were presumptively viewed as undocumented migrants.¹²⁹ Only when law enforcement consistently treats all people sensitively and with respect, and takes the time to sufficiently inquire about their situation, will they be able to better identify trafficking victims. This, in turn, will promote the principle of universality within the THB context.

¹²⁹ The human rights of irregular migrants and refugees who are not victims of THB is an extremely important topic, but falls outside the scope of this work.

C. *Lack of Respect*

The value of human dignity, which lies at the heart of human rights, demands that each and every individual be treated with respect (Ward 2009: 115-116, 125). EU Directive 2012/29 reflects this foundational norm by requiring Member States to ensure that their competent authorities, including police, treat victims respectfully.¹³⁰ While some participants reported that the Dutch police had treated them with respect, others complained about a lack of respect from the officers with whom they had interacted. For example, an interviewee who felt that a police officer had disrespected her with ‘strange’ and inappropriate questions during the process of pressing charges against her trafficker. She elaborated that he had asked her to describe ‘how I had sex, with a condom or without, and how I did a blow job’ (Interview #14). She added that his demeanour was ‘very cold’ while he was questioning her as well. Reflecting on her experience, this participant shared the following recommendation for how the police could improve their treatment of sex trafficking victims: ‘They need to be friendly and respect us. Yes, well we worked in prostitution but we’re also human beings and we deserve respect’ (Interview #14). This observation reveals her awareness that victims who are perceived as having willingly worked in prostitution are often considered ‘bad’ or unworthy of assistance (Doezema 2002: 25; Tyldum and Brunovskis 2005: 26; O’Brien, Carpenter, and Hayes 2013: 407-410; Segrave, Milivojevic, and Pickering 2009: 15-16). She also astutely recognizes that human dignity is intrinsic and universal, and that this requires respectful treatment, regardless of sex work experience.

A common way that authorities make trafficking victims feel disrespected is by treating them as if they are criminals, which has been noted as an issue across many jurisdictions

¹³⁰ Art. 1(1); preamble recitals 9, 61.

(Letschert and van Dijk 2011: 10; Lobasz 2009: 331; Williams 2008: 151). This practice also acts a barrier to forming trustful relationships with victims and can deter them from filing a complaint against their traffickers (Rijken 2018: 246; Surtees 2007: 101-102). For a few participants, the volume and tone police officers used with them caused them to feel like they were being treated as criminals. For example, one interviewee recalled that an officer in Den Haag had used a ‘quite commanding tone’ with her, about which she stated, ‘I felt in general, like being a criminal, being like interviewed like I’m a criminal does something wrong’ (Interview #37). Similarly, another participant described how she felt like she was treated like a criminal by Dutch police in different locations, on two separate occasions:

Well, I have to sit in police station [in Amsterdam, near Leidseplein,] for five hours to give explanation and press the charges against my pimp and stuff. Well I had the translator, but I feel very uncomfortable honestly, and not only that but because the police come and ask you with them way of talking, you know, as the police: ‘Hello, ja, what did you do and how’ [*said in an accusatory tone*] —and this here is so big, uh, gives me a feeling that I’m doing something wrong, you know. . . . And [two years later police in Amstelveen] call me and shout at me, ‘and you have to show up, and this’—I said, ‘but excuse me’. They really treat me in that way as that I was the one who is against, somebody do charges against me. They treat me in that way. (Interview #38).

This participant and another explained that police officers’ forceful manner of communicating with them also reminded them of the way their traffickers had done so. This may lead victims to relive traumatic memories and view police as another source of harm. The above interviewee explained that being shouted at by police, as she had been, causes a victim to ‘immediately . . . close in herself and think for her past that the pimp shout at her, immediately connect that with the pimp and with her past . . . because it feels like you’re doing something wrong’ (Interview #38). The other woman explained her experience in the following way:

[T]his police what I have it before I don’t like before because he too much time speak like, uh, pfff I don’t know, I don’t like it, you know. I want somebody to speak nice, you know. Not like, I am criminal or something, you know. . . . I

think, uh, when police picks up, I think ‘what is this’? I think I am to my loverboy because every time he has always big voice, you know. ‘When you don’t do this’ . . . every time somebody do this. ‘Where is your money, how much money, what is this’? . . . Like with too much voice . . . (Interview #28).

A combination of forceful communication and disbelief on the part of police officers led to an interviewee, who emphasized that she had had many negative experiences with Dutch police, to feel that the police in Amsterdam had treated her ‘with no respect’ on two separate occasions (Interview #36). During both incidents, one occurring in 2011 and the other in 2015, officers had interrogated her for approximately four hours and had made it clear that they did not believe her answers. Notably, police disbelief of victims of sexual offences is a well-documented form of secondary victimization (Condry 2010: 238-239; Jordan 2004; Mulder and Winkel 1996: 307, 317). During the first incident, the officers refused to believe that this participant did not have information about the criminal activities of her boss and his associates. She described the experience in the following way:

[W]hen I say ‘no, I don’t know nothing’, and they keep going back and they going to like switch little bit the question. And then I say—keep saying ‘no’ or ‘I don’t know’, they after when they got tired of that, they starting to kick the table. . . they was, like, screaming that hard that outside you hear it. . . . for four hour non-stop of the same question, the same things[.] (Ibid.).

The second incident involved misinformation the police had obtained from a third party, who had reported that this participant had been working for a particular pimp. She complained that, rather than ‘nicely [asking] if it’s true or not’, the officers ‘just “boom”, say it, from nowhere. And with no respect’ (ibid.). Though she insisted that the information was not correct, the officers refused to believe her. Due to the disrespect she felt they had shown towards her, she told them, ‘next time . . . it’s better you don’t contact me, because if [you do], I will don’t go’ (ibid.). This woman’s experience and reaction exemplify how treating victims disrespectfully

can alienate them and undermine the formation of collaborative relationships between victims and law enforcement (see Norris and Thompson 1993: 529; Surtees 2007: 101-102).

However, encouragingly, the principle of accountability played a role following another woman's experience of being treated disrespectfully. During this interviewee's very first interaction with Dutch police, a police officer based in Hoofddorp had asked her questions in a harsh and accusatory tone and had banged his hand on the table 'very hard' close to where she was sitting (Interview #33). She said that this had made her feel 'more scared', caused her to regret seeking help from law enforcement, and led her to believe that police officers in the Netherlands were like those in her home country, where police have a bad reputation (ibid.). Fortunately, another Dutch police officer had witnessed this officer's behaviour and a few months later, this participant was asked to be a witness in a case against him. She was told that this officer had acted improperly on another occasion as well. She agreed to be a witness against him and explained that doing so made her 'feel good' (ibid.). This woman's experience suggests that there is a degree of accountability within the Dutch police (at least with respect to Hoofddorp and the treatment of victims), which is an important component of a HRBA. Holding this officer to account signals the significance of victims' right to be treated with respect and will potentially deter others from engaging in similar conduct.

D. *Lack of 'Due Diligence'*

States are required to discharge their human rights obligations with due diligence (OHCHR 2010: 79). This standard involves a measure of care demonstrating that states take these duties seriously (ibid. 77, 81). The due diligence principle requires states to 'take all measures that can reasonably be taken in the circumstances in order to ensure the rights granted' (Bantekas and Oette 2013: 76). One of the key obligations under a HRBA to THB is to

investigate, prosecute, and punish traffickers with due diligence. However, it should be noted that the due diligence standard applies to all state obligations to protect and fulfil rights (ibid.). Participants' experiences suggest that some police officers' conduct has fallen short of this standard, and in certain cases, has even approached negligence.

When police fail to act with due diligence upon encountering possible victims of THB, it disempowers victims and deprives them of access to their rights, such as their rights to information, assistance, and protection. For example, when a participant finally got up the courage to report her trafficker to the police, she was devastated when the officer she approached at the police station in Sloterveer refused to help her. She recounted:

And then my neighbour forced me to go to the police to turn him in, and I went to the police and there was a policewoman, and she told me, 'yeah, you can turn him in, but you have to get a lawyer at first and you have to write a letter', but yeah, how can I write a letter or how can I get to a lawyer if I don't speak the language [well] and if I'm at the state of that moment I wasn't capable of doing anything. I thought they would help me but the policewoman told me to go to a lawyer. . . . She said to me, 'first of all, what are you doing at this time outside'? It was late, and she didn't offer me even a chair to sit on or a cup of water to comfort me. She only make things worse and because of her, I wanted to throw myself—I want to make an end of my life. I didn't want to live anymore because I—everybody was telling me, 'go to the police, go to the police' and when I went to the police they didn't help me as I thought they would help me. The way she looked at me scared me even more than I already was. Because of the policewoman, I was so scared that I peed in my pants[.] (Interview #39).

This interviewee's experience implicates the Article 4 ECHR procedural obligation to investigate situations of possible THB established in *Rantsev* (2010: para. 288) and reaffirmed in other Article 4 ECHR cases (see, e.g., *Chowdury and Others* 2017: para. 116; *C.N. v. United Kingdom* 2012: para. 69). Notably, investigations 'must be undertaken as a matter of urgency' when there exists a possibility of removing a victim from a trafficking situation (ibid.). As in this participant's case, when police have reason to suspect that someone has been trafficked, if they do not act, they have likely violated that state's Article 4 obligation towards the possible victim.

It is impossible to know how many other trafficking victims have had similar experiences, as those who have likely avoided seeking help from law enforcement again, and may have also been afraid to approach other authorities for help as a result of their negative first encounter with police (see Brunovskis and Surtees 2007: 117-118, 120-122). Thus, their victimhood status would probably remain unknown to any authorities or service providers. This particular victim only received assistance when she told a woman working at a government benefits agency about her situation, after she had met her at an appointment her husband (who was also her trafficker) had forced her to attend so he could commit welfare fraud. She returned to the agency on her own a few months after the appointment and told the woman, who was from the same home country as her, about her husband's criminal activities and abuse. The woman's manager told her that they could help her if she would turn her husband in to the police, but this participant pleaded with him not to call them, exclaiming, 'no, no, no, no, I have bad experience with the police so I don't want any police' (Interview #39). The woman from the agency later reached out to an organization that assists women from their shared home country on the participant's behalf, which is how she ended up at ACM.

Several interviewees felt that the Dutch police did not investigate their cases with due diligence after the identification stage, such as by failing to follow up on leads and information they had provided. One of these women asserted, '[the police] treated me well but I'm not sure if they did their job well' (Interview #16). She added, 'I told [the police] the names, I told them where they live, you know, those people [who trafficked me]', and explained her frustration with the police for closing her case due to a lack of evidence without even questioning the people she had identified as the perpetrators (ibid.). This is analogous to aspects of the *Rantsev* case, where Cypriot authorities' failure to interview key witnesses contributed to the ECtHR holding that

Cyprus had committed a procedural violation by failing to conduct an effective investigation (paras. 237, 242). Similarly, a woman who was trafficked to Poland and exploited there for six months before she was trafficked to the Netherlands strongly believed that the Dutch police had insufficiently investigated, mainly because they had failed to liaise with the Polish police to search for her traffickers prior to closing her case:

[M]y case was in the hands of the police, uh? They should do the investigation. They treat very well with me, but the investigation I think they didn't do that very nice, the investigation. They just contact with the airplanes and they don't contact in the Poland. They just contact in the German where, like, was my immigration. But they couldn't find the people . . . I give *all* the information to the policemen. They said that 'this all very good information for us. That maybe if they have done already any crime, then we can find them'. But, like, they couldn't find, but now I'm in a problem because they stop the case and the IND also stop the case . . . because of the police said 'we are unable to find the people'. So it's not to my mistake . . . I think I gave them all the information that I know about the building, about the places . . . They told me that, uh—but they didn't contact in the Poland. They should contact in the Poland police. . . . My advocaat,¹³¹ he have all the information, what the police did. They just contact in the German airlines. . . . The people [who trafficked me] is in Poland not in German. They have to make contact in the area where I was because I told them the whole area and the places that—the things that was there that are now the things, the places that was very important. (Interview #33).

Dutch authorities' failure to contact the Polish authorities amounts to a procedural violation of Article 4 ECHR, as the ECtHR has held that states have a duty to work with the other states concerned (with whom they have mutual legal assistance agreements) to investigate cross-border trafficking cases (*Rantsev* 2010: para. 289; *L.E.* 2016: para. 85).¹³² Furthermore, the CoE Convention (Arts. 32-34) requires state parties to cooperate with each other in THB investigations. This woman's experience also underscores the importance of the right to legal

¹³¹ 'Advocaat' is the Dutch word for 'lawyer'.

¹³² Since both the Netherlands and Poland are EU Member States, the exception to the duty to collaborate with other states in cross-border THB cases where making a legal assistance request would not 'have had any reasonable prospect of success' does not apply here (see *J. and Others* 2017: para. 117).

representation for trafficking victims, as her lawyer consistently followed up with the police about this investigative gap. He also successfully resolved her issue with the IND and she was granted permission to remain in the Netherlands on humanitarian grounds.

Another participant expressed her exasperation about the inadequate investigation of her case in the following way:

[I was] very, very disappointed because I was hoping at that time when [the police] call me, second, and that they find something, and what's happened? They only find for two years at the time, only his names and where he used to live. Well, but this every normal kid can find [in] one day. And you are police. And you find that this information [in] two years. (Interview #38).

In contrast, when her case was transferred to a police station located in Amstelveen, she noticed a substantial increase in the speed of progress on her case: 'in two months the other police station, they solved everything' (ibid.). She attributes this difference primarily to a particularly diligent detective in Amstelveen who had taken over the investigation of her case. This suggests that there is wide variation among police detectives' level of diligence and highlights the role of luck in who is assigned to investigate a case. However, the level of competence, diligence, and efficiency should not vary this widely, as EU Directive 2011/36 obligates Member States to ensure that those responsible for investigating trafficking cases are properly trained (Art. 9(3)) and provided with 'effective investigative tools' (Art. 9(4)).

When asked if she had any recommendations concerning how police can better help trafficking victims, a participant who had pressed charges three-and-a-half years prior, in 2012, emphasized the importance of conducting timely investigations and acting on information provided by victims:

Of course I would say do investigation but I can't really judge. Like, of course from my point of view I think had more than enough of all the things to prove that it happened to me. Like I said, Skype, print screens from Skype, from his IP address, recordings on the phone, and I gave I also the phone calls are recorded

with him when I already escaped just to prove—I was doing this myself. . . . [S]o I was bringing up on purpose with him this kind of subjects to get the proof that it happened. I felt I've done already all the work for the police. . . . I collected all the proof to show to them that I was beaten, and with his legs, and he was throwing away my stuff, he was chasing me with a gun. I had all the Skype conversation proof. I also had the recording that I really he took from me €200,000 . . . And I gave them already like the printed papers with all the recording. I've done even translation from [my native language] to English. Like, here you go. . . . And but he was logged in through my iMac to his email so I could access the old mails from him. And I also gave the police the proof that he was bringing girls to Holland to work in this business and he has a connection to really high people in Den Haag, to millionaires. They were planning to do this business together. And I gave to the police all the receipts . . . I found *everything* in his email. I printed everything out, I printed all the conversations with these people in terms of debts, they're gonna, you know, do this business. That he invested money there. . . . I had also a friend of mine, she could prove that it really happened because she saw me with, you know, with a blue eye, with a contusion, and she saw that I was drugged there. . . . So for me, it seems like [the police] have done fuck all in this case. (Interview #37).

This interviewee raises an important point about not being able to judge whether the police have diligently and effectively investigated a case. Her lawyer informed her that the police 'don't give information before the investigation's closed' (ibid.). As a result, whenever she contacted her lawyer over the course of the previous three-and-a-half years to inquire as to whether there had been any developments in her case, the lawyer responded that she had contacted the police and they had only indicated that the case was 'under investigation' (ibid.). Understandably, this lack of transparency was very frustrating for this participant, especially given the significant amount of time that had passed since she had pressed charges. As Victim Support Europe (2013: 24-25) asserts, '[w]ithout regular updates, victims may get the impression that nothing has happened and that [their] report is not taken seriously. [I]t is important to recognise that victims have a need to see progression in their case'. While Directive 2012/29 provides victims with the right to receive 'information enabling [them] to know about the state of

the criminal proceedings' (Art. 6(2)(b)),¹³³ it is unclear whether this includes substantive updates about an investigation intended to lay the foundation for criminal proceedings. Furthermore, given the sheer amount of time the investigations took in the above participants' cases (Interviews #37 and #38), the well-established requirement that investigations be conducted with 'promptness and reasonable expedition' is potentially also implicated (*Rantsev* 2010: paras. 233, 288; *Chowdury* 2017: para. 89; *J. and Others* 2017: para. 107; *S.M.* 2018: para. 60).

A lack of due diligence on the part of police regarding even simple tasks can have a serious impact upon victims and their ability to exercise their rights. For example, two participants suffered negative consequences when police lost track of their files. One of these women was made to leave the shelter where she had been staying after police in Dronten misplaced her file (Interview #4). At the time she was pregnant, and after being forced out of the shelter in Dronten, she gave birth twenty weeks into her pregnancy and her baby died, devastating her.¹³⁴ On the advice of a friend, she then sought assistance from Wereldhuis, an Amsterdam-based organization serving undocumented migrants. Fortuitously, she met a resourceful volunteer at this organization who had just completed her law degree and was committed to helping her. This volunteer 'chase[d]' the Dronten police on her behalf until they located her file (*ibid.*). Consequently, the police apologized to her and explained that her file had been misplaced because two officers who were assigned to her trafficking case had been transferred to different posts. As this victim's experience demonstrates, negligent treatment of victims' files can have dire consequences: she lost access to basic entitlements, including shelter, the stress of which likely contributed to the loss of her baby.

¹³³ However, this provision includes an exception to this right when 'the proper handling of the case may be adversely affected by such notification'.

¹³⁴ She showed me the photos she treasures of her deceased baby and told me his name.

The other woman whose file the police had misplaced explained that she had given a statement to the police detailing her trafficking victimization in 2009, but then did not hear from them again until 2011, when police called her and told her that they needed to re-interview her. When recounting how she had had to twice provide detailed statements to the police about the traumatic things that her trafficker had done to her, she explained: ‘Because turns [out] that they lost my papers. That’s why they called me after two years. They call—they lost my papers. I was so pissed off. *Incredible* pissed off’ (Interview #38).

Another example of negative consequences resulting from a lack of due diligence with respect to a straightforward matter involved a young victim being forced to recount her trafficking ‘story’ for a third time to police. She had been told to go to the police station to be fingerprinted, and, likely due to a communication failure among police, she was unexpectedly made to retell her story, which she found to be especially traumatic. She explained:

The last time was when I went to take the fingerprint, they also did it but it was not supposed to be like that, I only had to go for fingerprints, they didn’t have to ask me anything about my story again because I had told it. . . . I was scared. . . . I came with my mom and they told my mom not to come in. I was put in a room. I had to wait for them to finish, they asked me and I had to wait. Yeah. And I told the lawyer [later] and the lawyer said they did it but it was not the—it was only—it had to be only the fingerprints . . . I think it’s better that maybe they organize like an interview at once. And maybe if they want to take their opinion it’s done at once, not going—because I don’t feel comfortable talking to different people about the same thing that happened. This is something that sometimes I feel ashamed of. I feel so uncomfortable talking about it, it brings up so many—it disorganizes my life, like, it takes me too long to live with it[.] (Interview #34).

In addition to the due diligence principle, this interviewee’s experience implicates Directive 2012/29/EU’s requirements that the number of times a victim is interviewed during a criminal investigation be kept to a minimum and only conducted when ‘strictly necessary for the purposes of the criminal investigation’ (Art. 20(b)), and that the same people conduct all of the interviews with a victim who has special protection needs (Art. 23(2)(c)). Though not prevalent in this

sample, the issue of being forced to tell one's trafficking 'story' to authorities repeatedly emerged in Rijken, van Dijk, and van Mierlo's (2013: 108) qualitative study with 36 trafficking victims in the Netherlands. They contend that this practice can harm victims' mental health and disrupt their recovery process (ibid. 136-137).

E. *Lack of Gender-Sensitivity*

International and regional legal instruments within the THB legal framework promote the adoption of an approach that is sensitive to gender.¹³⁵ This makes sense as the majority of trafficking victims are female (Amir & Beeks 2006: xi; Calvani and Jung 2012: 58; ILO 2012: 14; Segrave, Milivojevic, and Pickering 2009: 28; Smith 2011: 274). Some interviewees in the present study expressed their discomfort with male police officers. This finding has also emerged in other studies with trafficking victims (Cuzuioc-Weiss and Lacroix 2010: 48; Nikolic-Ristanović 2005: 104) as well as in research with victims of other forms of gender-based violence, such as rape (Jamel 2010: 706; Spohn and Tellis 2012: 153, 391, 400) and 'honour'-based violence (Mulvihill et al. 2018: 7). Women who are sexually exploited and subjected to sexual violence at the hands of men commonly become wary of men in general (Praturi, Mendonca, and Smith 2013: 263). As one woman whose trafficker and 'clients' were male explained, 'ever since that experience I really feel uncomfortable around men' (Interview #34). Goodey (2004: 28) maintains that 'the prospect of being questioned about intimate details by male police officers and investigators' is a reason why trafficked women are often reluctant to cooperate with authorities. In light of these circumstances, it makes sense that 'with a lot of women who work behind the window [who] do aangifte,¹³⁶ it's better with woman because they

¹³⁵ Convention Arts. 1(1)(a), 5(3), 17; Directive 2011/36/EU Art. 1, recital 25; Directive 2012/29/EU Art. 23(2)(d), recital 61; Palermo Protocol Art. 6(4).

¹³⁶ 'Aangifte' is the Dutch word for 'pressing charges'.

can open up little bit more easy' (Interview #36). Having been interviewed by male police officers herself, another participant described the difficulty of verbalizing the graphic details of one's victimization to men and why it is easier to talk to women:

. . . I think it's more helpful if it's more women in this case to speak with the girls because for some of the questioning, especially when you press charges, you have to tell them specific things why you press the charges. So some girls are being raped or they're been asked to do terrible things what if it's men ask you that, it's very difficult to say it. But if it's women, it's little bit—it feel more confident. You know, when I have to give, uh, my explanations and stuff, there was two or three people and I have to write everything, how I was raped, and this, and that . . . (Interview #38).

Another participant 'wasn't comfortable' discussing the details of her trafficking victimization with the two male police officers who had come to the shelter to interview her (Interview #9). She preferred to communicate with female police officers, explaining, 'I think they can understand' (ibid.). However, she was not comfortable expressing this preference directly to the police, so she had asked her mentor to call them on her behalf (ibid.). The police agreed to arrange for her meet with female police officers in the future. This woman's experience demonstrates the need for police to actively inquire about preferences and comfort levels regarding the gender of officers who will interview victims about sensitive details of their victimization.

Targeting this issue of discomfort with male police officers among female trafficking victims is Article 23(2)(d) of EU Directive 2012/29, which requires all interviews during a criminal investigation with a victim of sexual or gender-based violence to be conducted by someone of the same sex as the victim if he or she so wishes, unless a prosecutor or a judge conducts the interview. However, as the aforementioned participant's perspective shows, it can be difficult for a sex trafficking victim to express her wish to be interviewed by female police officers. Thus, police should facilitate the use of an intermediary whom the victim trusts to

confirm whether she would experience discomfort if interviewed by male officers and prefers to communicate only with females. This measure is important for the realization of a gender-sensitive approach that can mitigate the risk of secondary victimization during police interviews. Though there were no male victims in the sample, this issue may also apply to them, as does Article 23(2)(d) of EU Directive 2012/29.

III. Shelter

Like the police, the shelter (ACM) is responsible for fulfilling the Netherlands's obligation to assist and protect trafficking victims. Approximately two-thirds of participants residing in the shelter were brought there by police, which signals the functioning of the 'Chain Partners Approach'. ACM and the police appear to have a close, collaborative working relationship and frequent communication. There is even a dedicated room in the shelter where police can interview victims as part of the process of pressing charges. Starting in 2010, ACM became part of a pilot project entitled, 'Categorical Shelter for Victims of Human Trafficking' (COSM) (National Rapporteur 2013: 183), which likely contributed to its close collaboration with police. The project's primary objective has been 'to provide appropriate and safe shelter with specialized counselling for victims of human trafficking', and the National Rapporteur noted that '[t]he trust between the chain partners involved has also grown' (ibid.).

Although Rijken (2018: 247) maintains that Dutch victims do not have access to these 'specialised facilities' for trafficking victims, this does not appear to be the case in practice as there were at least half a dozen Dutch victims who stayed at ACM during the course of the fieldwork, several of whom participated in this study. However, it should be noted that discrimination as to victims' opportunities for assistance based upon their nationality is contrary to the HRBA principles of equality and non-discrimination, and the Netherlands should take

steps to ensure that Dutch victims possess equal rights and entitlements as non-Dutch victims, both in law and in practice.¹³⁷ Existing discrepancies stem from the placement of the law addressing assistance to trafficking victims within the Dutch law on foreign nationals, in the context of temporary residence permits (Vreemdelingencirculaire 2000 (B)(8)(3)). This parallels Directive 2004/81/EC ‘on the residence permit issued to third-country nationals who are victims of trafficking in human beings’, which addresses victims’ rights to assistance and services only as connected with residence permits. The State Secretary of Safety and Justice noted that many foreign trafficking victims from EU countries apply for residence permits via the B8(3) regulation in order to obtain services and benefits that would not otherwise be available to them, even though they would be able to remain in the Netherlands legally on the basis of their EU citizenship (Teeven 2014). He specifically pointed to the right to reside in a COSM during the reflection period and the higher amount of financial assistance provided during this period as compared to regular social assistance (ibid.).

More than half of the total interviewees currently or formerly residing at ACM characterized their experience there as wholly positive, around a third as mixed, and a few as entirely negative at the time of the interviews. In the ‘positive’ category are two-thirds of non-EU participants and slightly more than half of EU participants (including one Dutch interviewee). A fifth of non-EU and approximately a third of EU participants (including two Dutch interviewees) reported having mixed experiences with the shelter. Lastly, the ‘negative’ category is comprised of three non-EU and two EU victims. Several women shared, during their

¹³⁷ Though there may be certain exceptions where the rights would not be relevant to Dutch victims’ situations, such as the right to a residence permit.

interviews or at some point afterwards, that their views of the shelter had evolved over time, mainly based on positive or negative interactions they had had with the shelter staff.

A. *Shelter Staff*

The residents at ACM mostly interact with social workers, but there are also managers, financial administrators, and receptionists at the front desk with whom they have contact. Each woman residing at the shelter or in shelter-affiliated housing, as well as those receiving services from the shelter but living independently, is assigned a social worker to manage her case, called a ‘mentor’. During the fieldwork for this study, there appeared to be considerable variation among the mentors in terms of competence, conscientiousness, compassion, and commitment to assisting victims. It must be recognized that the job of a mentor is not an easy one; directly serving a vulnerable population dealing with the effects of trauma can be incredibly challenging. The women residing in and/or receiving services from the shelter typically have many needs stemming from multiple vulnerabilities, which require significant time and energy (and paperwork) to address. Regularly hearing traumatic stories can lead to secondary traumatization and compassion fatigue (Figley 1995: xv-xvi, 6), which may have been the case for some mentors. Competing demands on their time and attention from their mentees, managers, and chain partners in an environment that seemed understaffed, and at times, disorganized and chaotic, can also lead to burnout.¹³⁸ These challenges can be a barrier to attracting and retaining high-quality mentors; indeed, two of the most competent and compassionate mentors left soon after the completion of the fieldwork for this study.

1. Empowerment through Assistance, Support, and Care

¹³⁸ Studies have also found burnout to be an issue among shelter staff in other destination countries (Bjerkman and Dyrliid 2005: 129-132; Brunovskis and Surtees 2008: 71; Segrave, Milivojevic, and Pickering 2009: 111).

Many of the participants expressed deep appreciation for the support and assistance the mentors had given them, which made them feel empowered. This has played a major role in their recovery from the harms of being trafficked. For example, one woman residing in the shelter contrasted her psychological and emotional state at the time she arrived at the shelter with that of when she was interviewed for this study two months later, and attributed the difference to the help she received from the shelter staff:

They have helped me an awful lot because when I arrived here I was totally desperate. I thought that there was no life for me anymore, that it was the end. So they gave me a lot of suggestions and a lot of information and they listened to me and they helped me a lot, and now I have some hope. I feel better. (Interview #11).

Another interviewee spoke very positively about her assigned mentor, who had taken concrete steps to support her physical and emotional well-being:

[M]y mentor has been so nice to me because even when I came to this place I was thinking there is no hope again. The way she advise me, she encourage me, she tell me to go to church, and each time I see her, I'm always happy. Sometimes she gives me clothes, about two or three times now she comes, she buy me clothes, and I'm happy about that. She tell me I should believe in myself, there is hope, and I hold onto that word. (Interview #7).

A woman who had resided at the shelter for approximately two years was extremely grateful for the support she received and believed that the mentors help the women to become empowered and avoid re-victimization:

[The mentors] teach us how to be independent and to do our life alone so that we can be strong on our feet and then we don't put ourselves in dependent situation that we ask strangers to help us, so we don't fall in the same difficulties. And I'm really, really thankful to them. (Interview #17).

In this way, the shelter staff not only contribute to the fulfilment of the Netherlands's obligation to assist and protect victims, but also to the fulfilment of the duty to address the root causes of THB.

2. Constraints on Agency

Fostering victims' agency following the disempowering experience of being trafficked is an important goal of a HRBA to THB (Jordan 2002: 30; Pescinski 2015). However, there is tension between this aim and the uneven power dynamic that exists among the shelter staff and residents. Furthermore, there is tension between the goal of facilitating victims' agency and the need for 'rules and parameters [for the shelter] to function, . . . [which are] especially needed in residential facilities where unrelated adults must try to live together in a communal setting after what can only be described as a difficult and stressful experience' (Brunovskis and Surtees 2008: 64; see also Surtees 2007: 173, 182). Some participants resented the control staff exercised over their lives and complained about being infantilized. This finding has also emerged in other studies of trafficking victims who have resided in shelters in other destination countries (Cuzuioc-Weiss and Lacroix 2010: 73-76; Segrave, Milivojevic, and Pickering 2009: 110-114; Surtees 2007: 174-185). In the present study, one resident commented that the shelter staff 'shouldn't treat us like five-year-old kids' (Interview #14). When describing feeling infantilized in the shelter, another interviewee likened the experience to the way her trafficker had controlled her:

[For] [o]ne year, I have to ask the my pimp I have to possible to I do this, possible. Now I'm the same, I have to ask somebody, impossible for my birthday [to be] normal. I ask what my birthday, impossible to I go outside with . . . my friend who had helped me. They say me 'no', you know, I feel the same to children. I have to ask my mentor and I twenty-five year, what? You know, it's crazy. (Interview #5).

Some residents bristled against shelter rules, such as the 10:00 p.m. curfew, mandatory attendance at 8:45 a.m. daily coffee meetings, and confiscation and monitoring of mobile phones for a period often lasting weeks at the beginning of residents' stay, in order to prevent contact with traffickers. As one interviewee asserted, 'If we stay here, for me it's also like jail

sometimes. After 10:00 I'm thinking, 'ok I'm sitting inside again'. And also without phone'. (Interview #30). She then contrasted her situation with that of her trafficker: 'He walks like free outside, he do the same things [he did before], he going out, and for me, I have to come here 10:00. No. I want also the freedom' (ibid.). These two (and other) participants' reflections echo Segrave, Milivojevic, and Pickering's (2009: 110) finding that strict shelter rules 'intensif[y] [victims'] sense of powerlessness'. Post-trafficking constraints on victims' agency that make them feel disempowered and lacking control over their lives can make recovery and reintegration all the more challenging.

However, one participant believed that the constraints on her agency were for her 'own personal good' and appreciated that the shelter staff 'are teaching me and protecting me with what kind of a people I'm communicating and what kind of a social contacts I'm building' (Interview #17). Though she noted that '[i]n the beginning, I was not very happy with it, I didn't agree', after two years in the shelter, she felt that the monitoring of and limitations on her social contacts had helped her to avoid re-victimization (ibid.).

The shelter's mobile telephone rule finds support in Rijken's (2018: 245) study in which victims reported 'that they are still under the control and influence of the traffickers . . . after they have left their exploitative situation' and require 'distance from the trafficker' in order to break free of this control. However, it is applied as a blanket rule, despite variation in individual residents' circumstances and the amount of time that had passed since leaving their trafficking situation. According to one participant, the mentor who had confiscated her phone had explicitly recognized that the rationale for doing so did not apply in her case, as she had not been in contact with her trafficker for some time and had been in another organization's care immediately prior to moving to ACM, but explained that she had to follow the rule regardless (Interview #22).

The interviewee who reflected on needing permission to go out for her twenty-fifth birthday emphasized that, although she wanted more freedom at the shelter, she did not think that this would be appropriate for all shelter residents. She explained:

[F]or some people, it's not good because not everybody—I don't want to talk now for the next people because I don't know everybody. But not everybody here is smart, you know. I see two, three girl here [who aren't.] . . . [M]y neighbour, you know, is [like a] five-year-old. (Interview #5).

These points underscore the importance of individualized assessments and tailoring of interventions to victims' particular circumstances, including their needs and wishes (see Surtees 2007: 185-186). A victim-centred model also requires that these assessments be repeated at regular intervals as victims' particular needs and risk level often change over time, which should prompt readjustment of the rules and restrictions applied (*ibid.*; see also Rijken 2018). However, there is often tension between imposing individual constraints that are no more restrictive than is necessary and practical considerations such as efficiency and resource limitations.

When victims are faced with cognizable threats to their safety while they are residing in the shelter, staff understandably take protective steps, but these often further circumscribe their agency. For example, a colour-coding system of green, orange, and red is used to indicate the level of restrictions on residents' movements outside of the shelter, with green as the least and red as the most restrictive. However, protective steps are not always well-executed. When a resident reported to her mentor that a woman who worked for her trafficker had approached her, tried to recruit her for prostitution, and followed her to the grocery store and back to the shelter after she refused, she said that the staff did not take protective action, such as changing her assigned colour, for two or three weeks (presumptively when the risk of harm was highest). Following this period, they informed her that she would be moving to a secret safehouse in another city for her own protection. This interviewee explained that she was then placed in an

apartment with a woman who jeopardized her safety and well-being by giving the key to other people, having many male visitors stay in the apartment (one of whom tried to seduce the participant), physically fighting with one of these men, stealing and reading her private documents, and bragging about knowing criminals. When she first told her mentor at the safehouse about her housemate's behaviour, she did not believe her, until she shared proof in the form of video footage she had taken. This participant felt that the staff in charge of this safehouse had not detected the situation because they would always call beforehand to say they were coming, giving her housemate's visitors time to leave before the staff arrived. Due to safety concerns, the staff then arranged for her to be moved to a shelter in yet another city. In this shelter, the participant had to share a tiny room with three other women and was not permitted to go outside because staff had assigned to her the red category of restriction, based on perceived risks to her safety. After years of being controlled by her trafficker, these restrictions were too much for this woman to bear:

Sorry, this not help, you know. It's not possible for person with post-traumatic stress you can close one month to don't go outside. To don't go to the psychologist . . . and, sorry but for two month I don't have a normal contact with the people, you know. . . . (Interview #5).

She eventually explained the situation to her former mentor at ACM and asked if she could return to that shelter, but was told that it was 'not possible' (ibid.). However, after an NGO leader advocated on her behalf, ACM agreed to allow her to return. In response to this difference in result, the participant observed, 'It's very important who are you, you know' (ibid.). Reflecting on the situation more generally, she added, '[i]f you don't help correct, better don't help' (ibid.). This interviewee's experience was highly disempowering and secondarily victimized her, in contravention to a victim-centred HRBA.

Participants' negative views of constraints on agency are, at times, exacerbated by a lack of transparency. For example, one woman who had resided at the shelter for five months was upset because her mentor had informed her that she would be moved to another shelter in a city approximately two hours away. However, she had not been given any indication as to why she was being transferred and this left her feeling confused and frustrated. She explained that she did not understand why she was the one who had been chosen for the move because other women had lived at ACM for much longer than she had and she did not believe she had done anything wrong. She added that she felt strongly about not moving to the other shelter because meals were provided there and the residents were not given money for food or access to cooking facilities, as opposed to ACM, where residents were given an allowance and could cook for themselves. This was an important cultural issue for her, as she strongly preferred to buy and cook food in accordance with her home country's practices. She expressed her distaste for Dutch food items, such as bread and soup. The lack of transparency led her to worry that the staff believed she had done something wrong and she felt the need to defend herself. When I inquired about the situation to staff members, one expressed her surprise at the woman's negative reaction to being informed of her transfer. In reality, her resistance is not surprising, as she was not given a choice or an explanation, and her views were not taken into account, let alone sought. In response to my inquiry, one staff member explained that decisions to transfer residents are based on both the length of their stay and what their needs are. A mentor later noted that this woman had resided at ACM for 'a long time' and 'fit the profile' for the other shelter. Given that there were other women at the shelter who were unhappy there and did not like to cook for themselves, another resident most likely would have volunteered to move to the other shelter, had the staff inquired. Though a less efficient means of settling the issue, which

may be challenging given the limited staff, it is important that service providers foster trafficking victims' exercise of agency, in line with a victim-centred HRBA. At a minimum, when decisions impacting the women's lives must be made, staff should strive to seek their input to the greatest extent possible and should explain the reasons behind these decisions, in order to minimize misunderstandings and infantilization. Moreover, this should be done in a sensitive manner. The distraught woman's mentor later recounted their conversation about the transfer to me, asserting that she had simply told her that she could choose whether or not to put the food they give her at the other shelter in her mouth, which is clearly an insensitive and inappropriate response to the woman's concerns. This conduct directly relates to the issues covered in the following subsection.

3. Insensitivity

EU Directive 2012/29 obligates Member States to ensure that victim support services treat victims in a 'respectful, sensitive, tailored, professional and non-discriminatory manner' (Art. 1(1)). Furthermore, the Directive's preamble states that 'specialist support services' should be provided to victims of gender-based violence and provide them with 'a supportive environment that treats them with dignity, respect and sensitivity'. Moreover, as discussed above, respect is a foundational concept underlying human rights (Ward 2009: 115-116, 125). ACM is a provider of 'specialist support services', and these legal standards are implicated in reports from some women that shelter staff had treated them insensitively.

There were multiple complaints about the insensitivity of a few staff members in particular. Regarding one of these individuals who is a mentor, a participant described how she had screamed at her for simply packing a couple of pots and pans when she had to move to

another room in the shelter that did not have any (Field Notes, June 2015). Another participant recounted an insensitive remark this mentor had made about her and her young son:

[I]t was so bad situation [for us] when we come in [the shelter] and then [my son was] just crying a lot and he sit on my legs and then the [mentor] comes and, just one example, she said, uh, ‘he’s reacting like your boyfriend’. Like, he’s very small child, he’s not three years old on that moment. . . . [She said it] because he sit on my legs and I hold him. When we come there, then he was also very in depressive situation and I was also. So we were just thinking like, no one can, um, separate us because we had suffered a lot. So, and that woman, she said—it was so hurt me. Why? She should not say that. (Interview #33).

This mentor’s behaviour towards some of the residents may be rooted in racial and/or xenophobic bias, as one of the women who had complained about her asserted that she is kind to European women but unkind to non-white, non-European women (Interview #39). Furthermore, given that all of the complainants were non-white and non-European and that three white, European women spoke highly of this mentor, with one even characterizing her as ‘the best one’ (Interview #17), there is a suggestion of animus based on race, ethnicity, and/or nationality. If this is in fact the case, the principles of equality and non-discrimination would be breached.

I witnessed another staff member’s insensitivity first-hand during one of the monthly ‘financial trainings’ provided to new shelter residents about the benefit funds they receive from the government, expenses to be deducted from these funds (e.g. rent for shelter room, health insurance), and how to live frugally. As the staff member running the training was recommending that the residents shop at low-cost stores, walk instead of taking public transportation, and get their hair cut at a hairdressing school for a low price, she informed them that she goes to an expensive hair salon, where she spends a lot of money (Field Notes, January 2015). She then smirked and exclaimed, ‘I like it, I can afford it’ (Ibid.). This is quite an insensitive way to act towards people who have just endured traumatic experiences, have no income apart from modest amounts of government assistance, and, in many cases, were living in

poverty prior to being trafficked. Bragging about being in a comfortable financial situation to people who are not is both insensitive and disrespectful. In addition, at certain points during the training it seemed as if this staff member was trying to make the women feel guilty for receiving taxpayer money (Ibid.). This is far from a victim-centred HRBA, which requires sensitivity to victims' feelings and the precariousness of their position, in line with Article 1(1) of Directive 2012/29/EU. In addition, in her research with trafficking victims in South-eastern Europe, Surtees (2007: 217) found that '[f]or many victims, being treated well and not "looked down upon" was central in the recovery process'.

Complicating the issue of insensitivity among some of the staff is that shelter residents are only supposed to discuss their issues and concerns with their assigned mentor (unless it is an emergency), and it is very difficult for them to switch mentors (Field Notes, November 2014). This is largely because the staff want to prevent what one referred to as 'mentor shopping', which she explained as occurring when a resident discusses her problems with multiple mentors and tries to get 'all of the attention' (Ibid.). Thus, if a resident is assigned a mentor who behaves insensitively toward her, it is likely that her needs will not be adequately addressed and that she will not fully realize her rights—partly due to the chilling effect of insensitivity on the part of a person the victim depends upon for access to assistance, benefits, and in many cases, to other chain partners.

4. Lack of Due Diligence

As discussed earlier, state agents tasked with protecting and fulfilling human rights must do so with due diligence (Bantekas and Oette 2013: 76). A lack of due diligence (often manifesting as disorganization) at the shelter sometimes led to preventable difficulties in residents' lives. At times, these difficulties have had serious consequences. For example, two

participants' described financial issues which they attributed to errors on the part of shelter staff. One of these women asserted, 'I have a lot of debt because [of the staff]' (Interview #14). She explained that she and her former mentor had agreed that the shelter would take a portion of her benefit money every month and use it to pay off a debt she had when she arrived. However, she later discovered that the shelter had only done so for one month rather than continuously. As a result, this participant explained that she had to go to court regarding the debt and pay an additional €800 for the case. The second interviewee recounted how for a month after she and her several children arrived at the shelter, her mentor told her that she did not have any benefit money that she could use due to clerical errors. First, she informed this participant that the funds shown in her account actually belonged to another resident and had mistakenly been deposited in there. Weeks later, her mentor told her that she still did not have any money because her benefits had been erroneously deposited into a third resident's account. In an attempt to track down her funds, the participant contacted the NGO in another city that had been handling her benefits before she moved to ACM, which told her that her money had been transferred to ACM a 'long time' before then (Interview #22). She explained her and her children's experience and her frustration about the situation as follows:

For a *long* time, [my mentor] told me, 'you don't have, you don't have, you don't have' and my children going to school without nothing. And my mind crazy. The whole time I say 'I have money, why she say I don't have, I have money'. . . . When I don't have enough food for my children, when I don't have shoes for my children, I am crazy. . . . [T]he teacher told me, 'the shoes for [your son] are broken'. I say, 'I know. Sorry.' And [he] come here crying. [My other son] also. He make a big problem crying, 'I want to go, I want to go', because they go to school for three weeks without bags, without [decent] shoes. (Ibid.).

In this way, simple clerical errors can interfere with victims' right to standards of living capable of ensuring their subsistence.¹³⁹ This woman also asserted that staff members' insensitive

¹³⁹ Convention Art. 12(1)(a); Directive 2011/36/EU Art. 11(5); Directive 2004/81/EC Art. 7(1).

reactions to her situation compounded her distress. For example, one advised her to direct her thoughts and energy towards her trafficking case and trying to resolve her residency issues instead of towards her financial and other concerns involving the shelter,¹⁴⁰ which left her feeling even more distraught about the situation.

This participant also recounted other instances in which disorganization at the shelter had negatively impacted on her. On several occasions, her mentor had told her that she could attend an activity at an NGO because there would be a babysitter to supervise her children there on specific days. However, each time she was not informed until the last minute that there would not actually be a babysitter available, and typically only when she double-checked as she was leaving for the activity with one or more of her children. This woman explained that for her, the issue was not the lack of a babysitter, but rather, '[t]he problem for me is why they don't tell me' (ibid.). She asserted that, due to incidents such as these, 'I don't feel nobody respect me here' (ibid.). Several other residents complained about similar issues, which appear to be mainly attributable to a lack of diligence, disorganization, and understaffing. Yet, as the examples here demonstrate, preventable mistakes and a failure to communicate relevant information can lead to additional difficulties in victims' lives and strained relationships between residents and shelter staff.

B. *'Activities' and Psychological Support*

Days at the shelter begin with the residents and mentors having coffee and tea at 8:45 a.m., during which time the mentors make announcements and distribute benefit money on a bi-

¹⁴⁰ Other participants also recounted this particular staff member saying this to them rather than addressing the substance of their concerns about the shelter.

weekly basis.¹⁴¹ Following this, on most days are ‘activities’ lasting a couple of hours, such as Dutch and English classes, group therapy, self-defence classes, and self-care workshops. The residents are required to attend the activities, unless they have young children they must care for instead (though women with infants may attend certain activities, such as language classes). These activities are run by volunteers and/or NGOs. Most participants¹⁴² had a positive view of the activities, which many noted took their mind off of their difficult situation. One of these women explained:

. . . I like the activity, it keeps me busy and uh, sometimes it’s makes me not to think because when I’m alone I think a lot, but if then I go to the activities I’m always occupied with in between one or two things and they—I’m carried away. I don’t think at that particular moment unless when I’m alone. So I like the activities, it’s nice, it helps me. (Interview #7).

Several participants voiced their desire for activities to be available for more hours of the day. In line with the sentiments expressed in the excerpts above, this mainly stemmed from a desire to keep busy to distract themselves from their problems and stressful memories. One woman explained, ‘Activity is not too much, I want more activity. It’s not too much, only in the morning and then you stay like this [doing nothing]. And this makes us thinking, thinking, thinking . . .’ (Interview #28).

The weekly group therapy was one of the less popular activities. A few women expressed their discomfort with sharing their feelings and personal experiences with other people they did not know well. For example, one interviewee explained:

I don’t like [the therapy in the shelter] because you’re sitting in a group. I was there yesterday and I didn’t talk about my real problem. How can I talk with

¹⁴¹ At the time of the fieldwork, victims without children received €25 twice per weeks and a victim with four children received €45 twice per week (Field Notes, January 2015).

¹⁴² In the section of this chapter about the shelter, the results relate only to the 33 participants interviewed while residing at the shelter and the one who had previously resided there. References to proportions relate only to this sub-sample rather than to the entire 39-person sample.

people that I don't know about my real problem? How can I trust that they don't use it [against] me? You know? Maybe we will go one day from here, we live in the same place, we will see each other again, and it's like, 'oh, you was that girl, you got that and that problem', you know. I don't want that. . . . [Also,] one-by-one [therapy] is better. Then she can maybe understand me more. (Interview #30).

This finding is in line with Rijken, van Dijk, and van Mierlo's (2013: 22) experience conducting focus groups with trafficking victims. They eventually abandoned this methodological approach, in part due to victims' reluctance to speak about their trafficking victimization and post-trafficking experiences in the presence of a group of strangers (ibid.)

Notably, not all women who felt they needed individual therapy were able to receive it. There appeared to be a shortage of therapists and a waiting list. One woman recounted her unsuccessful attempt to obtain individual counselling while residing at the shelter in the following way:

I'm receiving psychotherapy in the group, but I would love to have one-on-one psychotherapy. I asked about it, but it seems that I can't receive it. But I think it's very important for me to have it. I have asked [my mentor] here in the shelter . . . [and] [s]he asked me to refer to the psychotherapists when they come here. . . . I did that . . . but she said 'when the group therapy is finished, we may think about individual therapy. But first this has to be—you are already in the group therapy, so let's finish this one and then see or go further'. (Interview #24).

Given that the main objective of the COSM project has been 'to provide appropriate and safe shelter with specialized counselling for victims of human trafficking' (National Rapporteur 2013: 183), it is odd that sufficient resources have not been made available to provide individual therapy to all victims at the shelter who wish to have it. Rijken (2018: 247) asserts that '[m]any victims experience difficulties in their daily life because they have not received tailor-made and sufficient psychological treatment after trafficking'. With regard to sex trafficking victims in particular, she notes that inadequate psychological support has led to re-victimization in some cases (ibid.). Thus, although weekly group therapy sessions satisfy the obligation to provide

trafficking victims with psychological assistance,¹⁴³ in practice, a more victim-centred approach would be to provide individual therapy for all victims who feel they would benefit from it, in order to meet their needs and reduce the incidence of THB re-victimization.

C. *Safety*

Consistent with international and regional law,¹⁴⁴ one of the primary objectives of COSM shelters, including ACM, is to provide ‘safe shelter . . . for victims of human trafficking’ (National Rapporteur 2013: 183). Approximately half of the participants residing at ACM expressed concerns about their safety. Several noted that they felt safe while inside the shelter but thought that their safety was at risk when they ventured outside, such as when they had to shop for groceries. Though the shelter has a reception area at the front that is staffed 24 hours a day and a second locked door on the far side of the lobby, which the receptionist controls, a few participants commented that there should be additional safety measures put in place to protect the women residing there. One interviewee asserted:

I don’t see police protection. . . . [T]his is house, you know, give too much girl—women with problem, you know. Why here not stay one police or two police outside house and to look, you know? Here is—on the reception [desk] is one old man. When some mafia come here inside, put the old man out there and come here and kill this, that, which help you? You understand what I mean? (Interview #28).

Her concerns are not baseless. First, the shelter’s address is easily accessible on the Internet,¹⁴⁵ contravening the CoE Convention Explanatory Report’s instruction that ‘the address of any accommodation [for victims] needs to be kept secret’ (para. 164). Second, there have been instances when residents’ traffickers have come to the shelter. For example, as one woman

¹⁴³ Convention Art. 12(1)(a); Directive 2011/36/EU Art. 11(5), (7).

¹⁴⁴ Convention Arts. 12(2), 28, 30(b); Directive 2011/36/EU Art. 12(3); Directive 2012/29/EU Arts. 9(3)(a), 22; Palermo Protocol Art. 6(5).

¹⁴⁵ <http://hvoquerido.nl/locatie/acm-cosm/> (last accessed 1 October 2018).

recounted, '[p]eople in shelter also already three time see my ex here in the lobby . . . I don't know, he find me everywhere' (Interview #31). Third, there was an armed robbery at the shelter in the past, though fortunately no one was harmed. Fourth, the shelter is in a building that is also used as temporary shelter for homeless individuals and families. Though these residents occupy a different side of the building from ACM residents, both sides are accessible to all who live there, which can increase safety risks for victims. Fortunately, the Team Lead for Amsterdam Police Human Trafficking Unit from 2002 to 2015 reports that no trafficking victims were injured or killed while residing in a shelter during his tenure.¹⁴⁶ However, this does not mean that additional safety measures should not be seriously considered, in light of the serious risks and the emphasis on victim safety within international and regional law.¹⁴⁷

IV. Lawyers

A right to free, high-quality legal representation for victims is a significant part of a victim-centred HRBA to THB. Victims are empowered when they are represented by dedicated advocates who know the relevant criminal justice system and how to advance victims' interests within it. Having legal representation also enables victims to claim inter-dependant and inter-related rights. For example, lawyers can navigate the immigration system to help undocumented victims claim their right to a residence permit. In addition, legal advocates are often key to victims' ability to exercise their right to be heard within criminal proceedings (Muraszkiewicz 2016: 341-342), which promotes the principles of participation and inclusion. Specifically, lawyers can advocate for the implementation of special measures, which many vulnerable

¹⁴⁶ Email from Harold van Gelder, former Team Lead for Amsterdam Police Human Trafficking Unit, 26 December 2017.

¹⁴⁷ Convention Arts. 12(2), 28, 30(b); Directive 2011/36/EU Art. 12(3); Directive 2012/29/EU Arts. 9(3)(a), 22; Palermo Protocol Art. 6(5).

victims feel they cannot testify without (Hamlyn et al. 2004: 78). Having their lawyers present can also give victims an empowering confidence boost in the often ‘unfamiliar and forbidding [courtroom] environment’ (Doak 2008: 51).

Although Dutch Regulation B8(3.4) only provides for legal assistance for trafficking victims during the reflection period ‘if it appears necessary’ (Vreemdelingen­circulaire 2000 (B)), it seems to be standard practice for victims to be assigned lawyers once they are receiving services from a COSM shelter or are recognized as victims by the police (though in the latter case, one participant was never offered legal assistance). Most of the participants in this study were represented by lawyers, including those beyond the reflection period who had agreed to press charges, and the majority of these women spoke positively of their experiences with them. Some reported mixed experiences, while several had been displeased with their first attorneys, switched, and provided more positive feedback about their second ones. Less than a fifth of represented participants reported wholly negative experiences with their lawyers. Two Dutch interviewees had declined offers of legal assistance, one explaining that she had done so because she did not want to think about her problems ‘all the times’ and lawyers ‘call you to do this, do this, come and talk, [and] I don’t like that’ (Interview #32).

A. Empowerment through Assistance and Advocacy

Most of the participants reporting positive experiences with their attorneys felt empowered by having a legal professional advocating for them and explaining their options to them. One woman was amazed at her lawyer’s commitment to helping her, explaining, ‘[s]he started making me feel lucky that in this world even if you have problems you can meet people who can still fight for you, even if they don’t know you’ (Interview #34). Another participant

similarly expressed gratitude for her lawyer's assistance and dedication, as well as for taking the time to explain components of her case to her:

I like my lawyer because she help me so much. . . . [T]his woman help me and if I need something I got help for it. . . . I thankful for this because I have really good—I think this is woman for me is good. She know what she need to do, she explain me . . . the stuff for human [trafficking]. (Interview #27).

Several women expressed their belief in their attorney's competence and conscientiousness, as well as their hopes that their advocates could help them with what many participants experienced as desperate situations. After asserting her belief that her lawyer will do her best for her, one of these women murmured, 'I just pray to G-d for her to help me. That's my prayer' (Interview #23). Yet, most did not seem to realize that, within the constraints of the existing system, even with a committed and competent lawyer, the odds of their traffickers being brought to justice and long-term residency in the Netherlands (for non-EU victims) were not in their favour.

B. *Lack of Communication*

Some participants complained about poor communication on the part of their lawyers. These complaints ranged from not hearing from them for an extended period to their lawyers failing to return their telephone calls. An interviewee expressed how her lawyer's lack of communication made her feel, explaining, 'I called the lawyer and uh, lawyer busy at the time and will call me back, but I did now is not calling me back. . . . that's why I feel I'm just a number. I'm not important. (Interview # 31). Another participant was disappointed that she had not heard from her lawyer since she had met with her for the first time more than six months prior. She asserted, 'I think if I were a lawyer I would have to have contact more frequently, not just once' (Interview #14). As a result of the lack of communication from her lawyer, this woman was 'looking for a different lawyer now' (ibid.). On a positive note, trafficking victims

are able to switch lawyers if they are dissatisfied with their legal representation; indeed, several participants had successfully done so. For example, in recounting her decision to change lawyers, an interviewee explained, ‘I wasn’t happy with that [first] lawyer. There was indifference. He was not interested in anything to help me’ (Interview #24). She said it was not difficult for her to switch, and she was more satisfied with her second lawyer because he ‘was interested to help me’ (ibid.). Another participant informed her mentor that she wanted to change attorneys because she was ‘disappointed’ with the first and ‘didn’t trusted her’, and her mentor found another lawyer to represent her, who she felt ‘was much better and he paid me more attention’ (Interview #17). The option to change lawyers is significant because it facilitates victims’ ability to exercise agency and control in a consequential area of their lives. It also demonstrates that, for at least some victims, regular communication from their lawyers is very important to them and viewed as an indication of how invested their lawyers are in helping them.

The poor communication issue is likely attributable, at least in part, to the low level of compensation lawyers receive to represent trafficking victims in the Netherlands. Due to budget cuts, the Legal Aid Board (Raad voor Rechtsbijstand) under the Ministry of Justice and Security reduced the compensation paid to lawyers¹⁴⁸ for representing a victim in a case that proceeds to trial from €1170.40 to €1161.71 in February 2015,¹⁴⁹ and has not raised it since. This amount represents eleven points (one point = €105.61 since February 2015) or eleven hours of work.¹⁵⁰ Only if the attorney spends more than three times this amount of hours on the case can he or she

¹⁴⁸ Muraszkievicz (2016: 347) notes that budget cuts to legal aid are a trend among EU states.

¹⁴⁹ Email from Susanne Peters, Researcher at the Legal Aid Board, 3 July 2018; Emails from Annet Koopsen, 18, 21, and 25 June 2018.

¹⁵⁰ Ibid.

apply for additional funds from the Legal Aid Board, and even then, they are very difficult to obtain.¹⁵¹ Furthermore, when a lawyer represents a victim whose case does not proceed to trial (even when the victim presses charges), he or she can only receive a maximum of eight points (€844.88) for doing more than six hours of work on the case.¹⁵² The low compensation rate incentivizes lawyers to take on many cases at a time and avoid spending much time on each case. It is unreasonable to expect attorneys in just eleven hours to obtain the necessary information from their client, become familiar with the evidence, file the requisite paperwork, explain the procedure to the client, answer her questions, prepare her to testify, and attend court proceedings, among other things. The existing incentive structure undermines the realization of a victim-centred HRBA, given the great importance of effective legal representation to victims' ability to claim their rights from the state and avoid secondary victimization.

V. Falling through the Cracks

Despite the systems in place to identify and assist trafficking victims in the Netherlands, as well as the Chain Partner Approach, there are victims who fall through the cracks and do not receive the assistance to which they are entitled under the law. This has even been the case for some victims who have been in contact with a chain partner. One participant who had reached out to multiple shelters for help described her experience in the following manner:

I also was expected, you know, seeing sometimes how the other people got help and I really had nothing, and it wasn't only human trafficking, there was some other things on top of that. And I didn't get *any* help from these organizations. Nobody—I thought at least maybe I have a right for the social emergency house because I have no place. I lost all the money, I lost . . . everything. Was nothing. . . . [I was told that] I was supposed to live officially in Holland more than three years. If I lived less than three years, then I have no rights at all. Like for the housing, because I called a couple of shelters when I was there, they rejected, another shelter . . . then I was supposed to pay and I didn't have money to pay. It

¹⁵¹ Emails from Annet Koopsen, 21 and 25 June 2018.

¹⁵² Email from Annet Koopsen, 21 June 2018.

was like, not much, but still, you know, the situation . . . So my experience wasn't so good. But maybe . . . I didn't live long enough in Holland to be getting this kind of help. Yeah, I was also really quite surprised about that because I was calling like—I really called a couple of shelters . . . I was not only the victim of human trafficking, I have domestic violence, I got €200,000 stolen from me from me, from my parents who passed away in my country, so I was completely mentally sick, I was only like 21, 22, and all this horrible stuff happened . . . I just knock on all these doors, like, I have no idea what to do, I'm just want to die because I nobody, please help me, I'm just going mentally sick, I can't keep going anymore, you know. And then, just nothing. I was expecting—like, I was really surprised that there was really nothing in the end. (Interview #37).

This woman's experience is puzzling as trafficking victims are not required to have lived in the Netherlands for a certain period of time or have personal funds to receive accommodation at a shelter. Perhaps the shelters she had called had not understood that she was a trafficking victim and thought that she was simply homeless. This may have been the case as many municipalities in the Netherlands have required a person to have a 'local connection' (residency within the region for at least two of the previous three years) in order to be eligible for emergency shelter (Planije and Tuynman 2013: 183-184). Fortunately, this participant finally received services from ACM, but was not connected with this organization through any official or established channels. After giving up on trying to obtain assistance from organizations in Amsterdam, a friend of hers met a woman who worked at a similar organization by chance on a train. Her friend asked this woman many questions about her situation and whether she could help. The friend then connected this participant with the woman he had met on the train, and the woman arranged for ACM to accept her as a client. If not for this chance meeting, this victim would, in all likelihood, never have received the help she so desperately needed.

Another participant never did receive that help. Despite having interacted with police in Amsterdam many times and having pressed charges against her trafficker in 2009, she was never offered the opportunity to speak with a lawyer or to stay in a shelter when her safety was at risk.

When she contacted police in the summer of 2010 and informed them that she was very worried about her safety because her trafficker had just been released from prison and had approached her, they replied, ‘we can’t do nothing’ (Interview #36). She felt especially concerned because at the beginning of her interview to press charges against him, police had told her that he would be going to prison for six years, but he only ended up serving six months because he had provided information about other traffickers. They had also said that she should call them if her trafficker came near her so he could be sent back to jail. Unsurprisingly, this woman was disillusioned with the Dutch police, plainly stating, ‘[t]hey don’t care’ (ibid.).

Unfortunately, it is likely that an increasing number of trafficking victims have recently ‘fallen through the cracks’ and that this trend will continue due to a significant decrease in the level of resources the Dutch government devotes to THB. Police resources have been reallocated from THB towards counterterrorism (U.S. Department of State 2018: 321) and undocumented migrants (Pieters 2017). Furthermore, government funding for three specialized shelters for trafficking victims, including ACM, has been reduced by half of the 2017 level for 2018 through 2021 (U.S. Department of State 2018: 321).¹⁵³ The decrease in resources is a serious threat to victims’ human rights, as they are less likely to be identified and assisted as a result. This can already be seen in the decreasing number of victims identified over the past several years, which Dutch government officials and civil society do not interpret as a decline in the crime’s prevalence (ibid.). In 2016, only 952 potential victims were identified in the Netherlands, which represents a decline of 17 percent from 2015 and almost 40 percent from 2014 (U.S. Department of State 2015: 259, 2018: 321). The resource reduction is also a threat to

¹⁵³ In its second evaluation report on the Netherlands’ implementation of the Council of Europe Convention, GRETA (2018: 28) emphasized that ‘[w]hen specialised assistance is delegated to NGOs, the State has an obligation to provide adequate funding and monitor the quality of the assistance services provided’.

potential trafficking victims' human rights because it reduces the likelihood that traffickers are detected and stopped, thereby allowing them to continue to victimize others. Report and arrest rates in 2016 and 2017 appear to reflect this problem. While there were essentially the same number of reports of possible THB during these years (184 and 186, respectively), there were 36 percent fewer arrests made in 2017 (141) as there were in 2016 (220) (U.S. Department of State 2018: 320). As investigative resources are required prior to making arrests, resource limitations likely prevented full investigation of every report in 2017, thus leading to fewer arrests.¹⁵⁴ Consequently, the extent to which the Netherlands has fulfilled its key obligations under a HRBA to THB appears to have decreased in recent years, and this trend is likely to continue in coming years unless adequate resources are allocated toward this purpose.

VI. Conclusion

Understanding victims' experiences with police, shelters, and lawyers is a key step in assessing the extent to which the Netherlands realizes a victim-centred HRBA to THB in practice. These data show that, in many cases, the Dutch system succeeds in carrying out the state's obligations towards trafficking victims contained in international and regional law. However, there are also a significant number of cases in which it falls short, often resulting in dire consequences for victims. Some such situations could be prevented in the future by implementing organizational procedures and safeguards, but others are more difficult to address,

¹⁵⁴ This trend may also be due to a recent reorganization within the Dutch police force, which led to a loss of institutional knowledge as trafficking experts were transferred to other departments (which is troubling) (U.S. Department of State 2018: 321; Pieters 2017). In addition, it is worth noting that the number of prosecutions for THB in 2017 (157) is similar to that in 2016 (though inexplicably reported as 174 in the 2017 U.S. Trafficking in Persons (TIP) Report and 150 in the 2018 one), and convictions rose from 103 in 2016 to 127 in 2017 (though there were 139 or 140 convictions in 2015 (another discrepancy among the TIP Reports, this time with respect to the 2016 and 2017 ones)) (ibid.: 320; U.S. Department of State 2016: 283, 2017: 297). These figures are encouraging as they suggest that the Public Prosecutor's Office may not be as impacted by resource cuts with regard to its work on THB as the police and shelters are.

particularly those related to bias that may require a shift in institutional culture.¹⁵⁵ The latter cases often involve fulfilment of substance of the obligations under the law, but in a manner that is inconsistent with core human rights principles. Of these, the most commonly implicated in the data were equality and non-discrimination, universality, inter-dependence and inter-relatedness, and empowerment. Importantly, a HRBA can only be realized if *both* the substance of state obligations and the core human rights principles are fulfilled. Unfortunately, closing many of the gaps between human rights standards and practice will be challenging under the strain of recent cuts to the level of resources that the Dutch government allocates towards rooting out THB and providing assistance and protection to its victims.

¹⁵⁵ For example, police culture ‘can be a stubborn obstacle to change’ (Crawshaw, Cullen, and Williamson 2007: 386).

CHAPTER 5

Deliberating at a Crossroads: Victims' Decisions with respect to Participating in the Criminal Justice Process

I. Introduction

A HRBA to THB emphasizes the importance of facilitating victims' agency, empowerment, and ability to exercise control over their lives (Jordan 2002: 30; Pescinski 2015; Rijken and Römken 2011: 81, 94). This is directly relevant to victims' right to decide whether or not they will participate in the criminal justice process, as well as the conditions under which they can make this decision. As discussed in Chapter 2, under international and regional human rights law, victims possess a legal right to a reflection period, during which they can engage in an 'informed' decision-making process.¹⁵⁶ In addition, they have legal rights to various types of assistance during this period, including a 'subsistence' standard of living, emergency medical treatment, translation and interpretation services, and having their safety and protection needs taken into account.¹⁵⁷ Understanding victims' experiences and considerations during the decision-making process is key to assessing the practical operation of these rights, identifying gaps in victim assistance measures, and analysing victims' ability to exercise agency immediately following the disempowering experience of trafficking victimization. Furthermore, victims' right to make a decision about their participation demonstrates that they are '*not* entirely powerless' (Segrave, Milivojevic, and Pickering 2009: 93) within a system that wields a great deal of control over their post-trafficking lives (as highlighted in the previous chapter). Thus, the facilitation of victims' decision-making power in this context is an important part of a victim-centred HRBA to THB.

¹⁵⁶ CoE Convention Art. 13; Directive 2004/81/EC Art. 6.

¹⁵⁷ Convention Arts. 12-13; Directive 2004/81/EC Arts. 6-7; Directive 2011/36/EU Art. 11.

In the Netherlands, human trafficking victims are entitled to a three-month reflection period, during which time they are expected to decide whether or not to press charges against their traffickers (Vreemdelingen­circulaire 2000 (B): B8(3.1); GRETA 2018a: 161). The number of trafficking victims granted the reflection period was 174 in 2014, 134 in 2015, and 116 in 2016 (GRETA 2018a: 34).¹⁵⁸ A decision to press charges obligates a victim to fully cooperate with criminal justice authorities. This process includes, at a minimum, in-depth police interviews, and can also involve testifying and being cross-examined during criminal proceedings, as well as other types of cooperation. An overwhelming majority of participants in this study decided to go forward with pressing charges, while only a few decided against it. A handful had not yet made their final decisions and remained unsure, though one of these participants was leaning towards pressing charges and two were inclined not to do so. The group that decided to press charges is comprised of nearly 90 percent of the non-EU interviewees and approximately three-quarters of the EU interviewees (including one Dutch victim). Only one non-EU participant and two Dutch participants had decided firmly against pressing charges at the time of their interviews for this study.

Regardless of the outcomes of their decision-making processes with respect to pressing charges, almost all interviewees considered multiple factors while making their decisions. Like victims' decisions regarding whether to accept or decline assistance, their decisions about pressing charges are 'the outcome of a complex set of considerations' (Rijken and Römken 2011: 82 citing Brunovskis and Surtees 2007; see also Segrave, Milivojevic, and Pickering 2009: 84). Their descriptions of these factors and of their thought processes reveal the typically

¹⁵⁸ This downward trend is reflective of fewer victims being identified, likely due to reduced police resources devoted to THB and a wide-reaching reorganization of the Dutch police force that led to a loss of institutional knowledge (GRETA 2018a: 25; U.S. Department of State 2018: 321; Pieters 2017).

complex balancing of advantages and disadvantages in which victims engage when deciding whether to participate in the criminal justice process. It was common for participants to give weight to one or more factors which favoured one decision outcome over the other, but then to ultimately decide that these factors were outweighed by those on the other side of the equation. This chapter explores the contours of this decision-making process, as reported by interviewees, highlighting context and implications in the consideration of various factors, including constraints on their decision-making power.

II. Reflection Period

Following the disempowering and traumatizing experience of trafficking victimization, victims are immediately confronted with a sudden change in environment and major questions about their future, including whether to press charges against their traffickers (Craggs and Martens 2010: 88). Adding to this challenge is the fact that, following their exit from their trafficking situation, they are often experiencing pressing issues that must be addressed before they can fully process their future options, such as physical exhaustion, medical needs, and Stockholm syndrome (Rijken 2018: 239, 244-245, 248; see also Rajaram and Tidball 2016: 21-22). The reflection period is thus important to enable victims to address their immediate needs prior to having to finalize significant decisions about their future. Moreover, the right to a reflection period and the accompanying assistance and protection measures underscore the principles of inter-dependence and inter-relatedness because their fulfilment is often a prerequisite to the realization of other rights, such as the right to be heard in criminal proceedings and the right to seek compensation.

Almost all participants reported that they had been informed of their entitlement to the three-month reflection period. In a couple of instances, interviewees had wanted to start the

process of pressing charges prior to the expiration of the reflection period, but were prevented by the police from doing so. When asked if there were any factors that caused her to hesitate to press charges, one woman explained:

There's no way I hesitated. Actually I wanted to do it, but the police told me when they came here, 'we want you to think about it for three months' . . . I wanted [to press charges] immediately but they told me 'after three months'. (Interview #9).

Victims who have decided in favour of pressing charges prior to the expiry of the reflection period may want to start the process before three months have passed for a variety of reasons, such as wanting to end the 'limbo' of the reflection period, to feel like progress is being made on their case, to prevent evidence from becoming stale, and to get the police interview portion of the process, which is often emotionally taxing, over with sooner. In refusing to allow victims to begin the process before the end of the reflection period, perhaps police are concerned that even victims who say they are certain of their decisions to press charges may later have doubts or change their minds (which would be a paternalistic approach) or perhaps there are resource limitations that have resulted in a queue of cases waiting to begin the 'pressing charges' process. However, the IND's (2013: 2.1) policy document concerning the Dutch law on benefits for foreign trafficking victims in the Netherlands (the 'B8 regulation') (Vreemdelingen­circulaire (B): B8(3)) states that victims can press charges immediately. According to the Amsterdam Police Human Trafficking Unit, there is no policy against allowing victims to start the process prior to the expiration of the reflection period.¹⁵⁹ This indicates the likelihood that there have been misunderstandings among police officers about the policy and/or miscommunications between police and victims. Either way, there is a need to re-examine police communication

¹⁵⁹ Emails from Bart Soels, Operational Specialist in Amsterdam Police Human Trafficking Unit, 19 and 20 July 2017; Email from Harold van Gelder, Team Lead for Amsterdam Police Human Trafficking Unit from 2002-2015, 27 April 2017.

protocols and procedures to ensure that victims are clearly informed and understand that they are able to begin the process of pressing charges prior to the end of the reflection period, if they prefer to do so. This would empower victims by giving them more control over the process.

Although Dutch law states that the reflection period cannot be extended (Vreemdelingen­circulaire 2000 (B): B8(3.1)), there appears to be some flexibility in certain cases. One participant reported that the police had extended her reflection period by three months. She explained:

When I came here I had the three months that I can then think over, and only then. But actually I needed six months . . . [A]fter those three months had passed, I had an appointment [with the police] and then I didn't go to this meeting. And they called me here and they asked me am I going to give my testimony. I said that I would like to do that, but I need more time. And they agreed with that because they knew that I have some valuable information I can give them. So they gave me those three extra months. (Interview #17).

As the excerpt shows, this interviewee appears to think that her reflection period was extended due to the usefulness of the information she could provide to the police. One hopes that this is not the case and, in actuality, the police base these decisions upon victims' needs rather than upon the quality or utility of the information they can provide. Extending this participant's reflection period empowered her to participate in the criminal justice process and contributed to the fulfilment of the Netherlands's obligation to investigate, prosecute, and punish traffickers with due diligence. It is also consistent with EU Directive 2012/29's requirement that victims be treated in a tailored and sensitive manner (Art. 1(1)).

III. Factors Participants Considered when Deciding whether or not to Press Charges against their Traffickers

A. Retribution for Past Harm

Kaufman (2013: 47) asserts that '[r]etributive punishment remains a powerful intuition', and this phenomenon is strongly reflected in these data with respect to pressing charges: two-

thirds of participants cited one or more retributive factors as impacting their decision-making processes. Roughly two-thirds of this group (almost half of all interviewees) described the severe harms they personally suffered at the hands of their traffickers as a factor weighing in favour of pressing charges. In the words of one participant:

I see it as a necessity to stand for this and to come with my complaints so that those who've been guilty of doing harm to me will have to pay for—hopefully they'll find them—and they have to pay for what they did to me. (Interview #24).

The harms participants' traffickers caused often had lasting effects and negatively impacted these women after, even long after, they were no longer in their trafficking situations:

Because of him, I wanted to kill myself, because of him, I'm sick, because of him, there are so many things . . . he needs to pay for it, for what he did to me. And because of him, he forced me to do things I never wanted to do. Because of him, I will be traumatized all of my life. (Interview #39).

Several interviewees explained that their traffickers had not only harmed them, but had also inflicted harm upon their loved ones and/or other individuals. A victim with a young son expressed the following rationale for her decision to press charges:

I want that the people should get—they should be punished because they have done lots of bad things. Not only with me but maybe for—with the other women also because I saw there . . . Yeah, because they not only hurt me, they hurt also to my son also . . . they destroy all life. (Interview #33).

Similarly, an interviewee described the harm her traffickers tried to inflict upon her unborn child as one of the reasons underlying her decision to press charges:

So when I was with them, and I was pregnant, they were wanting me to use drugs and alcohol. They wanted me to keep working while I was pregnant. They walked on my stomach and my back. And they beat me, hit me. (Interview #14).

Participants' retributive reasoning was often stated expressly, explicitly connecting harms with punishment, but in some cases, it was implied through the description of the harms victims endured at the hands of their traffickers. In detailing these harms while explaining their

decision-making processes, a number of interviewees implied that their traffickers deserved to be punished for inflicting them. Women citing retributive rationales, whether expressly or implicitly, viewed pressing charges as the process by which punishment can be imposed upon their traffickers.

Other empirical studies with trafficking victims and those with victims of similarly serious human rights violations have also identified retribution as a motive for deciding to participate in the criminal justice process. This was the case with respect to giving testimony in Bjerkan and Dyrliid's (2006) qualitative study involving semi-structured interviews with approximately 12 female trafficking victims from Eastern Europe (as well as with psychologists, NGO representatives, and other actors who work closely with victims).¹⁶⁰ Furthermore, Mischkowski and Mlinarević (2009: 51-52) found that retributive punishment was the most common motivation for agreeing to testify about experiences of sexualized violence among a sample of 45 female witnesses (almost all were victims) at the International Criminal Tribunal for the former Yugoslavia (ICTY) and/or the War Crimes Chamber of the Court of Bosnia and Herzegovina. Nearly all participants in the study reported considering this factor. Desires for retributive justice also emerged as a significant theme in Stepakoff et al.'s (2014: 439, 442-443) study of 200 witnesses (more than three-quarters were victims) who had given evidence before the Special Court for Sierra Leone, as almost a quarter of participants provided this factor as a reason underlying their decisions to testify. In addition, 52 percent of victim-participants reported being motivated to testify by a desire to denounce and respond to wrongs committed against them personally and/or against others during the war (ibid.: 445). Though Stepakoff et

¹⁶⁰ Surtees (2007: 163) also maintains that retributive reasons motivate trafficking victims to testify, but supports this assertion with an interview excerpt from Bjerkan and Dyrliid (2006) rather than with one from her own empirical study with trafficking victims. Thus, it is unclear whether retribution is also identified as a decision-making factor in Surtees's study or if she is simply referring to this finding in Bjerkan and Dyrliid's research.

al. consider this motivation distinct from retribution, it appears to have retributive underpinnings, particularly in light of the interview excerpts provided as supporting examples, which all describe the severe harms suffered at the hands of the defendants (ibid. 442-443). Given Kaufman's (2013: 47) aforementioned assertion about the strong intuitive nature of retributive reasoning and the commonalities in their experiences, the parallel between sex trafficking and war crimes victims with respect to their retributive motivations is unsurprising.

B. *Prevention of Future Harm*

Another commonly reported factor was a fear of harm at the hands of their traffickers and/or their traffickers' associates. Approximately half of the participants stated that this fear played a role in their decision-making processes. For all but a few of these interviewees, this factor weighed against pressing charges. Many were worried about the possibility of retaliation against themselves and/or their loved ones if they pressed charges. One trafficking victim described her fear of reprisals in the following way:

Because if I do aangifte¹⁶¹, I'm scared that later, maybe in six month later, I have very happy family, I have job, I have boyfriend, I have very beautiful life, and then my [trafficker] . . . make trouble for me. That's why I have to think very carefully. (Interview #31).

The fear of violent retaliation was a very real concern for many participants, and some of them referenced their traffickers' violent pasts, possession of weapons, and/or specific threats their traffickers had made against them when describing their consideration of this factor. For example, one interviewee explained that her trafficker 'have make people dead for money, you know, he's killer for money' (Interview #28). Another participant recalled the following threat:

This man I was with, he has threatened me with a weapon, with a gun, telling me that whenever I would press charges against him, he would kill me. And I'm still scared for that reason. (Interview #11).

¹⁶¹ 'Aangifte' is the Dutch word for 'pressing charges'.

Similarly, another victim's traffickers made serious threats explicitly related to pressing charges:

They said if you press charges and then we're definitely going to find you and take your child and kill you . . . many times I heard them say it. (Interview #14).

A woman who was extremely worried about her safety made reference to her trafficker's prior violence and threats against her in explaining the role her fear of violent reprisals played in her decision-making process:

I was thinking about it a lot, but I am very afraid to do it because I am really scared of this guy. If the police can give me some guarantee and security, then I might press charges . . . I was afraid to die (*she points to scars on her body*). He has beaten me up, even with a gun [because]. . . I tried to run away from him two times and he could find me. The second time he told me that if I do it again then he will kill me and cut me to pieces and bury me in his garden. (Interview #1).

A significant portion of the participants who reported that fear was a factor in their decision-making process articulated their concern that pressing charges would risk the well-being of their loved ones. One woman who expressed intense fear because her trafficker knew where her family lived in her home country, explained:

I don't know what police can do. I don't know. I never have make so press charges . . . Because I think for me, I say, when I go there you make press charges, there is your name, which is this girl, and then he go to my family. He cannot find me because I am here, I am protected, but I have my family, I don't want to be nothing for my family. (Interview #28).

This participant raised a serious issue when she pointed out that her name would be included in official documents if she pressed charges, since in the Netherlands, victims are not typically granted anonymity.¹⁶² A lack of identity protection was also highlighted as '[o]ne of the biggest

¹⁶² In correspondence from 31 July 2015, the National Public Prosecutor for Trafficking in Human Beings and People Smuggling, Warner ten Kate, stated that he was not aware of any witnesses in human trafficking cases who had been granted 'full anonymity'. 'Full' anonymity, as opposed to 'restricted' anonymity, prevents a witness's name from appearing in official documents.

obstacles to the safety of the victim' in a study involving human trafficking trials in Serbia (Nikolic-Ristanović 2005¹⁶³: 111).

Another participant described her deep worry about the safety of her family in her home country, which she believed was at risk due to her decision to press charges against her trafficker:

[My trafficker has] a very big family and if he enters in prison, if he is put into jail . . . [H]is father is a killer. He already killed once for him . . . So they are not going to forgive me. And so they even will go to my parents . . . So this is what I am constantly thinking about. Every day I'm calling my mom just to see how she is. To ask her. She doesn't know, you know, anything. She doesn't know how serious the things are. I don't want to scare them. I want to keep them calm. They don't know about the serious situation that I'm in. So I'm calling them every day and if they don't pick the phone up for whatever reason I get into panic. I have very scary thoughts. Every time when she picks the phone up I imagine my mom picking up the phone and that my pimp is next to her and he will pull the phone and he will start speaking. And then, you know, my heart is pumping, I have no idea what I would do then, what it would be then. And I'm so far away, you know, from them and even Dutch police cannot do anything for them. (Interview #17).

In some cases, participants' loved ones had been the subject of violent threats and/or received these threats directly from traffickers:

My pimp most of the time he tried to explain me, 'what, you go to speak with you family, what you think he can help you? Your mother can learn you *dead*. Understand? Dead. You possible to learn your sister dead. I can make this for you . . . he called to . . . my mother to explain this. (Interview #5).

The preceding quotations demonstrate serious concerns reflecting the well-documented issue of threats and harm from traffickers targeted at victims' family members (see Brunovskis 2012: 66; Deighan 2010: 91; Jobe 2010: 164, 168, 171). When these family members live in countries that are ill-equipped to protect them, such as due to a lack of resources or corruption,

¹⁶³ This is a chapter of a report edited by Lise Bjerkan and is based on the same or substantially the same sample as Bjerkan and Dyrliid (2006).

the obligation to protect victims' families from trafficker intimidation and retaliation¹⁶⁴ means little without a specific duty to relocate them (in line with their needs and preferences). Though non-binding, the Explanatory Report to the CoE Convention asserts that 'the only solution, to guarantee effective protection, is sometimes to arrange a new place of residence for [endangered individuals] in another country' (para. 291). This statement is made with respect to Article 28 of the Convention, which obligates state parties to protect trafficking victims and their family members. However, none of the participants' family members who had had threats made against them had been offered relocation for their protection, even in the cases where victims had communicated the nature of these threats to chain partners.

One young woman's fear for her and her family's safety appeared to be reinforced through peer influence:

Oh, no, I don't want that. I don't—I was very scared so I said no I don't want [to press charges] . . . Yeah because there are more girls and they are in the same situation as me, because they hanging out with him too, and now they working¹⁶⁵ and so but—and they talked to the police too and—but no one [pressed charges] . . . I'm very scared of him because I know he have a *lot* of friends and, yeah, he always knows to find me . . . That, and for my mother's safety, and my brother . . . (Interview #3).

As this interviewee was still a teenager, she may have been more susceptible to peer influence than an older victim would be. Still, it can be difficult for individuals of any age to overcome social influences, particularly when doing so involves personal risk. She may have questioned why she should be the one victim to take this risk and perhaps believed that if all of her trafficker's other victims came to the same decision with respect to pressing charges, then that must be the correct one.

¹⁶⁴ Convention Art. 28(1)(d); Directive 2012/29/EU Art. 18.

¹⁶⁵ 'Working' in this context typically means working in prostitution.

Bjerkkan and Dyrliid (2006: 4-6) and Nikolic-Ristanović (2005: 108-109) also found that victims' fear of reprisals against themselves and/or their families was a significant factor weighing against giving testimony in prosecutions of their traffickers. Moreover, this fear was identified as a main reason underlying victims' refusal to cooperate with authorities in Cuzuioc-Weiss and Lacroix's (2010: 121) study comprising semi-structured interviews with 33 (mostly female) victims of sex or labour trafficking and 24 with anti-trafficking actors,¹⁶⁶ conducted in the Czech Republic, Hungary, Italy, and Portugal.

In contrast, a few participants counted the 'fear' factor as a reason weighing in favour of pressing charges. Two such women thought that if they pressed charges, state authorities would be more willing to provide them with protection from potential harm at the hands of their traffickers and/or their traffickers' associates. This belief reflects the impression given by the conditionality of victim assistance embedded in the system following the reflection period.

A couple of participants felt that their fear could be addressed through the incarceration, and therefore, incapacitation of their traffickers. One asserted, 'I have to do this, you know. I have to do this because I want to live relaxed. To . . . live relaxed, this guys for me have to stay in the jail, you know' (Interview #5). This theme also emerged in Surtees's (2007: 163) qualitative study of 80 trafficking victims in five South-eastern European countries.

Though a special witness protection programme for victims or witnesses of THB has existed in the Netherlands since 2010, it has only ever been used once (GRETA 2014: 56; GRETA 2018a: 45). Dutch authorities reported to GRETA that this is the case because the programme requires participants 'to break all ties with their past' (GRETA 2018: 45). However,

¹⁶⁶ 'Anti-trafficking actors' refer to '[p]ersons working for governmental and nongovernmental organisations including service providers such as NGOs and religious congregations, who are involved in all stages of anti-trafficking interventions from identification to return and social inclusion' (Cuzuioc-Weiss and Lacroix 2010: 28).

none of the victims interviewed for the present study who expressed concerns about their safety had been informed about the existence of this special witness protection programme.

Another frequently reported factor weighing in participants' decision-making processes is a desire to prevent future harm to others. Almost half of the participants reported that their desire to prevent others from becoming trafficking victims was a concern weighing in favour of pressing charges against their traffickers, based on deterrence and/or incapacitation. Many viewed this factor in terms of the risk that others will become future victims of the specific individuals who had trafficked them:

[A]nother reason [why I have decided to press charges is] that he can do the same thing to other girls . . . There may fall more victims . . . This person who has done this to me may have done it before, so I may have not been his first victim. And he may do it still after me, so I wonder why he has not been caught up until now. But I have very good information on him, very concrete information, and I want to give that information so that he will be stopped. (Interview #24).

In addition to stopping their specific traffickers from victimizing others, many participants expressed that a desire to work against trafficking victimization more generally was a factor in their decisions to press charges:

What I have gone through is inhumane. I can't stand the idea of other girls going through the same thing. So if I decide to press charges it is just as an example and to contribute in the possibility to stop this kind of activities. (Interview #11).
[W]hat I wanted to stop were the . . . people who actually use the women and the prostitution . . . If I only could stop them this is what is my greatest—if it was in my power only. And if I had the ability and the power to do that, no one would stay on this position . . . [E]xactly where you don't expect there exactly live a girl that is—has been beaten. Sometimes when I walk on the street and I see a man and a woman walking, sometimes I'm thinking, it can just very well be that she is a prostitute and he is her pimp. That she is afraid. Because I had been like that, I have been—had the same feelings and I have been afraid myself. I was among people and I was walking next to my pimp but nobody knew that I'm this person in difficulty and that somebody has to help me and save me. And this thought just was killing me, that there's more women like me that has been beaten and they're working¹⁶⁷ . . . (Interview #17).

¹⁶⁷ In this context, the term, 'working', typically refers to working in prostitution.

For some participants, this factor appeared to be connected to wanting to protect their loved ones, particularly their female relatives and friends, from becoming victims of sex trafficking. Thinking about the possibility of their loved ones enduring trafficking situations similar to the ones they had experienced themselves was a powerful motivator for some interviewees, often in the face of fear, to decide to press charges. The following quotations illustrate consideration of this factor:

I thought about it and I said if this can happen to me, it can happen to my sister, it can happen to anyone. Maybe it's happening to many people and I don't know. And I said maybe this man is going on collecting girls my age, maybe other women and doing the same thing he did to me. So I said if I have a chance that they can look for him, let me try. (Interview #34).

Yeah I want to help with the case because—look, now, I know this situation, but I have two sister. I have friends. My brother have daughter. Nobody give me guarantee to after one year, my sister is don't be in my situation, you know? Nobody give me guarantee to next girl is not be in my situation. (Interview #5).

A significant issue with the rationale of preventing others from becoming trafficking victims is that in the Netherlands, those convicted of trafficking offenses are incarcerated for only very short periods. In 2015, the average prison sentence for convicted traffickers was just 558 days, down from an average of 804 days in 2013 and 665 days in 2014 (National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children ('National Rapporteur') 2016: 21; National Rapporteur 2015). Moreover, offenders generally only serve two-thirds of their sentences before being released on parole (Custodial Institutions Agency, Ministry of Security and Justice 2013: 5). These light sentences incapacitate traffickers for only brief periods and are unlikely to have much of a deterrent effect. Perhaps if victims had been made aware of typical sentencing practices, they would not have given as much weight to their desire to prevent their traffickers from victimizing others (and other factors related to incarceration) in

their decision-making processes. Bjerkan and Dyrliid's (2006: 5-6) study provides support for this notion as at least one of their participants chose not to testify due in large part to her awareness that her traffickers would likely receive light sentences. In the present study, none of the participants who had decided to press charges at least in part due to their desire to prevent the victimization of others had reached the sentencing phase of a criminal case against their traffickers, and if any eventually do, they are probably going to be disappointed. This is particularly likely to be the case given that approximately half of the sample¹⁶⁸ believed that their traffickers should be sentenced to least five years in prison, while almost a quarter¹⁶⁹ asserted that they should be incarcerated for twenty or more years.

Akin to this study, Bjerkan and Dyrliid (2006: 5) found that a desire to prevent the trafficking victimization of others motivated some victims to testify.¹⁷⁰ This factor also played a role in a number of war crimes victims' decisions to testify. Mischkowski and Mlinarević's (2009: 54-55) study revealed that female victims of sexualized violence during war are often motivated to participate in the criminal justice process in order to prevent the victimization of others. A majority of participants asserted that this was a reason underlying their decisions to testify, and relevant interview excerpts provided in the study report reflect considerations of both specific and general deterrence as well as incapacitation of the perpetrators (ibid. 54). In addition, preventing future war crimes was a motivation for testifying for almost a fifth of interviewees in Stepakoff et al.'s (2014: 442) study and for some of the participants in a study of

¹⁶⁸ But nearly two-thirds of participants who specified a length of incarceration.

¹⁶⁹ Approximately a third of those who specified a length of incarceration.

¹⁷⁰ As with retribution, Surtees (2007: 163) also notes that wanting to prevent others from being victimized is a factor underlying trafficking victims' decisions to testify, but supports this assertion with an interview excerpt from Bjerkan and Dyrliid (2006) rather than with one from her own empirical study. Thus, it is unclear whether this factor emerged in Surtees's study or if she is simply referring to this finding in Bjerkan and Dyrliid's research.

21 war crimes victims who had testified before the Extraordinary Chambers in the Courts of Cambodia¹⁷¹ (Stover, Balthazard and Koenig 2011: 523). However, this motivation was only asserted by a couple of participants within a large study of 87 victims and/or witnesses who had testified before the ICTY (Stover 2005: 134).

C. Gaining or Maintaining Access to Rights

Due to the structure of the THB legal framework in the Netherlands (and in many other jurisdictions), victims must agree to press charges in order to maintain continued access to assistance and protection measures, such as residence permits, shelter accommodation, and material assistance.¹⁷² Segrave, Milivojevic, and Pickering (2009: 82) identify this commonly employed structure as a ‘pillar of the strategy to overcome women’s non-cooperation in the criminal justice process’. It severely constrains freedom of choice for many victims, particularly those who do not have other viable options. Furthermore, victims must agree to press charges in order to exercise their right to compensation.

Roughly a quarter of participants stated that their desire to remain in the Netherlands legally played a role in their decision-making processes. This figure includes nearly a third of non-EU interviewees in the study and one EU (non-Dutch) interviewee, who likely did not know that her status as an EU citizen would have permitted her to legally remain in the Netherlands regardless of whether she agreed to press charges. It is somewhat surprising that only a third of non-EU participants reported that this factor weighed in their decisions, given the significant consequences of losing their temporary residence permits. For some interviewees though, this

¹⁷¹ This factor was described within the context of a desire to educate the world about the Khmer Rouge regime.

¹⁷² See Chapter 2 for in-depth discussion of why making certain rights conditional on cooperation in investigations and prosecutions is problematic under a victim-centred HRBA.

consideration carried a great deal of weight. For example, when asked why she had decided to press charges against her trafficker, one woman initially responded:

You want an honest answer? . . . [P]robably I wouldn't be doing this. I don't know, it's hard to say but I had to do it for my status. For my visa. (Interview #37).

For this subset of participants, like those in Brunovskis and Skilbrei's (2016: 23) qualitative study with 12 trafficking victims in Norway, 'even the possibility of permanent residence contributed strongly to motivating cooperation' with criminal justice authorities.

Most of the victims citing this factor asserted that it would not be safe for them to return to their home countries. Indeed, the need to leave an unsafe situation in their home countries directly led to a number of them becoming trafficking victims in the first place. A participant who had been living in an orphanage in a village that had been destroyed by Boko Haram prior to being trafficked explained why she wanted to remain in the Netherlands:

I don't have a home [in Nigeria]. I don't want to go . . . Also, my life is in danger. 'Cause this man hurt so many people and they are killing so many [of] these girls that work in the streets. My life is in danger . . . I feel safe [in the Netherlands]. I don't have anywhere to go. For my life and the life of my daughter. (Interview #23).

Another Nigerian participant was even more explicit in framing this factor as a barrier to her freedom of choice when explaining why she had agreed to press charges against her trafficker:

Because I don't get a choice . . . because I don't have anywhere to go. I don't have anybody . . . I don't have anywhere to go . . . Because I don't have anybody in Nigeria. My mother is dead . . . don't know my father . . . I can't go back to Italy . . . because that woman [who trafficked me is there and] will kill me[.] (Interview #25).

This woman's belief that her circumstances constrained her freedom of choice may have been exacerbated by the fact that she was pregnant and was concerned for her future child's well-being. The absence of meaningful choice for certain victims within the context of decisions

about pressing charges parallels that of people who make ‘rational’ decisions which increase their vulnerability to trafficking victimization due to constraining structural factors (Cameron and Newman 2008: 23-24; Dickenson 2006:45-49; Loff, Gaze and Fairley 2000: 1765).¹⁷³

Even some participants who did not report or even denied that this factor played a role in their decision-making process expressed that it would be dangerous for them to return to their home countries. One woman who had explicitly stated that the possibility of remaining in the Netherlands legally had not factored into her decision to press charges described her reaction to learning that the police had closed her case and she will not be permitted to stay in the Netherlands:

[W]hen [my trafficker] came, she didn’t find me again, she will know that I must have reported her. It is a . . . danger for me. This politie,¹⁷⁴ they don’t think in that way. They will just say, ‘I cannot—you should go back to your country’. Since you give me protection, you empowered me, you give me . . . peace. You are now losing me again to the danger . . . I’m in more danger if these people send me out. (Interview #35).

This quotation raises an important concern that applies to foreign nationals who are victims of trafficking in the Netherlands. This participant expressed that she felt ‘empowered’ enough, through protections and support, to press charges against her trafficker. Yet, after she took that step and gave the Dutch authorities the information they wanted, she was upset and worried to learn that she was losing the protections and support because her case had been closed. In pressing charges against their traffickers, victims, such as this one, risk potential retaliation (Dottridge 2007: 14; Gallagher 2010: 102). This risk is exacerbated by the use of victims’ real names, rather than pseudonyms, in official documents, which is generally the case in the Netherlands. Although victims may provide law enforcement authorities with a great deal

¹⁷³ For additional discussion of this concept, see Chapter 1.

¹⁷⁴ ‘Politie’ is the Dutch word for ‘police’.

of information, through no fault of their own, their cases may be closed because authorities are unable to locate their traffickers or decide that there is insufficient evidence to prosecute the accused. Indeed, this appears to be the case for the majority of trafficking victims who press charges in the Netherlands.¹⁷⁵ When their cases are closed, victims without a right to remain in the Netherlands that is independent of their status as a trafficking victim are subject to deportation. Often, these victims' lawyers will apply for permission for victims to stay in the Netherlands on humanitarian grounds (pursuant to Vreemdelingen Circulaire 2000 (B): B9(12)), but this has become increasingly difficult to obtain in recent years. Annet Koopsen, a lawyer with vast experience representing trafficking victims in the Netherlands, believes that this trend is attributable to an increase in these types of residency applications, greater skepticism about the veracity of victimhood claims (stemming from a rise in the number of cases lacking details from the victims about their trafficking experiences), and an increasingly anti-immigrant political climate.¹⁷⁶ Furthermore, Richard Korver, another Dutch lawyer, agreed that a changing political climate in the Netherlands contributed to this trend.¹⁷⁷ These assertions are supported by research documenting anti-immigrant attitudes in the Netherlands in recent years (Gemmeke 2013: 59-60, 81, 83; Poushter 2016).

¹⁷⁵ A Vice News article asserts that 90 percent of human trafficking cases in the Netherlands are dismissed due to a lack of evidence (Jones 2017). Furthermore, a researcher at the Office of the National Rapporteur agreed with this assertion but explained that reliable statistical data demonstrating it is not currently available. Although the police are technically required to report any action taken on a trafficking case, they do not count cases as criminal investigations when victims press charges but their cases are closed due to a lack of evidence or an inability to locate the perpetrators. Therefore, official statistics on the percentage of trafficking cases that are prosecuted are actually inflated and unreliable (e.g. National Rapporteur 2014: 189). The National Rapporteur noted the failure of the authorities to officially register cases which are closed very quickly, particularly those involving West African victims, and recommended that these cases be officially registered with the Public Prosecution Service in the future (ibid.: 256-257; National Rapporteur 2016: 27).

¹⁷⁶ Email, 6 December 2016.

¹⁷⁷ Email, 12 January 2017.

Trafficking victims from West African countries appear to face greater hurdles than those from other nations and tend to be constructed as ‘bad’ or ‘non-ideal’ victims (Christie 1986) in the ‘hierarchy of victimisation’ (O’Brien, Carpenter, and Hayes 2013) in the Netherlands. It seems that it is more difficult for West African victims to have their trafficking victimization and the risks they would face should they have to return to their home countries taken seriously by authorities. This can be at least partly attributed to the fact that, as Annet Koopsen maintains, opposition to immigration in the Netherlands is especially strong with respect to West Africa,¹⁷⁸ an assertion also supported by research (Gemmeke 2013). The Care Coordinator for the shelter where this thesis research was conducted asserts that almost 100 percent of the cases of West African victims who stay at the shelter are closed before reaching trial.¹⁷⁹ The implication is that these cases are closed more quickly and at a higher rate than the cases of victims from other regions. Furthermore, the National Rapporteur notes that investigations into trafficking cases involving West African victims are often short-lived and, despite the pressing of charges, not even officially registered with the Public Prosecution Service (National Rapporteur 2014: 256-257; National Rapporteur 2016: 27). The National Rapporteur links this trend with a lack of information in the statements that these victims provide to authorities within the context of pressing charges, upon which a criminal investigation could be based (National Rapporteur 2014: 257; National Rapporteur 2016: 27). The danger is that stereotypes about West African victims and the quality of the information they can provide may influence criminal justice gatekeepers’ treatment of their cases. In other words, decisions about whether to pursue investigations and prosecutions, as well as the level of resources to devote to them, may be based

¹⁷⁸ Email, 6 December 2016.

¹⁷⁹ Emails from Mill Bijnen, 11 and 23 February 2017.

upon preconceived notions rather than on the quality of evidence provided in each particular case. These stereotypes may also interfere with the collection of information, as police may end interviews prematurely and fail to ask sufficient follow-up questions to victims who are presumed to provide scant useful information. This situation would violate the human rights principles of equality and non-discrimination.

Once victims' cases are closed, their humanitarian stay applications rejected, and their governmental financial assistance discontinued, they typically must move out of the shelter within one week and those without an independent right to remain in the Netherlands usually must leave the country within one month. Consequently, victims who face a risk of retaliation for cooperating with authorities are seldom able to benefit from Dutch protections once their cases are closed. Their home countries are often ill-equipped to protect them due to resource shortages, unreliable or corrupt police forces and/or weak rule of law. In these cases, which are far too common, victims are left in a worse situation than they would have been in had they decided against pressing charges. Disappearing into the shadows in order to remain in the Netherlands illegally can seem like a better option to these victims than facing the risk of retaliation or other dangerous conditions in their home countries. Regardless of whether a desire to remain in the Netherlands played a role in participants' decisions-making processes, the principle of *non-refoulement* is implicated in cases where victims would face serious danger if sent back to their home country, or to another country.¹⁸⁰

In reality, the conditions that non-EU trafficking victims must meet in order to stay in the Netherlands long-term are very strict, and the majority of those who press charges do not qualify due to the closure of their cases. Simply pressing charges is not enough; victims are only eligible

¹⁸⁰ For a discussion of this principle and its applicability to trafficking victims, see Chapter 2.

for long-term residency if their case is prosecuted¹⁸¹ or if they have maintained temporary residency based on an ongoing trafficking case for three years¹⁸² (Vreemdelingen­circulaire 2000 (B): B9(12)). Given that ‘[m]any THB cases do not lead to prosecution because of lack of evidence and hence residence permits are usually not granted’ (GRETA 2018a: 24), victims who decide to press charges with the hope of being granted permission to remain in the Netherlands on a long-term basis are likely to be disappointed.

Akin to permission to remain in the Netherlands for foreign nationals, permission to reside in the shelter after the reflection period is a benefit only available to victims who press charges against their traffickers, regardless of whether they have EU citizenship. Two interviewees reported that their wish to remain in the shelter was a factor weighing strongly in favour of pressing charges. Notably, this factor was absent from the results of previous studies with similar populations, including the ones where participants were or had the prospect of residing in shelters. This difference could be attributable to the possibility that victims in the other samples had another viable housing option or greater resources than those who were influenced by this factor in the instant study. For example, one of the women who weighed this factor explained:

[My lawyer] ask me [if I want to press charges] because she was telling me if I don’t do that, yeah, they have to ask me out in the street. So where can I go and live, I don’t have place to live. Don’t have place to go. Don’t have nowhere. (Interview #19).

This woman’s circumstances also raise questions about the existence of meaningful choice if she believes that she has a binary choice between pressing charges and becoming homeless. The

¹⁸¹ In the latter half of 2018, the law was changed from requiring a conviction to requiring a decision to prosecute.

¹⁸² Annet Koopsen indicated that cases in which a conviction is reached typically take at least three years to be completed, including appeals, and that she has even had cases take more than ten years to be completed.

emergence of ‘permission to remain’ as a motivation to press charges, whether with respect to the shelter or to the Netherlands, underscores the significance of structural factors, such as poverty and gender inequality, as constraints upon victims’ decision-making processes.

Furthermore, if victims choose not to press charges or if their cases are closed, both EU and non-EU nationals lose their right to receive welfare assistance (Field Notes, July 2015). Though they will be able to legally remain in the Netherlands, they will need a legal income in order to apply for health insurance and other benefits (ibid.). Thus, though not emerging as a decision-making factor in this sample, even EU victims are incentivized to press charges to maintain their rights to welfare assistance and safe accommodation.

Several participants expressed that their desire to access their right to compensation was a factor in their decision to press charges. Almost all of the women in this study were struggling financially, and this was often due to their traffickers having taken their earnings, savings, and/or other assets. This is unsurprising as human trafficking has been recognized as a tremendously profitable crime (McCabe 2013: 136; Turek 2013: 81). One participant described the significant financial damage her trafficker had inflicted upon her and the importance of trying to recover her stolen funds in her decision to press charges as follows:

And that was the reasons, like, at least I was thinking that [my family] could be happy seeing me happy, at least I could buy myself an apartment with this money so I thought maybe I have a chance to—with all this proof—to claim something back. So that was, of course, really, really big reason, as you can imagine. It’s not like 2,000 euros, it’s 200,000 euro. I was like, yeah, I could buy this apartment with this money and pfff . . . (Interview #37).

As this interviewee points out, access to compensation, including restitution, is empowering for victims because it expands the scope of their options—in this woman’s case, full restitution would allow her to become a homeowner. Another participant, for whom the chance to recover her money was the sole reason for pressing charges, explained: ‘Well I do the aangifte and I was

like, ok, I think about “ok I give you all my money, so fucking hell and I don’t get nothing for it, now you go pay it back” (Interview #36). This woman’s response suggests that recovering her trafficker’s ill-gotten gains through restitution would be more meaningful to her than receiving the same amount from a compensation fund, as her anger about being wronged is clear. In addition to empowerment, restitution promotes the principles of accountability and rule of law because it disgorges the perpetrator’s unjust enrichment from trafficking the victim.

The significance of monetary compensation was also noted in studies exploring trafficking victims’ decisions with respect to giving testimony in cases against their traffickers. Surtees (2007: 162) identifies this factor as a ‘prime motivator’ ‘in a number of cases’. Furthermore, Bjerkan and Dyrliid (2006: 7) highlight this factor by referencing the assertion from an NGO providing assistance to trafficking victims in Moldova that the expectation for ‘financial or material compensation is the strongest motivating force’ behind female victims’ decisions to testify.

In order for victims to obtain restitution, their traffickers must be convicted, which only occurs for a small minority of trafficking victims who press charges in the Netherlands.¹⁸³ However, victims whose cases do result in a conviction are guaranteed receipt of any damages the court awards them. This is because the Netherlands has an advance payment scheme in place through which the government pays any damage amount still outstanding eight months after the court issues the final judgment (GRETA 2014: 49). The government then seeks reimbursement from the offender. The application of this scheme to trafficking victims in the Netherlands is a positive development that can make victims financially ‘whole’ even when their traffickers lack

¹⁸³ As previously mentioned, Jones (2017) reports that 90 percent of trafficking cases in the Netherlands are closed due to a lack of evidence (see also GRETA 2018a: 24).

funds or try to evade paying damages by hiding their assets.¹⁸⁴ However, it can still take years for victims to receive their court-awarded compensation as reaching a final judgment in a case is a lengthy process, and often involves appeals (Field Notes, July 2015).

D. *Closure and Relief*

A handful of participants viewed pressing charges as a way to obtain a sense of closure and relief with respect to their trafficking situations. This rationale weighed exclusively in favour of pressing charges and was, at times, accompanied by other positive feelings. Two participants considering this factor regarded pressing charges as a concrete step towards changing their lives that would both provide them with closure and empower them. One described the role of this factor during her decision-making process as follows:

[I]t was also, like, you know, you give a chance for life, you know. If you don't press charges, ok, you may always be in the—like feel bad or sad that you did not do anything for the situation, you know. But, and then when you press charges then you feel like, you know, you have decided to move on with your life[.] (Interview #15).

This interviewee conceptualized the decision of whether or not to press charges as one of action versus inaction in one's life. Notably, she also speculated about feelings regarding this decision in the long-term, and suspected that failing to press charges may lead to lifelong regret.

The second participant viewed the opportunity to press charges with the hope that it could lead to great changes in her life and a fresh start. Furthermore, it represented the transition from always putting her trafficker's needs first to acting in her own best interest:

No, [pressing charges] is—I gonna do, I think, for do this because maybe for do something good for me because I lose so much. So much time, so much, uh—crying all day, for nothing, you know. And maybe this can help me for born again, you know. For change my person, you know. And for do something good

¹⁸⁴ The aforementioned Moldovan NGO reported that traffickers often strategically register their properties in their relatives' names so as to protect them from seizure, which is one reason why victims typically do not receive any compensation in the court cases (according to the NGO) (Bjerkan and Dyrliid 2006: 7). The Dutch advance payment scheme avoids this problem as it relates to victim compensation.

for me. Not for the person. For me. I'm person that if I can help you, I help you . . . I want to help, but [my trafficker] don't help me . . . you know. And I give [him] *all* of me, all of me, for nothing. (Interview #27).

Two other participants expressed a desire to feel relieved as a reason motivating their decisions to press charges. One of these women stated: 'I can feel relief for my heart, my chest, my pains I've gone through, my suffering' (Interview #19). Her feelings of relief with respect to pressing charges suggest that she is comforted by the action she is taking to address and move on from the suffering she endured, which is directly related to the concept of closure.

Another interviewee who was still making her decision but was not inclined to press charges shared: 'Filing a complaint would probably make me feel a little bit better about it, just more—I would be more at peace with myself' (Interview #29). However, this potential benefit appeared to be outweighed by factors on the other side of the equation in this participant's decision-making process.

Similarly, Nikolić-Ristanović (2005: 115) found that some sex trafficking victims had decided to testify because they 'expected to feel better afterwards'. Approximately a third of participants in Mischkowski and Mlinarević's study (2009: 56) and a dozen (6 percent) in Stepakoff et al.'s study (2014: 442) also indicated that a desire for relief influenced their decisions to testify about war crimes. As both human trafficking and war crimes are usually deeply traumatizing to victims, it is understandable that both types of victims would seek relief, closure, and peace of mind.

E. *Futility*

Three participants felt that pressing charges would be futile. They expressed a lack of confidence in the criminal justice system to hold traffickers to account, for a variety of reasons. One doubted the ability of Dutch law enforcement to locate her trafficker outside of the

Netherlands and suggested the existence of corruption allowing those with ‘connections’ to commit crimes with impunity:

I was concerned, being honest, if [my trafficker] would get, um, any kind of punishment. First, he is not from Holland, he is from Lithuania, he has the family and, um, house there. So he can always go away. Nobody will be searching for him. Second, he has connections. Third, the money he’ve taken, he’s spent them already. So, I mean, it’s in the ideal world it’s nice to believe every criminal who does bad things to you is going to be punished, but I wasn’t really, you know, believing this 100 percent is going to happen. (Interview #37).

Another interviewee was explicit in her belief that corruption would render the process of pressing charges futile. She recalled: ‘One time I didn’t want . . . I was like, even if I do it maybe he’ll have money and he will bribe the police (Interview #34). This consideration appears to be connected to her awareness of police corruption issues in her home country, which Cameron and Newman (2008) identify as a ‘proximate factor’ contributing to the perpetration of human trafficking.¹⁸⁵

In explaining why she was leaning against pressing charges, another participant articulated her belief that it would take more than a single victim pressing charges to result in a prison sentence for her trafficker. She also expressed concern that his associates would continue his trafficking activities without him:

I’m not sure how my complaint would change things in any way . . . I don’t believe that one complaint will put him to jail . . . then I’m thinking that maybe he has more people behind him that would continue his legacy, even if he goes to jail. (Interview #29).

In contrast to these findings, belief in the futility of participating in the criminal justice process did not emerge as a decision-making factor in previous studies with trafficking or war crimes victims. Perhaps those participants had been made aware of past successful cases against

¹⁸⁵ For a discussion of Cameron and Newman’s conceptual framework, see Chapter 1.

traffickers or war criminals and their networks that prevented them from believing that participating in the process would be futile.

F. *Receiving or Giving Support*

A few participants referred to the emotional and/or psychological support they were receiving from others as a factor weighing in favour of pressing charges. These women generally found the support they received to be empowering. One interviewee described the support and empathy she received from other trafficking victims in the shelter as a reason why she chose to press charges:

Maybe I feel more comfortable coming forward is that where I am right now getting support. There's someone I can talk to all the time and there are a lot of [other women] that are going through the same thing that I've been through, so that gives me the courage to go forward with pressing charges. (Interview #10).

Similarly, Mischkowski and Mlinarević (2009: 60) found that the support a group of victims of sexualized violence during the war in the former Yugoslavia provided to each other empowered them to testify at the War Crimes Chamber in Sarajevo.

Another participant explained that the support she received from the shelter staff was instrumental in her decision to press charges:

Because if I was not here, I would *never* press charges. I wouldn't do it. They gave me support and then I managed to take this decision even though it took me six months . . . the people [working] here in the shelter,¹⁸⁶ they were those that supported me taking the decision. (Interview #17).

As agents tasked with carrying out the Netherlands' obligation to assist trafficking victims, shelter staff's employment of empowering strategies, such as providing victims with meaningful emotional support, is essential to the realization of a HRBA (see UNDG Human Rights Working

¹⁸⁶ The context strongly suggests that she is referring here to the shelter staff rather than to the other victims staying in the shelter.

Group 2003: 3). Their support empowered this participant to both ask for an extension of her reflection period and to exercise her participatory rights in the criminal justice process.

An interviewee who was not inclined to press charges shared that she was receiving support from multiple sources, but that this was not enough to overcome the factors she weighed against pressing charges:

[T]he people always think about, uh, talk to me, everybody's very nice and want to support me, I know, the police, everybody [says], '... please aangifte doen. That is better for you and maybe you get some money' but right now I think I'm not in the money. (Interview #31).

While this participant interpreted the 'support' positively, it is troubling (regardless of their purportedly good intentions) that the police and others appear to have attempted to pressure her into agreeing to press charges. This particular woman was quite strong-minded and seemed to have resisted this pressure, but a more malleable victim may bend to pressure (particularly from authority figures), even if she does not actually want to press charges. When aiming to provide support to trafficking victims in line with a victim-centred HRBA, it is important to facilitate their empowerment while respecting their independent decision-making processes. This is a delicate balance, particularly because many victims have multiple vulnerabilities, which at times can render them easily influenced by others (especially when there are uneven power dynamics in relationships between victims and chain partners). However, under a HRBA, it is essential to provide the type of support and information that fosters victims' exercise of agency in their lives, and to remind them that the ultimate decision with respect to pressing charges is theirs.

Rather than focusing on receiving support, one participant explained how her wish to support other victims by being a role model for them was a reason why she was inclined to press

charges. She expressed her hope that she could inspire other victims to seek help from and trust the police by doing so herself:

If the other womans can happen the same with me or this woman, maybe if see that what you do, speak with the police and you ask for help, you want help, you need help, maybe you can have a good life for this, but you need help because alone you don't have . . . And maybe this can help the other womans . . . This is because so much people don't—this is the problem with people because they don't, uh, don't ask for help, you know. They [think] 'ok I alone. I alone go. I reach my hand and I go'. But, no. If you don't understand something, if you have something you see that is bad for you, speak with one person can you know that this person wants something good for you, you know. The politie or this situation, this person don't want something bad for you. And for this you need—if you have these people for help you, you need to open your, uh, you know, you open for these people for help you, you know. But other womans, they don't think so. (Interview #27).

In stating this as a reason why she wanted to press charges, this participant suggests that cooperating with law enforcement and other criminal justice actors in the investigation and prosecution of traffickers is helpful to victims. She appears confident that the police act in victims' best interests and want 'something good' for them. Her point about the importance of openness is a bit ambiguous. She may mean that victims should be receptive to offers of assistance or that authorities need full information about a victim's situation as a prerequisite to providing effective, individualized assistance. Alternatively, perhaps she is speaking to the requirement that victims provide information to law enforcement in order to receive certain benefits for longer periods, such as residency, financial support, and permission to remain in the shelter.

Inspiring others to seek help and to trust the police was not identified in the aforementioned empirical studies as impacting victims' decisions about their participation in criminal justice processes. While not articulated as a reason underlying their decisions to press charges, a few other participants in the present study also expressed their belief that victims

should be inspired to take action against their traffickers and/or sex trafficking in general. One of these interviewees asserted that ‘it’s very important that all women, also the women who are afraid, learn why they should stand for their rights’ (Interview #12) and another expressed that she wanted to ‘empower people to not to be afraid to expose [sex traffickers]’ (Interview #35).

G. Link with Traffickers

Several participants revealed that a connection to their traffickers played a role in their decision-making processes. For example, the responses of two women demonstrate how having children with their traffickers influenced their deliberations, albeit in different ways:

For the children. He’s the father of my kids so I feel bad. Thinking of it in all is incredible that I have to press charges against the father of my children. And that my children can’t have a father. (Interview #22).

The person was the father of my daughter and the family wanted to take her from me. So that was also a reason. (Interview #14).

While both interviewees were concerned about the impact of pressing charges upon their children, the former appeared to feel guilt, while the latter worried about a threat arising from her trafficker’s parental rights. This difference is reflected in the contrasting ways in which they viewed this factor with respect to their decision-making processes: for one, it was a reason not to press charges, but for the other it was a factor in favour of doing so.

Cuzuioc-Weiss and Lacroix (2010: 116) report that, according to one or more of the anti-trafficking actors they interviewed, some victims refuse to cooperate with authorities due to family bonds they have with their traffickers. However, unlike in the present study, this factor is solely identified as weighing against cooperation.

Another participant reported an affinity with her trafficker due to their shared background, which she considered a reason not to press charges against him. She explained: ‘[T]he person who brought me, we’re from the same country . . . So, inside me I feel bad punish

him . . . We speak the same language. We from the same country' (Interview #26). Even though this victim did not have familial ties to her trafficker and she did not know him for very long, their shared nationality and linguistic background was enough to foster a sense of loyalty towards him.

In contrast with the foregoing, one interviewee asserted that the absence of a link between her and her trafficker made her decision to press charges an easy one. She stated: 'For me it was very easy because this person is not my friend, he's not my husband, he was not being my pimp[.]' (Interview #16). It is noteworthy that she listed the 'pimp-prostitute' relationship as one that would have made her decision with respect to pressing charges more difficult. It is unclear whether this is due to loyalty she would feel towards her pimp, fear that a pimp would retaliate if one of 'his' prostitutes cooperated with authorities to investigate and/or prosecute him, or another reason (or combination of reasons).

H. *Rule of Law*

Three participants cited the rule of law in the Netherlands as a factor weighing in favour of pressing charges. One contrasted the weak rule of law in her home country with the stronger Dutch rule of law in discussing her consideration of this factor:

I found out there's law in the land and that's the law of the land. Because I was told too that if someone did something like that you, you're supposed to go to the law and get the perpetrator arrested . . . What really helped me come up to the decision is that where I'm from, the law of the land doesn't always prevail, but in the Netherlands here, I was told there's a law, and the law has to be followed. (Interview #10).

Another explained why 'justice' was an important factor underlying her inclination to press charges in terms of the rule of law:

Justice like if I done something wrong to you. I think you understand. If I done something wrong to you, and you take me to the court, so the judge will decide which punishment for me . . . I think this country have rules. So I think if I done

something bad to you, if you take me to the police of course they'll take me to the court so the judge will decide what they have done for you. (Interview #2).

Except for a single victim in Bjerkan and Dyrliid's (2006: 12) study, whose faith in the rule of law contributed to her decision to testify against her traffickers, this factor did not emerge in the aforementioned empirical studies with similar populations. The discrepancy could be due to the other samples having less faith in the relevant legal system, lacking knowledge about rule of law in the relevant foreign jurisdiction or implicit incorporation of this factor in other motivations, such as a desire for retribution or to prevent the victimization of others.

One concern with victims giving weight to this factor may feel obligated to press charges rather than do so because of their own personal preferences. They may feel pressured to participate in the criminal justice process simply because it is more reliable and involves more effective and independent institutions than exist in their home countries. It is likely that certain victims are unaware of the optional nature of their participation and feel as if they are 'supposed to' (Interview #10) engage with existing criminal justice procedures and institutions.

The third participant who considered this factor was primarily concerned with the ability and willingness of law enforcement authorities in her home country to enforce the law with respect to trafficking:

You know why I [decided to press charges in the Netherlands]? Because I don't believe to in Bulgaria the police here do something for my case. Because how impossible I can go there to talk, three, four months, and nothing about my case. Nothing! (Interview #5).

This woman's exasperation with the weak rule of law in her home country and her belief in the comparatively stronger rule of law in the Netherlands contributed to her decision to press charges against her trafficker.

I. Leaving the Past Behind

One participant reported that her desire to focus on her future rather than discuss her past trafficking situation was a factor weighing against a decision to press charges:

I'm still thinking with [the decision about pressing charges], because I, um—yeah now I think about my own future. And I don't want to look back to my past. (Interview #31).

This interviewee was very optimistic about her future, believing that in six or seven months she would likely have a 'very beautiful life' with her boyfriend¹⁸⁷, with whom she had already made her future plans. Thus, it makes sense that focusing on her (potentially) happy future rather than on her traumatic past was appealing to her (Interview #31). This participant's situation and optimism about the future was unusual in the research sample, which could help to explain why she was the only one who reported considering this factor during her decision-making process.

A desire to move on from the past and to focus on the future was also reported as a reason why some victims declined to testify in cases against their traffickers in Bjerkan and Dyrliid (2006: 6) and Cuzuioc-Weiss and Lacroix's (2010: 112) research. As in the present study, this finding was associated with hope and optimism about the future, based on positive changes in victims' life situations (Bjerkan and Dyrliid 2006: 6; Cuzuioc-Weiss and Lacroix 2010: 112). Furthermore, Bjerkan and Dyrliid (2006: 6) explain that, due to the typically lengthy nature of the criminal justice process, victims' life situations may drastically change between the time they initially agree to testify and the time their traffickers' trials begin. Victims may not inform individuals with whom they enter into new personal or professional relationships about their trafficking victimization, and participating in a trial can raise the risk that these individuals will find out about victims' pasts (ibid.). In addition, anti-trafficking actors (Cuzuioc-Weiss and

¹⁸⁷ This participant's boyfriend was not the same man who had trafficked her.

Lacroix 2010: 116) and psychologists (Bjerkan and Dyrliid 2006: 5) have attributed reluctance to testify to the necessity that, in court hearings, victims must ‘both remember and face, once again, what they have tried hard to forget’ (ibid.). This can make it difficult for them to truly move on with their lives (ibid.) and cause them to relive pain from their pasts (see Cuzuioc-Weiss and Lacroix 2010: 116).

J. Disinclination to Discuss Details of Trafficking Situation with Law Enforcement

During the process of pressing charges, victims typically must recollect traumatizing experiences in full detail and share sensitive information with law enforcement. Not surprisingly, some do not wish to face that ordeal. One participant viewed this as a reason not to press charges, stating, ‘I don’t want to talk with the police in details’ (Interview #3). This woman made clear that this was a specific factor weighing against a decision to press charges. She may have felt concern for her privacy or been embarrassed to speak about certain topics and share specifics with strangers.¹⁸⁸ This factor may also be related to the preceding one in that recalling and discussing negative past experiences can make it difficult to look forward towards the future or may interrupt the healing process in certain cases.

Another interviewee described similar feelings when discussing her experience of pressing charges, following her decision to do so. She explained, ‘you maybe have decided to put this behind me, but you have to tell everything . . . So it was very difficult to say—certain things are very difficult to say, but you just have to say them’ (Interview #4).

Analogously, Cuzuioc-Weiss and Lacroix (2010: 109-110, 112) document a reluctance among some trafficking victims to share details about their trafficking experiences with the

¹⁸⁸ Feelings of embarrassment and shame were also reported by a number of participants with respect to giving testimony during a court proceeding (see Chapter 6).

police or in court. An interview excerpt from one of their participants indicates that she felt embarrassment related to the many questions the police had asked her about her situation (ibid. 110). Another of their interviewees seems frustrated that law enforcement officers repeatedly asked for additional details, as this individual felt that he/she had already provided sufficient information to them (ibid. 112). This participant also appears to have connected her disinclination to discuss further details of her trafficking situation with ‘leaving the past behind’, as he/she follows the preceding sentiment with ‘[n]ow it is time to move on’ (ibid.).

K. *Absence of Choice*

The actual degree of ‘choice’ regarding pressing charges that many victims possess, given their situations (particularly with respect to those lacking legal status and resources), is arguably quite limited. However, in the case of one participant, the absence of choice was even more overt: she reported that the police had ‘kind of’ forced her to press charges (Interview #38). In her situation, a former client of hers had brought her to a police station in Amsterdam because she had told him that she wanted to escape from her pimp. The police then instructed her to write a statement about her situation. She also asserted that the police did not inform her about her right to a reflection period. The difference between this participant’s experience and that of the others is likely attributable in large part to timing: she first pressed charges in 2009, which was several years before most of the other interviewees in the study had had contact with law enforcement about their trafficking situations.¹⁸⁹ Although in 2009, the Netherlands was not obligated under international or EU law to provide this non-Dutch participant with a reflection

¹⁸⁹ The other participant who pressed charges in 2009 (Interview #36) was also not offered the reflection period but, unlike the aforementioned interviewee (Interview #38), reported that she did not feel that she had been forced to press charges.

period (her home country was part of the EU, so Directive 2004/81/EC did not apply to her¹⁹⁰ and the CoE Convention did not enter into force for the Netherlands until 2010 (Chart of signatures and ratifications of Treaty 197 2016)), it was required to do so under its domestic law (National Rapporteur 2002: 24). However, this woman had to begin the process of pressing charges against her trafficker once again, in 2011, as the police had lost her documents from the 2009 process. By this time, the Netherlands was legally bound under the CoE Convention (Art. 13) to offer all trafficking victims a reflection period, but perhaps the police had interpreted the fact that she had previously begun the process of pressing charges as assent to doing so again over two years later. Regardless of whether a trafficking victim is legally entitled to a reflection period, it is antithetical to a HRBA for law enforcement to force a victim to press charges. Fortunately, the data show that the other participants had not encountered this practice, which is a promising sign that progress has been made towards respecting trafficking victims' agency and rights in recent years.

IV. Decision-making Factors Absent from This Study

While the aforementioned empirical studies with similar populations (referenced earlier in this chapter) have yielded analogous findings with respect to certain decision-making factors emerging in the present study, these other studies have also detected additional factors which were absent from the present study's results. One such factor is stigma related to trafficking victimization. For certain victims in Bjerkan and Dyrliid's (2006: 4) study, this factor weighed against testifying because they feared that doing so would increase the likelihood that their family, friends, and community members would find out about their victimization, leading to

¹⁹⁰ The benefits in this directive, including entitlement to a reflection period, only apply to third-country (non-EU) nationals.

stigma and social exclusion. The discrepancy between the findings may be due, at least in part, to geographical proximity. As compared to the women in Bjerkan and Dyrliid's research, who were either from the same country or a country close to where the trial was taking place, most of those in the present study are from nations which are much farther away from the location where court proceedings would be held should their cases reach trial (i.e. the Netherlands). Perhaps the comparatively greater distance between the location of the trials and that of many participants' home countries in the present research allayed any concern that news of participants' victimization would reach their local communities.

Another factor arising in Bjerkan and Dyrliid's (2006: 8) findings but not in those of the present study is victims' feelings of loyalty and guilt connected with the receipt of relatively small amounts of money from their traffickers. Bjerkan and Dyrliid contend that by allowing sex trafficking victims to keep a small percentage of the profits from their exploitation, traffickers strategically foster a sense of indebtedness and loyalty among their victims (ibid.). These feelings can translate into a reluctance to testify against their traffickers (ibid.). This theme did not emerge among the sample in the present research but may apply to other sex trafficking victims in the Netherlands.

Some trafficking victims in Cuzuioc-Weiss and Lacroix's (2010: 110) study were reluctant to cooperate with authorities because they were afraid of being criminalized. One of their participants reported her fear of being jailed if she failed to answer law enforcement's questions correctly while giving a statement about her trafficking victimization (ibid.). This factor did not appear in the present study, possibly due to information victims received while in the shelter about the procedure of pressing charges and what to expect while giving a statement to police officers as part of this process. Furthermore, this fear may be more prevalent in

jurisdictions where sex work is illegal and trafficking victims are often charged with prostitution offenses, unlike in the Netherlands (Hayes-Smith and Shekarkhar 2010: 50; see also Lloyd 2011: 13; 135-139).¹⁹¹

While human trafficking and war crimes victims value some of the same factors when deciding whether or not to participate in the criminal justice process (as highlighted earlier in this chapter), there are certain differences in their considerations. For example, many members of the latter group chose to participate in order to educate the world about the crimes committed (Stepakoff et al. 2014: 431, 442; Stover, Balthazard and Koenig 2011: 518, 523), honour other victims (Mischkowski and Mlinarnević 2009: 56; Stepakoff et al. 2014: 432, 442; Stover 2005: 134; Stover, Balthazard and Koenig 2011: 522), and contribute to the rebuilding of society (Clark and Palmer 2012: 8, 10; Mischkowski and Mlinarnević 2009: 56). It makes sense that these factors are absent from the present study's findings as they reflect the often stronger collective nature of war crime victimization as compared to trafficking victimization, as well as the former's connection with historically significant events.

V. Conclusion

The research reveals that trafficking victims often engage in complex balancing of multiple factors when deciding whether or not to press charges against their traffickers, which supports the notion that, rather than 'passive objects . . . incapable of making reasoned judgments', trafficking victims are deliberative, agentic individuals (Jordan 2002: 30). This exercise of agency is particularly significant given its occurrence shortly after the deeply disempowering experience of being trafficked. Understanding the full range of victims' concerns, priorities, and perspectives is essential to addressing the constraints on their agency

¹⁹¹ For a discussion of issues related to sex trafficking and prostitution policy, see Chapter 1.

and fostering their empowerment, in line with a victim-centred HRBA. In order to do so, victims' decision-making processes must be viewed in the context of relevant legal, structural, and practical factors. For example, the structural factors of poverty and gender inequality existing in many victims' home countries combined with the legal framework conditioning residence permits and material assistance on agreement to press charges operate to constrain victims' freedom of choice. In contrast, a legal right to reside in specialized shelters for trafficking victims facilitates the giving and receiving of empowering emotional support, which can expand the range of options they feel capable of pursuing. Thus, analysing victims' decision-making processes within the broader context is a prerequisite to improving the support, services, and rights provided to them during and after the reflection period.

The foregoing insights into victims' decision-making processes also allow for the identification of shared interests among victims and criminal justice actors, which is useful in fostering mutual collaboration. For instance, both trafficking victims and law enforcement are interested in preventing the victimization of others, guarding against retaliation, and upholding the rule of law. A focus on shared interests can lay the foundation for positive, productive, and collaborative relationships among victims and chain partners.

A notable finding from the data is that participants' decisions often appeared to be impacted by incorrect beliefs or incomplete information about the nature of the Dutch criminal justice process and typical case outcomes. This was particularly apparent with respect to the likelihood of prosecution and conviction, sentencing norms, and residency policies and practices. This finding calls into question whether the Netherlands truly enables victims to take an 'informed decision' about whether to cooperate with authorities, as is required by the CoE Convention (Art. 13(1)) and Directive 2004/81/EC (Art.6(1)). Thus, the Netherlands should

share additional information about these topics with victims in order to allow them to make more informed decisions about whether or not to press charges and participate in the criminal justice process.

CHAPTER 6

Participation in Criminal Proceedings: Trafficking Victims' Perspectives on Testifying, Protective Measures, and Sentencing

I. Introduction

As core principles of a HRBA, victims' participation and inclusion in processes and decisions that affect them should be facilitated (OHCHR 2004: 18-19; OHCHR 2006b: 14-15; UNDG Human Rights Working Group 2003: 2; see also Goonesekere and De Silva-de Alwis 2005: 2). This includes criminal proceedings against those who victimized them (see Obokata 2006: 394). Victims' participation and inclusion rights in this context are enshrined in positive law: EU Directive 2012/29 requires Member States to 'ensure that victims may be heard during criminal proceedings and may provide evidence' (Art. 10). Under a HRBA, the nature of participation and inclusion must be meaningful and active, and fulfilment of these rights must be done on an informed and consensual basis (Darrow and Tomas 2005: 507-510; OHCHR 2004: 18-19; OHCHR 2006b: 14-15; UNDG Human Rights Working Group 2003: 2). Victims' participation in the criminal justice process can take various forms, and this chapter will focus on testifying as a witness and sharing sentencing views.

As discussed in Chapter 1, there is tension between victims' participation in criminal proceedings and states' duty to protect them. Exercising their participation rights can be empowering for victims and assist in their recovery from the harms of victimization (Doak 2005: 312; Doak 2008: 117; McGarry and Walklate 2014: 127; Obokata 2006: 394 citing Roht-Arriaza 1995: 19; see also Muraszkievicz 2016: 341). However, given that '[t]he victims of trafficking are among the most vulnerable of witnesses' (Nikolic-Ristanović 2010: 191), facilitating their participation poses certain challenges, such as the risk of re-traumatization, privacy violations, and retaliation from traffickers and/or their associates. A HRBA requires states to provide

trafficking victims ‘with the protection and support they need to participate safely and effectively in the criminal justice process’ (Gallagher and Karlebach 2011: 11). This principle is enshrined in international and regional law. As part of its objective, Directive 2012/29 requires Member States to ‘ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner in all contacts with victim support . . . or a competent authority operating within the context of criminal proceedings’ (Art. 1). Also regarding the protection of vulnerable victims from secondary and repeat victimization during criminal investigations and proceedings, international and EU laws instruct that unnecessary repetition of interviews be avoided,¹⁹² the same trained professional conduct every interview with a particular victim on premises specialized for this purpose,¹⁹³ visual contact between victims and defendants be prevented,¹⁹⁴ and court proceedings be closed to the public.¹⁹⁵ Furthermore, victims’ privacy and identity must be protected,¹⁹⁶ as well as their physical safety and that of their families.¹⁹⁷

It is in states’ interest to provide protections for trafficking victims in the course of criminal proceedings for reasons apart from their legal obligations towards trafficking victims. For example, doing so serves states’ interest in maintaining the fairness and integrity of the criminal justice process. Psychological research has demonstrated that stress and intimidation

¹⁹² Directive 2011/36/EU Art. 12(4)(a); Directive 2012/29/EU Art. 20(b).

¹⁹³ Directive 2012/29/EU Art. 23(a), (b), (c).

¹⁹⁴ Directive 2011/36/EU Art. 12(4)(b); Directive 2012/29/EU Art. 23(3)(a); CoE Convention Explanatory Report 2005: paras. 309-310.

¹⁹⁵ Directive 2011/36/EU Art. 12(4)(c); Directive 2012/29/EU Art. 23(3)(d); Explanatory Report 2005: para. 308.

¹⁹⁶ Convention Arts. 11, 30(a); Directive 2011/36/EU Art. 12(4)(d); Directive 2012/29/EU Arts. 21, 23(3)(c); Palermo Protocol Art. 6(1).

¹⁹⁷ Convention Arts. 12(2), 28, 30(b); Directive 2011/36/EU Art. 12(3); Directive 2012/29/EU Arts. 9(3)(a), 22; Palermo Protocol Art. 6(5).

can interfere with a person's ability and willingness to recall information from memory (Goodman and Helgeson 1985: 190). Therefore, providing for measures aimed at minimizing victims' stress and anxiety levels while they participate in criminal proceedings, as well as protecting them from any threats from their traffickers and/or their traffickers' associates, can increase the accuracy and comprehensiveness of their testimony. Doak (205: 312-313; 2008: 117) also contends that victims' participation enhances the overall legitimacy of the criminal justice system because participation is one of its foundational values and victims' contributions promote transparency and, truth-finding. Moreover, states have a strong interest in maintaining their rule of law on THB, and making special measures available to trafficking victims serves this interest. This is because victim testimony is usually necessary to convict traffickers (Kara 2009: 38; Laczko and Gramegna 2003: 183; OHCHR 2010: 156; Rijken and Römken 2011: 92) and victims who feel safe and supported are more likely to be comfortable acting as witnesses (Dinan 2008: 76; Konrad 2008: 175; UN.GIFT 2008a: 2, 4; Williams 2008: 150).

II. Views on Giving Testimony

Three-quarters of participants believed that they would be capable of testifying in court proceedings against their traffickers. This demonstrates their resilience, as most interviewees had experienced severe trauma at the hands of the defendants in these proceedings. Though they felt able to give testimony, many thought it would be difficult for them to do so. This is consistent with Mischkowski and Mlinarević's (2009: 57) finding that many victim-witnesses who had testified about sexualized violence before the International Criminal Tribunal for the former Yugoslavia and/or the War Crimes Chamber of the Court of Bosnia and Herzegovina 'felt thrown back into the darkest hours of their life' as they recounted the details of their

victimization. Two-thirds of Mischkowski and Mlinarević's sample¹⁹⁸ reported that testifying in court about rape had been traumatic for them, but in spite of the difficulty, they had been able to complete their testimony (ibid. 56). This is a testament to the strength and resilience of these women, characteristics also evident among the participants in the present study. For example, when asked about her feelings with respect to testifying, one interviewee responded, 'I see myself doing it because I know I'm a strong person and I have to overcome this weakness moment that I might have and I would just go on with it' (Interview #29).

Whether or not they believed it would be challenging, around a fifth of the participants conceptualized testifying against their traffickers as an empowering experience. This supports Kelsall and Stepakoff's (2007: 366) argument that 'for many victims . . . what is painful (and an ordeal) can also be extremely empowering'. Somewhat surprisingly, given the need to recount traumatic and painful experiences, several women viewed giving testimony as *entirely* positive and empowering. For example, one interviewee asserted:

Well, honestly I just think it's like gonna be—if it really goes to the court will be one of the best days of my life. Like, seriously, just to see him there, you know, being, like in the position what he—what I was there and he can't do nothing, you know, now finally he is weak and I have something to talk about. Of course I will be really happy to do it. Like, I see sometimes—before I was thinking more about that when there was the police meetings of course was more in my head and I was even thinking about the speech I'm gonna say. Like, you know, strong powerful woman . . . I mean, of course it would be awesome if it's ever going to happen. (Interview #37).

Two Nigerian participants told of plots to assault their traffickers in court. Rather than communicating this in terms of a fantasy or abstract desire, these women articulated concrete plans (which they reiterated in responses to follow-up questions):

¹⁹⁸ 65 percent of 37 women who had completed a structured questionnaire (ibid. 51, 56).

I would be very happy because I'll point her direct and I would ask the police to get her arrested if she is there. I will be very, very happy. I will go there, give her a slap, and I will tell the police to get her arrested. (Interview #7).

I'm feeling because if I see this woman, the kind of, uh, power I have now as I'm talking to you, I will tear her. I'm telling you the gospel truth, I will tear that woman. I will pounce on her even in the court. The only thing maybe they will detain me. (Interview #35).

These excerpts reflect misconceptions about the Dutch criminal justice process, not only in terms of believing that assaulting the defendant is a logistical possibility, but also in terms of the ordering of events—i.e. arrest occurring during rather than prior to trial (Interview #7). Yet, the underlying idea in these women's assertions is one of empowerment and a desire to take advantage of the reversal of the power dynamics with their traffickers—themes also apparent in many other participants' responses.

Timing is a crucial consideration in enabling victims to feel able and even comfortable with giving testimony. Victims' attitudes towards testifying and recounting details about their trafficking victimisation can evolve over time. For example, one interviewee contrasted her current feelings about giving testimony with her ability to do so shortly after she had escaped her traffickers: 'What has happened, what has been done, cannot be undone. You have just to face it, say it, and be done with it. Before, I cannot talk, I would be crying; but crying will not solve the problem' (Interview #4).

While the passage of time can serve to mitigate fear and overwhelming emotions, it can also pose difficulties for victims who have tried to move past their trafficking experiences, especially in light of the typically lengthy nature of the criminal justice process (Bjerkan and Dyrliid 2006: 6). A woman who agreed to return to the Netherlands to testify against her trafficker after spending approximately a year back in her home country explained her feelings about having to recount traumatic experiences so long after they had occurred:

[F]or me think is difficult because one year I want to try to forget, I don't want to really remember. One year I think I 'ok I can forget, my life is changed, my life is changed', but no, you only think so, you know. (Interview #5).

This sentiment aligns with the finding that for some trafficking victims, a desire to leave the past behind factored into their decisions with respect to participating in the criminal justice process (see Chapter 5; Bjerkan and Dyrliid 2006: 5-6; Cuzuioc-Weiss and Lacroix 2010: 112, 116).

While this interviewee had not reported considering this factor while making her decision about pressing charges, this concern weighed on her mind as she prepared herself to testify in criminal proceedings against her trafficker (which she had been flown back to the Netherlands to do).

Another participant was concerned about the effects of trauma and the passage of time on her memory and her ability to accurately answer questions from the judge and the lawyers:

The only thing what—I don't know—that starts to worry me a little bit: I can't really remember, like you know, what's exactly the chronology. Like it's just, I even can't remember what I was doing like three years ago on my birthday, you know. It's just one, like, black hole. So that might be a—yeah, like a really blur. . . Yeah, so I don't know if I will be giving the right answers—that's a little bit a worrying side of me because, of course, it was a lot more fresh. But three-and-a-half years ago, so many things happened in my life and I don't seem to—and if I need to testify something, that's a little bit of worry how it's going to happen. (Interview #37).

It is well-understood that memories generally fade over time (Grabitz 1988: 210; Sanbonmatsu et al. 1991: 546-547, 553). Yet, an additional difficulty for trafficking victims is that people who have experienced traumatic events commonly suffer memory disturbances (Samuelson 2011: 346; Hopper and Lisak 2014). Not only are survivors' memories of their trauma often fragmented, jumbled, and incomplete (Hopper and Lisak 2014), but 'declarative memory' function ('defined as the ability to consciously remember and reproduce emotionally neutral material') among those suffering from post-traumatic stress disorder also tends to be impaired

(Samuelson, 2011: 346), which may explain this participant's memory deficits.¹⁹⁹ It is important for criminal justice institutions and actors to appreciate the impact trauma can have upon memory when confronted with human trafficking cases to ensure that memory issues do not prevent victims' accounts from being taken seriously and their traffickers from being prosecuted. As the ECtHR recently held in *S.M. v Croatia*,²⁰⁰ states cannot dismiss trafficking victims' testimony as unreliable without first assessing 'the possible impact of psychological trauma on . . . [their] ability to consistently and clearly relate the circumstances of . . . [their] exploitation' (para. 80). This holding represents an important step towards realizing a victim-centred HRBA because it is no longer acceptable for state parties to disempower and secondarily victimize trafficked individuals by deeming them unreliable and even dishonest based on the effects of trauma (see Condry 2010: 238-239, 241-242).

III. Protective or Special Measures

In light of the challenges and potential for secondary victimization associated with trafficking victims' participation in criminal proceedings, the right to protective or special measures for trafficking victims²⁰¹ is significant. The use of these measures can mitigate the risk of secondary victimization and enable victims to claim inter-dependant and inter-related rights, such as the rights to be heard and the right to seek compensation. Empirical research has demonstrated the benefits of special measures for many vulnerable and intimidated witnesses. A large survey of this population²⁰² in England and Wales found that those who had received

¹⁹⁹ Trafficking victims, and particularly those who are trafficked for sexual exploitation, are highly vulnerable to developing post-traumatic stress disorder (Lugris 2013: 232; Oram 2012: 8-9).

²⁰⁰ For a discussion of this case, see Chapter 2.

²⁰¹ Directive 2011/36/EU Art. 12(4); Directive 2012/29/EU Arts. 22(3), 23(3).

²⁰² All participants were vulnerable in one or more of the following ways: they experienced and/or feared intimidation, had psychological and/or emotional problems, were minors, had physical illnesses and/or disabilities, were victims of sexual offences or were learning disabled.

special measures²⁰³ were more confident that the criminal justice system meets victims' needs and is effective in bringing criminals to justice as compared to those who had not ($p < .05$) (Hamlyn et al. 2004: 101-103). Members of the former group were also significantly more likely to be satisfied overall with their experience as a witness than members of the latter²⁰⁴ (ibid. 96). One-third of participants who had used special measures reported that they would not have been willing and able to give evidence if these measures had not been available to them (ibid. 78).

In addition, multiple studies with child witnesses support the notion that protective measures are beneficial for many vulnerable witnesses. Based on observational data, researchers have found that child witnesses who testified via live television link were less likely to cry (Murray 1995: 66 ($p < .05$)), appeared less anxious (Cashmore and De Haas 1992: 78 ($p < .05$)) and unhappy (Davies and Noon 1991: 72, 74 ($p < .05$)), were more self-confident (Davies and Noon 1991: 72 ($p < .05$)), fluent (Cashmore and De Haas 1992: 78 ($p < .05$); Davies and Noon 1991: 74 ($p < .05$)), and audible (Davies and Noon 1991: 72 ($p < .001$)), and gave more consistent testimony (Davies and Noon 1991: 72-73 ($p < .001$)) than those who testified in a courtroom.²⁰⁵ Regarding child witnesses' own perspectives, Murray (1995: 71, 75) found that

²⁰³ The special measures assessed in this study comprised screens preventing the witness from seeing the defendant, video-recorded evidence-in-chief, testimony via live television link, clearing the court's public gallery, removal of wigs and gowns in court, and allowing the witness to use communication aids (e.g. alphabet board) (Hamlyn et al. 2004: 2).

²⁰⁴ The p -value for this association is not provided in the report.

²⁰⁵ In contrast to Davies and Noon (1991), Cashmore and De Haas (1992: 78) and Murray (1995: 66) did not find statistically significant differences for confidence and audibility among child witnesses testifying via live television link and those testifying in court. This discrepancy may be due to the comparatively smaller sample sizes in Cashmore and De Haas (1992: 78) ($n = 18$ for CCTV group and $n = 22$ for non-CCTV group) and Murray (1995: 66) ($n = 48$ (examination--in-chief) and $n = 44$ (cross-examination) for live television link users, and $n = 17$ (examination-in-chief) and $n = 15$ (cross-examination) for non-users) than in Davies and Noon (1991: 22, 27) ($n = 154$ for the live link group and $n = 100$ for the comparison group who had testified in open court, the data for the latter group being drawn from Flin et al. 1990). Furthermore, Murray (1995: 66) did not find a significant relationship between use of live link and fluency (unlike Cashmore and De Haas (1992: 78) and Davies and Noon (1991: 74)) or consistency of testimony (unlike Davies and Noon 1991: 72-73), but again, this may be due to the relatively small sample size, which may not have provided sufficient power to capture the relationship between these variables.

those who testified over live television link felt significantly less fear ($p < .001$) and a greater sense of fairness about the mode in which their evidence was presented than those who testified in the traditional manner ($p < .01$). Other types of special measures have been demonstrated to have a positive impact for child witnesses as well. For example, Goodman et al. (1992: 85) found that clearing the courtroom of spectators was associated with a lower likelihood of child witnesses crying during defence questioning ($p < .05$), but that having a (non-offending) parent or loved one remain in the courtroom was correlated with appearing less frightened of the defendant ($p < .025$) and more credible as a witness ($p < .05$). Court preparation measures have also yielded promising results. A qualitative study with 50 young witnesses in the UK concluded that almost all participants felt that pre-trial contact with a ‘supporter,’ a court visit, and an information pack about what to expect in court were helpful to them (Plotnikoff and Woolfson 2005: 4-5). Another study, in which 144 child witnesses in criminal proceedings who were either victims of or witnesses to sexual abuse were randomly assigned to one of two court preparation programs, revealed that the children in the program involving a courtroom tour, consultations with prosecutors, several one-on-one court preparation sessions with a therapist (covering courtroom procedures and relaxation techniques), and a court tour had significantly fewer generalized fears and specific abuse-related fears (e.g. fear of re-victimization) than those in the program consisting only of a courtroom tour and verbal explanation (Sas et al. 1991: 1, 10-14, 83, 116-117).

Although existing research indicates that the majority of vulnerable victims prefer and benefit from special measures, there are some who do not. For example, in Murray (1995: 69), twelve child witnesses expressed their dislike for the video-link setup and six called it ‘scary’. Similarly, three participants in Wade’s (2002: 224-225; 230) study of child witnesses in criminal

cases in England and Wales who testified via video-link reported that they would have preferred to give evidence in a courtroom instead, and some became agitated or distressed while watching themselves on pre-recorded evidence-in-chief during the proceedings. Wade (2002: 225) notes that none of the 26 children in her study had been consulted about their mode of testifying. Wade (2002: 225, 230-231) and Hall²⁰⁶ (2007: 34, 37, 39-41, 47, 49-51; also citing Plotnikoff and Woolfson 2005) criticize the apparent lack of choice in the practical application of special measures to vulnerable witnesses within the UK system (despite § 19(3)(a) of the Youth Justice and Criminal Evidence Act 1999 requiring that their views be taken into account). Allowing victims ‘to make a genuine and informed choice’ with respect to special measures is an important part of a victim-centred approach to criminal justice (Hall 2007: 51). ‘[A]pplying special measures in a broad-brush manner to all [eligible] witnesses’ without accounting for their individual preferences or providing them with alternatives can have negative consequences for witnesses who would prefer to give evidence in another way (ibid. 47; see also Wade 2002: 231). These consequences can include undermined confidence and self-esteem (Wade 2002: 231), increased stress and confusion, and even refusal to continue with the process²⁰⁷ (Hall 2007: 33, 42). Indeed, Cashmore and De Haas (1992: 87-88) found that aspects of child witnesses’ testifying experiences depended more upon whether their wishes regarding closed-circuit television (CCTV) had been honoured than upon whether they had used it or not: participants who had wanted to testify over CCTV but were not permitted to do so felt significantly more

²⁰⁶ Hall (2007) observed criminal trials and conducted interviews with criminal justice practitioners and court staff at three criminal courts in England.

²⁰⁷ One of Hall’s (2007: 42) interviewees, a legal adviser at a magistrate court, described an instance in which a key witness to a case was giving testimony over live video-link when a legal point arose and the judge began to ask the lawyers questions about it. The witness refused to continue his testimony and said that he felt confused because he could not tell who was saying what and felt that ‘people were discussing the case round him’ (ibid.).

scared than both those who had used and those who had not used this measure, in accordance with their preferences ($p < .05$).

On a fundamental level, failing to provide victims with the opportunity to control whether and what type of protective measures are employed for them compromises their agency and is contrary to a victim-centred HRBA (Pescinski 2015; Rijken and Römken 2011: 81, 94). Thus, the importance of individualized assessments, as required by EU Directives 2011/36 (Art. 12) and 2012/29 (Arts. 22-23), in determining the appropriateness and nature of special measures in each case, cannot be overstated. Especially significant is the 2012 directive's requirement that '[i]ndividual assessments . . . be carried out with the close involvement of the victim and . . . take into account their wishes including where they do not wish to benefit from special measures' (Art. 22(6)). This is strongly supported by the data that follow, which highlight the heterogeneity among victims' needs and perspectives with respect to protective measures. In the present study, participants were asked specifically about their preferences regarding two common types of protective measures: testifying in the courtroom without the defendant present and testifying outside of the courtroom via video-link.

A. Victim Preferences and Perspectives regarding the Presence or Absence of the Accused during Their Testimony

While special measures can protect vulnerable people from having to face the defendant, it cannot be assumed that all will wish to take advantage of such protection. Some victims wish to face the perpetrator in court. For example, one participant sought to communicate her empowerment by testifying with her trafficker present in the courtroom to show 'that [she was] not scared from him' (Interview #36). While almost a third of the participants were keen not to face their traffickers, approximately half reported that they would prefer for their traffickers to be

present during their testimony against them, with the remaining victims being unsure or not having a preference either way. This undermines the presumption implicit in EU Directives 2011/36 (Art. 12(4)(b)) and 2012/29 (preamble recital 57,²⁰⁸ Art. 23(3)(a)) that trafficking victims would prefer avoiding visual contact with defendants, which also appears to be reflected in the Dutch approach. Specifically, in the Netherlands, '[v]ictims of THB are as a rule not heard in open court hearings, but instead video links are used' (GRETA 2018a: 46). Using special measures 'as a rule' is dangerous in light of the aforementioned empirical research finding negative consequences for victims when special measures are applied in a 'broad-brush manner' (Hall 2007: 47) rather than allowing victims 'to make a genuine and informed choice' about whether and what type of measures are used (ibid. 51). Perhaps the entry into force of the new Dutch law on victims' rights in April 2017, which explicitly states that a victim's wish not to use special measures should be considered, will begin to change this practice ('Besluit slachtoffers van strafbare feiten' (Decree on victims of criminal offences) Art. 10(5)).

As with attitudes toward testifying generally, victims' feelings about seeing their traffickers can change over time. One participant described the evolution of her feelings as follows:

I will be afraid to see his face . . . and when I have to speak my story . . . So, um, to see his face it would be a little scary, but not that much. The scaring that I has before and now is not the same scaring. Before I—I cannot even look the person in the eyes like this I . . . if I see the traffickers . . . I cannot even look at them, you know. But now I can look the face. Before I was, 'oh my gosh'. (Interview #15).

Another interviewee experienced a similar but even more sizeable shift in her perspective on seeing her trafficker during her testimony:

²⁰⁸ Specifically referring to victims of human trafficking and other types of vulnerable victims, paragraph 57 in the preamble of Directive 2012/29 states that 'there should be a strong presumption that those victims will benefit from special protective measures'.

[At] first I was like, ‘no, I don’t want to see him’, you know. But now I want to see him. I want to see that face. I want to see the face, if it’s the same like what he did to me. . . . And I’m waiting for that day. (Interview #30).

Like this participant, a number of others also expressed a strong desire to confront their traffickers in court. This appears to be linked to retribution, vindication, and power dynamics. As trafficking victimization is a fundamentally disempowering experience marked by a lack of control over one’s life, it makes sense that victims would seek empowerment. For example, in the first aforementioned excerpt from Interview #37 in this chapter (p. 227), the participant expressed excitement over the prospect of testifying against her trafficker in court and their accompanying role reversal—i.e. putting him in a ‘weak’ position and her in a ‘powerful’ one. Based on their research with victim-witnesses, Mischkowski and Mlinarević (2009: 57) conclude that ‘[t]o confront the perpetrator can mean to demonstrate to him, to oneself and the world that he lost his power over you. It can be an act of reclaiming control over one’s life, leaving the position of the helpless victim behind’. Victims’ desire to exercise power over the individuals who formerly exploited and wielded power over them can also have retributive elements. For example, one woman described her desire to humiliate her trafficker:

It would make me happy to confront him with everything he did and I would love to make a fool out of him and so everybody know what kind of person he is . . . I’m at a state at this moment that I could tell it with him and his whole family in the courtroom. (Interview #39).

Several participants wanted their traffickers to be present during their testimony because they believed that it would compel them to feel negative emotions such as guilt, shame, and regret. For example, one participant explained that she would like to testify in the presence of her traffickers ‘maybe to make them shamed, then I can tell it in front of them if they feel shame on that what have they done’ (Interview #33). Furthermore, three participants in particular

couched their desire to testify in front of their traffickers in terms of making the offenders understand and feel their pain:

I would want him to be there and I would watch him, look him in the eyes, and he should look me in the eyes and see and feel what I feel. (Interview #12).

‘Cause I want him to see what I feel and I want the judge to give him punishment so I want him to feel that pain what I feel that moment. (Interview #2).

So you want the person to see you, how pain you are when, you know, when you was in the [trafficking] situation it was not easy for you, so you want the person to feel that too. . . . I just want the person to—to just feel the situation[.] (Interview #15).

However, this belief presumes that the traffickers are capable of empathy, which may not be the case. Greer, Cotulla, and Seddighzadeh (2016: 124) note that traffickers ‘exhibi[t] the behavioral, emotional, and psychological constructs of psychopathy’. Gotch’s (2016: 105-106) empirical research on U.S.-based sex traffickers provides support for this notion, as 79 percent of the sample possessed a high or very high level of psychopathic traits.²⁰⁹ As psychopaths are ‘not physical[ly] capable of feeling sincere remorse’ (Greer, Cotulla, and Seddighzadeh 2016: 124) and lack empathy (von Polier et al. 2013: 2), it is unlikely that victims seeking understanding and empathy from their traffickers as a result of testifying in their presence would be satisfied.

For a handful of interviewees, their desire to testify in the presence of their traffickers was connected with their ideas about credibility. In other words, they assume that if the accused is present while they communicate the crimes he or she has committed against them, then they will be believed. There is a high level of certainty in these women’s statements about the connection between the presence of the accused and the credibility of their testimony. This notion was not only related to the judge’s impressions of the victim’s credibility, but also the

²⁰⁹ However, it should be noted that the sample consisted of only 28 participants, which is on the small side, all with an ‘arrest, charge, and/or conviction’ for sex trafficking in Oregon. The proportion of participants who pled guilty or were actually convicted of trafficking is unclear.

perpetrator's. For example, one woman explained that she wanted her trafficker to be present during her testimony 'so that she will look into my eyes and see that I'm telling the truth'

(Interview #23). Another participant stated:

I want the criminals to be present at the court, and while I'm there too. I want to be there in their presence. I want them to see me. I want to see them face-to-face. . . . I think it is good for me to see them because of what they did. So that they should know that I'm not lying. (Interview #20).

The root of participants' concerns regarding the offender's beliefs about the truthfulness of their testimony is unclear, as presumably, (1) the offender knows the truth about what he or she actually did to the victim regardless of the content of the testimony, (2) believing the victim's testimony is not likely to prevent the offender from lying, and (3) the offender is not the judicial decision-maker. However, one woman asserted the following, in disagreement with the second point:

I want them to see me so they will not deny [what they have done to me]. Because if [they are not there when I testify, then] they will deny it. But if they see me, I see them. Look at them. They will not deny it. (Interview #4).

The belief about a link between credibility and the defendant's presence during testimony appears to be connected to culture and background, as all of the participants who expressed as much are from Nigeria.

A significant reason why some women would not want their traffickers to be present while they testify is to avoid negative associations, feelings, and memories triggered by seeing the person who had traumatized them. Protection from this type of secondary victimization appears to have been the primary legislative intent behind the provision of special measures in the EU Directives. A Bulgarian woman described feeling overwhelmed by the prospect of seeing her trafficker, even in a photo:

I don't want to see it him. For me, it's too much to I come here, and to I have to explain what happened three year, you know, because one year, I try to forget, and now, I have to remember and to speak for this, and I think it's very difficult for me and I can have to see him, no. It's too much for me. Really, I don't want to see him of the picture. (Interview #5).

The passage of time since she had escaped her trafficking situation was not sufficient to mitigate her strong negative associations with her trafficker's image. Another Bulgarian interviewee feared that seeing her trafficker would trigger a loss of control over her associated anger. She also implied that seeing him would disrupt her efforts to move past her trafficking experience and bring it to life for her again:

I don't want see this person, you know. I don't want. I don't want. I'm really sure for this. . . . [I]f I see this person and explain what he do, I don't know, maybe I pfff—I don't know, I'm crazy because this person . . . if I go to the court and explain this stuff, what he do with me, and then I see the face of this man, I don't know what I gonna do because I'm angry. I'm angry. I want this person to pay for what he do, you know. And I can't because I don't want, because for me this person don't live. For me, this person is over, finished, I don't want to know nothing. (Interview #27).

Some victims did not want their traffickers to be present during their testimony because they were afraid of reprisals:

I would think this man would—you'll be the person like who has exposed him and I don't think those people like him have hearts. He would not rest then and I think maybe until he's, uh, maybe got you to—I think he would even find a way of getting a gun and shoot you. . . . [Even in a courtroom] I cannot feel safe. (Interview #34).

Well, . . . I would not want to see him. You know, because the reason is that if I was there, . . . by seeing him you still have the fear from him. And this might change what you will say because you're still terrified and afraid from him. So, and because then you think, it's also the fact that one day he also gonna comes out from the jail. It's also this factor and—listen if you got there and you're the person who going to put him in the jail, and if you know he will comes out after four or five years, well, he might find you wherever, you never know. Then [this] might change the things what you are going to say because of the fear. (Interview #38).

However, this latter explanation presumes the defendants would not find out the content of victims' testimony after-the-fact, which is unlikely to be the case. Thus, the risk of retaliation would still be a serious issue even when the defendant is absent during the victim's testimony.

B. *Victim Perspectives on Video-link versus In-court Testimony*

Akin to Wade's (2002: 230) study of child witnesses, there was 'considerable diversity' among victims' attitudes towards testifying via video-link. Slightly more than half of the participants reported that they would rather testify in a courtroom than over video-link from outside of the courtroom. Only about a fifth of interviewees expressed a preference for video-link testimony, which is cause for concern over the Dutch approach of having trafficking victims testify over video link 'as a rule' (GRETA 2018a: 46). The remaining quarter of participants stated that they were unsure, had no preference or did not answer the question. Within this quarter, it was clear that a few of the women did not fully understand the question, which was not entirely unexpected as video-link testimony can be difficult to conceptualize for someone who is unfamiliar with it. For instance, one woman interpreted it to mean that the person's testimony would be broadcast on regular television in people's homes, and it was hard to disabuse her of this notion.

A participant explained her preference for testifying in a courtroom rather than over video-link in the following manner:

I [prefer to] sit in the court because I need to the people understand what the situation I have. Maybe when you speak, no is the same when you speak in the television. When I speak with you—one example, you know. When you speak with the person, personally, is more connection, you know . . . Connection—what is the connection with the people? You connect with the people talking, you know. And for this, if I talk in the court, the people can connect with me and I can connect with [them]. (Interview #27).

This insightful explanation relates to Hall's (2007: 43) finding about how video-link testimony deprives both witnesses and lawyers of the opportunity to 'read' each other and communicate in a 'natural way'. Likewise, a district judge interviewed for Hall's study observed that when witnesses testify over video-link, they have 'no relationship' with the judge 'because you're just a face on the screen, they can't see how you're reacting to something' (ibid.).

Another participant who did not want to testify over video-link explained, 'I have problems with the cameras so that would be a bit hard'. This may be related to the use of cameras to record her during her trafficking, such as through forced pornography (a type of sex trafficking (Farrell, McDevitt and Fahy 2010: 216)). A third interviewee explained her opposition to video-link testimony in the following terms:

[B]ecause when the victims [are on] video things and they ask you a question, you're not in the room, but they see you on the wall, everybody see you. This, you still think, 'ok, everybody look at me, my pimp is there'. And this is still freaking you out. And believe me, for the pimps, the better far away from them eyes you are, the better for you is, because then they're more focused, they see you go against them again and stuff like that. (Interview #38).

Her concerns about being watched echo Wade's (2002: 224) findings that some child witnesses were disturbed by the thought of the defendant watching them whilst they could not see him or her.

In contrast, around one-fifth of participants expressed their preference for testifying via video-link rather than in a courtroom. One woman who said that she would feel ashamed while testifying explained her preference for video-link testimony as a way of minimizing these feelings of shame:

I would prefer [testifying over video camera] because, for instance, if you were in the room and I see you later because I remember I saw you there, I feel bad because I know the story you heard about me and in my head it starts to lead a certain life. (Interview #12).

This woman's perspective is consistent with findings that victims of sexual violence often feel intense shame when testifying about their victimization in person (Dancig-Rosenberg 2008: 160; Guthrey 2015: 91).

For the other interviewees who preferred video-link testimony over testifying in a courtroom, their choice appeared to stem from their fear and/or comfort levels, but not many provided clear explanations. Further research exploring precisely why certain victims prefer to testify via video-link, and examining whether there are any differences between those who would choose this option and those who would not, would be useful in the development of policy regarding protective and special measures.

IV. Victims' Ideas about How to Help Sex Trafficking Victims to Give Testimony

Victims' input and ideas must be solicited and taken into account in order for policies, processes, and measures to be truly victim-centred (Goodey 2005: 116-117). Furthermore, the HRBA principles of participation, inclusion, and empowerment require meaningful engagement with vulnerable and disadvantaged groups (Darrow and Tomas 2005: 507, 509-510; see also OHCHR 2004: 19-20), which includes sex trafficking victims. Therefore, it is essential to provide the opportunity for this stakeholder group to share their perspectives and ideas about criminal procedures and policies that directly affect them. This section gives voice to participants' ideas regarding how to improve the process of giving testimony for victims.

Most participants stated that they could not think of any ideas about how to make the process of testifying any easier or more comfortable for trafficking victims; a few thought improvements were not possible. This may have been at least in part due to the prospective nature of the questions on this topic for most participants, as the vast majority had not (yet) testified against their traffickers and may have had difficulty conceptualizing the experience.

Two of these women emphasized self-reliance—the need to ‘boost yourself up’ (Interview #4) for testifying and that ‘it’s up to [the victim] to prepare herself’ (Interview #29). The latter interviewee further explained, ‘[i]t’s up to the woman to help herself and to decide that she has to get over some fears and then just go through the story again’ (ibid.). However, almost a quarter of the sample articulated proposals for external measures which they believed would assist victims with the process of giving testimony. A participant who had testified in criminal proceedings against her trafficker suggested keeping the number of people present during the victim’s testimony as low as possible. She explained:

Well I think for me the easiest is if like that how we see them talk just with somebody, you know, with what the girl would feel comfortable and . . . is a judge or somebody from the judge office, and if it’s recorded because there is only two persons, you know. . . . [I]f it’s you and the girl, and you’re the judge or I guess he has to have one person for more sure extra, you know. But I think this give more confidence because then you don’t have to face so much people, you don’t have to see the front of your pimp, and freak you out and be so nervous. And at some point you forget that you have the recorder, so then you feel more confident. You know it’s more *personal* and stuff, so I think it’s here just better . . . I think I would feel more confident not when it’s too much people or when my pimp is there or all the kind of lawyers and stuff like that. (Interview #38).

This proposal accords with psychological research indicating that ‘the environment most conducive to the disclosure of painful, traumatic events would contain a minimum number of unfamiliar persons’ (Ellison 2001: 40-41). However, in all likelihood the strategy would not be able to be implemented exactly as this participant envisioned, since the absence of defence counsel during a victim’s testimony would implicate the defendant’s fair trial rights under Article 6(3)(d) ECHR. The European Commission on Human Rights²¹⁰ has held that a defendant may be prohibited from being in the courtroom when a witness is testifying against him in

²¹⁰ The European Commission on Human Rights was a preparatory body for the ECtHR that rendered admissibility decisions, and in admissible cases, provisional opinions regarding the existence of ECHR violations (Barkhuysen and van Emmerik 2009: 438). It was abolished by Protocol 11 of the ECHR, which came into force in 1998 (ibid.).

exceptional circumstances (such as in cases concerning serious drug crimes), as long as his lawyer is present during the testimony (*Kurup v Denmark* 1985: 287, 292; *X. v Denmark* 1981: 50, 54-55) (the ECtHR acknowledged and followed this precedent in *Hilden v Finland* (1999)). The Commission reasoned that this situation does not violate a defendant's rights under Article 6(3)(d) ECHR because 'the interests of the defence could be safeguarded just as well by the lawyer as by the [defendant] himself' (*Kurup v Denmark* 1985: 292; *X. v Denmark* 1981: 55). While prohibiting a defendant but not his attorney from being present during a victim's testimony in a human trafficking case would comport with Article 6(3)(d) ECHR, permitting neither a defendant nor his counsel to be present, as the above participant suggests (Interview #38), would likely amount to a violation of the defendant's Article 6 rights, in light of the case law.

Three participants believed that having support from individuals that the victims trust would make testifying easier and more comfortable for them. This is consistent with the Office of the UN High Commissioner for Human Rights' (OHCHR) assertion that '[v]ictims of sexual violence . . . often benefit from the presence of a support person or psychologist in the courtroom' (OHCHR 2011). Moreover, witnesses in Mischkowski and Mlinarević's (2009: 93) study recommended that psychotherapists and/or other support individuals be permitted in the courtroom during testimony, even in closed proceedings. The Dutch Code of Criminal Procedure permits victims to have a person of their choosing present during court hearings (Art. 51(c)(2)). While the police, prosecutor or judge may prohibit a particular individual from assisting a victim during court proceedings if it is deemed to be in the interest of the investigation or the victim to do so (Art. 51(c)(4)), this seldom happens in practice (GRETA 2018a: 46).

A pre-existing, trustful relationship with the individual who is present for the victim's testimony to support her is key, according to one interviewee in the present study:

Well I think it's good always to have a person who they know, like a friend of them or something, just to be there because then give you more confidence. Or somebody from the organization who help you, somebody who really you trust little bit, because then even if the person is not involved and doesn't have to say nothing, already by the idea that somebody who you know is there, it makes you feel more relaxed, you know, and give you little bit more the comfort in yourself that it's ok if you say what's happened. . . . [W]hen you know that inside in the room is a friend of you, and if you feel little bit scared what you have to say but your friend is next to you and say, 'ok, it's ok', you know, 'we'll get there'. You know, this also little bit push that the girl can talk and say more things. . . . You know, that they, 'ok, somebody's there so if something goes wrong I know that somebody's there for me'. Because these girls, never somebody's there for them, you know. When a social worker or somebody with who they have little bit more stronger bond at that moment, you know, and is there in the testimony . . . [it] make them feel more secure and make them feel that they do the right things, and it's ok to say everything and it's nothing to be ashamed of . . . because, you know, many girls are beaten up and raped and they think that's such a big shame because I was raped, for example. But . . . when somebody in this case is there for you and you know it's ok and you have to say because this might help you, you know, it might help to put your pimp in the jail. In the end, after all, that's what's the point is. So when somebody's there next to you, it's much more better to speak about it. (Interview #38).

This interview excerpt highlights how allowing a supporting individual to accompany a victim while she testifies can serve both the goals of the victim and the state. For the victim, the supporter provides comfort, reassurance, and familiarity in an unfamiliar environment. For the state, he or she facilitates the trafficker's prosecution, which is the state's duty, by enabling the victim to give stronger and more detailed evidence. In this way, allowing a support individual whom the victim trusts to accompany her and sit next to her while she testifies is a positive measure for both victims and the state. The state could facilitate this measure by reimbursing the victim's chosen supporter for costs incurred (e.g. travel costs or lost wages) and taking this individual's personal obligations into account when scheduling the victim's testimony.

Another interviewee specifically explained the importance of having a supportive lawyer:

I think, um, that the help of the lawyer is very important because he—lawyer has to be there for her all the time and he knows the whole story so he can help her when she don't want to talk that he takes it over and talk for her and if she ready to talk then she can talk again and—I think the lawyer . . . That's very important. (Interview #3).

While it is highly unlikely that a lawyer would be permitted to speak in place of a victim-witness while she is testifying, the underlying notion that victims should have lawyers who support them throughout the process is valuable. Even though a victim's lawyer cannot testify in her place (which another participant had also proposed (Interview #26)), he or she can, and has a duty to, advocate for the victim's rights under the law and ensure that she receives the protections and benefits she is entitled to, in accordance with her preferences. Having an engaged and supportive lawyer to do so can understandably make the process of giving testimony less stressful for many victims.

The third participant who asserted the importance of supportive individuals in making the process of giving testimony easier for victims also emphasized the need for trust within these relationships (Interview #27). Beyond simply providing moral support, this woman viewed the 'people [who] want something good for [you]' as being able to 'advise you for maybe "this is more better or this is more better"' (ibid.). She also explained that even one individual providing support to the victim is enough to make a difference (ibid.). For her personally, she trusted the police to take on this role (ibid.).

A few participants suggested that efforts be made to motivate victims to testify. Rather than having it presented as a neutral option, they believed that it is something that women should be encouraged to do. One woman asserted that victims should be galvanized into action to further both women's individual and collective rights through testifying:

[I]t's very important that all women, also the women who are afraid, learn why they should stand for their rights. And, like me, more women we complain and

more easy it will be for those men to understand that they will, in any case, get punished. And maybe here [in the shelter] we could talk about that more to make them aware. (Interview #12).

The proposal of explaining and championing the benefits of testifying to victims was echoed by another woman, who also suggested victims be reassured that going to court will not risk their safety:

You talk to them. You empower them. . . . Well to help those [women] to [testify]—that’s why I say is to speak to them, educate them, enlighten them. They should not be afraid, it’s good they go [to court]. If they go they will not be killed . . . because the politie²¹¹ people are there. The judges are there. Going to court—court is not just—maybe, maybe like in my country, you may not feel that safe. But I know in the Western world they are more adequate in what they are doing. . . . I’m from Africa, I’m telling you. They are better here. They are more equipped, they are more—I don’t know. (Interview #35).

In contrast to the two preceding interviewees, a third suggested that victims be encouraged to look within themselves for inspiration to help them to give testimony:

You have to fight for something. I fight for my family, to be good with them again because in the—during the time [I was trafficked] I lose the contact with my good friends and with my family. And I came back and I saw that they miss me also, you know? And this give me the power to fight. They have to think about something that they really want. And they can get the power out that. (Interview #30).

Another idea that two participants proposed was to implement a degree of informality to make the process of testifying easier and less intimidating for trafficking victims. One of these women suggested that the setting in which victims testify should be comfortable and informal, in order to put them at ease (Interview #1). The other interviewee thought that speaking to victims in an informal manner would make them feel more comfortable giving testimony and answering questions about their trafficking victimization. She explained:

And in the end if somebody kind of say ‘ok, we have a few questions’, then put the papers and thinks ‘ok first question’. Well that is too official and that’s

²¹¹ ‘Politie’ is the Dutch word for ‘police’.

already bring the border between the person, you know, between the victim and the person who is asking. But if you start like, ‘well, how are you today? Are you ok?’ You know, just with the normal questions what you usually you ask your friend. If you have something to do with your friend you say, ‘oh hey how are you what’s up’ and you know . . . Then, it’s coming little bit in the same level you talk with them. And that’s very important because it’s the same if I go by the—for example, in a hospital, yeah, and the doctor come and speak with me and start to explain me that, you know, official things. . . . but if they say ‘hey how are you today? Are you having a good day?’ Then you start to feel then because he’s a doctor doesn’t matter anymore. Doesn’t matter because you think, ‘well he’s nice person’. That makes the difference, you know. (Interview #38).

Allowing testimony in an informal setting and having criminal justice actors employ simple, informal language may make the process less intimidating for trafficking victims and help to build rapport, which can facilitate communication. By making efforts to communicate with victims on the ‘same level’, criminal justice actors can minimize the risk that victims will ‘feel so small’ and patronized (Interview #38). The idea of injecting a level of informality into the process is also reflected in the removal of wigs and gowns in court as a special measure in the UK, which the majority of vulnerable and intimidated witnesses for whom this measure was employed found helpful (Hamlyn et al. 2004: 74).

An interviewee who had testified in court multiple times for the defence prior to being identified as a trafficking victim believed that speaking with someone in a similar situation who had already given testimony would increase victims’ comfort level with respect to testifying.

She emphasized the importance of life experience in helping victims over secondary knowledge:

What I have gone through in my life, I can help somebody who going through the same things as me. I *know* what the people, what the person feels and while I can help somebody like that because I also go through all those things. But then maybe somebody, the mentor from here [at the shelter]—for them it’s not—they can talk and speak with you what they learn at school and what they learn out books but they cannot talk to you about how the people really feels. (Interview #32).

Finally, one participant recommended that female victims of sex trafficking be given the option of speaking only to women while they testify to make giving evidence easier and more comfortable for them. She asserted, ‘Well, I prefer talking to ladies. I think they can understand’ (Interview #9). With regard to her traffickers, she explained that ‘there are some things that they did . . . to me that really [are] . . . so shaming, I don’t think I can talk [about them to men]’ (ibid.). Along these lines, Goodey (2004: 28) notes that ‘the prospect of being questioned about intimate details by male police officers and investigators’ is a reason why many trafficked women are reluctant to cooperate with authorities. This concern is acknowledged in EU Directive 2012/29, which requires all interviews during a criminal investigation with a victim of sexual or gender-based violence to be conducted by someone of the same sex as the victim if he or she so wishes, unless a prosecutor or a judge conducts the interview (Art. 23(2)(d)). While this helps with part of the issue, it fails to address the discomfort and anxiety victims may experience when required to share graphic details of their sexual exploitation with members of the opposite sex during their testimony in criminal proceedings. A potential remedy may be the use of a female intermediary during a female victim’s testimony when judges, prosecutors and/or other lawyers involved in the case are male.

V. Victims’ Perspectives on Sentencing and Punishment

In 2016, victims of serious crimes in the Netherlands gained a statutory right to express their views on the appropriate sentence for the defendant during criminal proceedings (Government of the Netherlands 2016b). Previously, victims only possessed the right to address how the crime had impacted them personally (ibid.).²¹² Thus, trafficking victims’ perspectives

²¹² However, some Dutch judges had previously permitted victims to discuss sentencing in spite of the existing statutory restriction (Government of the Netherlands 2018).

on sentencing are particularly significant in the Dutch context. This relatively recent enhancement to victims' participatory rights promotes the HRBA principles of participation, inclusion, and empowerment. Even prior to this change, utilizing victim impact statements was associated with increased trust in the legal system for victims of serious crime in the Netherlands ($p < .05$) (Laxminarayan 2015: 281). Given that crime victims' satisfaction with the criminal justice system is strongly correlated with their satisfaction with the sentence imposed upon the perpetrator (Erez and Bienkowska 1993: 59 ($p < .0001$); Erez, Roeger, and Morgan 1997: 53 ($p < .001$); Erez and Tontodonato 1992: 404 ($p < .001$)²¹³), allowing judges to hear victims' views on sentencing may increase the chances that victims will be satisfied with the system. However, inviting their views could have a negative impact on their satisfaction levels if doing so raises their expectations about their ability to influence the sentence and these heightened expectations are not met. Empirical research has found that crime victims who expected their input to have an impact on the sentence but felt that it had not actually had an effect were significantly less satisfied with the sentence ($p < .01$) (Erez, Roeger, and Morgan 1997: 54; Erez and Tontodonato 1992: 403) and with the criminal justice system as a whole ($p < .01$) (Erez and Tontodonato 1992: 403)²¹⁴ than those who did not have unfulfilled expectations. As will be seen below, many participants in the present study believed that much harsher sentences than the average given to traffickers in the Netherlands would be appropriate for their traffickers. Therefore, unless Dutch judges change their sentencing practices, victims who interpret the invitation to express their

²¹³ Victims' satisfaction with the sentence accounts for 51 percent of the variance in their satisfaction with the criminal justice system in Erez and Tontodonato's (1992: 409) study.

²¹⁴ Unlike Erez and Tontodonato (1992: 403), there was not a significant difference in satisfaction with the criminal justice system between those with and without unfulfilled expectations in Erez, Roeger, and Morgan's (1997: 53) study.

views on the sentence as allowing them influence over it are likely to be dissatisfied with the result and with the criminal justice system in general.

The CoE Convention obligates state parties to ensure that THB offences are ‘punishable by effective, proportionate and dissuasive sanctions’ (Art. 23). However, Dutch courts have generally given light sentences to those convicted of human trafficking, leading evaluative bodies to urge the Netherlands to impose sentences upon traffickers that are commensurate with the seriousness of the crime (GRETA 2018a: para. 230; U.S. Department of State 2018: 320; 2017: 296; 2016: 283; 2015: 259; 2014: 289). According to the most recent available data, the average length of non-suspended custodial sentences for convicted traffickers was just 558 days in 2015, down from an average of 804 days in 2013 and 665 days in 2014 (National Rapporteur 2016: 8, 21; Government of the Netherlands 2016a). The distinction between suspended and non-suspended portions of sentences is significant because prisoners in the Netherlands are typically released on parole once they have served just two-thirds of their sentence (Custodial Institutions Agency 2013: 3). However, the Dutch Minister for Legal Protection submitted a legislative proposal in May 2018 that, if approved, will end automatic eligibility for conditional release for prisoners serving sentences of six years or more and require the Public Prosecution Service to instead engage in case-by-case assessments (Government of the Netherlands 2018). It will also limit the duration of conditional release to a maximum of two years of the sentence (ibid.). Yet, as most sentences for human traffickers fall below the six-year threshold, this proposal is not likely to have much of an impact upon the duration of their incarceration.

C. Nature of Punishment and Sentences

Most participants believed that it was important for their traffickers to be punished. When asked what sentence, if any, they thought they should receive, almost a quarter of

interviewees stated that prison sentences of twenty years or longer would be appropriate.²¹⁵ Several others responded with sentences ranging from ten to nineteen years and a few with sentences of between five and nine years. Two victims stated that their traffickers should receive the death penalty, while several on the opposite end of the spectrum wanted them to be incarcerated for one year or less or to receive no punishment at all. A few interviewees believed that their traffickers should be incarcerated until they are rehabilitated and are no longer a danger to society. Approximately a sixth wanted them to be given prison sentences but declined to specify a duration. Outside of incarceration and the death penalty, a few participants believed that their traffickers' punishments should include being beaten, having their identities as traffickers publicized, having to pay restitution or being subjected to sexual exploitation themselves.

D. Justifications for Punishment and Sentencing Views

In explaining their views on appropriate and fair punishment for their traffickers, many participants gave one or more of the following rationales, which generally align with classical punishment theories (see Orth 2003: 174). Notably, some responses blend multiple reasons and the edges of each remain blurry. Others do not indicate their underlying basis and I have avoided making assumptions about which conceptual category(ies) applies to these explanations. For example, some participants articulated the goal of preventing other women from being victimized as the rationale for their belief that a particular punishment would be appropriate for their traffickers, without making clear whether this was rooted in deterrence, incapacitation, rehabilitation and/or other reasoning. Moreover, in most cases, interviewees' views on punishment cannot be divorced from the factors impacting their decisions about whether to press

²¹⁵ But approximately a third of those who specified a length of incarceration.

charges against their traffickers, as two-thirds of the sample reported that retributive considerations, and almost half of the sample that deterrence and/or incapacitation considerations, had weighed in their decision-making processes.²¹⁶

As noted in Chapter 5 with respect to decisions about pressing charges, ‘retributive punishment remains a powerful intuition’ among victims of sex trafficking (Kaufman 2012: 47). As the strongest theme to emerge from the data, many participants believed that their traffickers should receive their ‘just deserts’ and be punished for the past harm they committed (see Carlsmith, Darley, and Robinson 2002: 284). Vidmar and Miller (1980: 584) note that, with respect to retributive responses to crime, ‘[i]n general, the greater the harm, the greater the punishment reaction’. This trend is reflected in the data, as victims who referred to the serious harms they endured during their trafficking victimization when explaining their views on appropriate punishment for their traffickers tended to be quite punitive. For example, articulating her belief that the five-year sentence her trafficker received was inadequate and that a much longer sentence would have been more appropriate, one participant explained:

[F]ive years, this is just comes and go. It’s nothing. . . . [T]he trauma . . . he caused me, the fear what I had to live with, the humiliation, the [abuse] to my body . . . I was beaten up, I was raped—five years? . . . Because the fear what I had, and what I went through, and the trauma, I still have it and I will have it till the rest of my life. So five years—that’s for me a kind of joke. Honestly, because these people, they own your life. (Interview #38).

Another interviewee who emphasized that her trafficker should receive punishment proportionate to the severe harm he caused her asserted:

I want [him] to receive what [he] deserve[s]. . . . I just want him to suffer so he can feel my pain. To feel body pain like I felt it myself. And the pain that I had in my heart and in my soul. That is pain that you cannot forget. The fact that

²¹⁶ Since participants were asked about their views on appropriate punishments for their traffickers after they had been asked to explain their considerations when deciding whether to press charges, some did not reiterate their reasons but it was clear that these factors impacted their punishment perspectives as well.

now I cannot establish a normal relationship with another man, this is a mark for life. . . . [L]ess than twenty years [in prison], it's just not fair. (Interview #17).

This woman struck a vengeful tone in articulating her desire for her trafficker to suffer, but as 'retribution and revenge [have] similar underlying dynamics', particularly within the context of criminal law (Vidmar 2000: 38), this chapter places them in the same conceptual category.

Similarly, another participant expressed that her trafficker's suffering would bring her satisfaction:

Of course it would be nice at least if he would sit in the cell and lose, you know, his health there and just get sick or you know, somebody will fuck him in the ass, I mean, what he was doing to me. That will be awesome. At least something, you know. . . . [If he is incarcerated] it will be nice [because] at least he'll lose also some years of his life. I literally lost years. I wasn't living. I was just . . . drinking pills because there was just, uh, not even existence, was just dark, dark, dark life. And that's the person done all these things to me. (Interview #37).

An interviewee who believed that her traffickers should receive the death penalty described her desire for both individual and collective retributive justice as follows:

I want to kill them.²¹⁷ They don't give respect to women. It's not only about me, about the whole [of] women. Every woman. Yeah, they [could have done] that with another woman also. . . . I hate that person who do the wrong with the woman. (Interview #33).

One woman's view of an appropriate prison term for her trafficker was tied to the length of her exploitation, underscoring her perspective on proportionality between the punishment and the harm (the 'central precept of just deserts theory' (Carlsmith, Darley, and Robinson 2002: 285)). She asserted, 'He used me for nine years, so I think nine years is enough' (Interview #31). Speaking on punishment for sex traffickers generally, another participant hewed even more closely to the 'eye for an eye' approach: 'give him the punishment that he can work [as a

²¹⁷ While this quotation is not an explicit call for capital punishment, this participant indicated that she wanted the state to execute her traffickers rather than for her to execute them herself.

prostitute]. . . . I'm sure he don't want it too. But he have no choice because the girls have no choice, he have no choice' (Interview #3).

Deterrence as a rationale for participants' views on sentencing also emerged as a strong theme in the data. Many interviewees referred to their desire to prevent future instances of sex trafficking when explaining their perspectives on appropriate punishment for their traffickers. Deterrence as a justification for punishment presumes that criminals are rational actors who weigh the costs and benefits prior to committing a crime (Carlsmith, Darley, and Robinson 2002: 285). In this vein, several interviewees reasoned that punishment can teach their traffickers a 'lesson' about the costs of unacceptable behaviour towards others and therefore deter them from engaging in that behaviour again. As one woman explained, 'I have to make her to pay so that she will have her lesson. Next time she won't treat somebody like that' (Interview #8). Furthermore, a Dutch woman who believed that sentences in the Netherlands are at times too light asserted that punishments should impose sufficiently serious costs to effectively deter criminals from re-offending 'because if you do something and you see it's easy, maybe you will do it one time again' (Interview #30).

Two participants expressed their view that their traffickers' crimes and bad character should be publicized in connection with specific deterrence. One asserted, 'I want the people know that he is very mean and not allowed to get any girl. . . . I don't want him to use other girls' lives' (Interview #31). This not only suggests the goal of warning others about his bad character but also the aim of deterring him from re-offending by shining a light on him to encourage public monitoring. The other interviewee explained that as part of his sentence her trafficker should be 'exposed . . . on the media so that people know, everyone knows' what he has done (Interview #34). This appears to be rooted in both deterrent and retributive rationales. Like the other

participant who wanted her trafficker to be exposed, it seems that this woman wanted to warn others about her trafficker and encourage monitoring of his activities, especially since preventing the victimization of others was her main reason for deciding to press charges. In addition, she also seems to have a desire to shame her trafficker publicly for his crimes, which reflects retributive reasoning. In considering retribution from the perspective of the social group, Vidmar and Miller (1980: 580) argue that '[p]unishment lowers the offender's status (relative to that of the victim) and suggests to others that the offense should be attributed to the offender's bad character'.

Several participants referred to general deterrence of sex trafficking as a basis for their views on punishment. Referring to the pervasiveness of the crime, one woman explained, 'because there's so many women involved and there's also underage girls going through this things so they should have really bad punishments for this kind of things. . . . [J]ust make it strong enough that it discourages this kind of behaviour' (Interview #29). Another participant who was concerned with general deterrence (but declined to make a sentencing recommendation) stated:

I think it's important [for my traffickers to be punished] because that will not make other people to do it[.] [B]ecause if they living like that [as traffickers], everybody is going to do it and girls are going to be in the same situation, so . . . when things happen you need the justice, you know. And what kind of justice, uh, doesn't matter, just that no other people do the same things to other people so that life is good life for everybody, you know. (Interview #15).

This interviewee declined to specify the nature of punishment she thought would be appropriate for her traffickers but felt that punishing them was important as a means to deter others from engaging in sex trafficking and therefore prevent future victimization.

Some victims who were concerned for the safety of themselves and others wanted their traffickers to be incarcerated for the purpose of incapacitation. Almost all of these participants

favoured life sentences, which makes sense as incapacitation theory ‘focus[es] on restraining a person who has proved himself or herself dangerous’ (Carlsmith, Darley, and Robinson 2002: 286). One of these women explained, ‘if they release them, I think they will try to find us and harm us or they will start doing it again because it's part of them. Imprison them for life’ (Interview #4). Another woman who thought her trafficker should receive a life sentence emphasized, ‘the other girls [and I]—we know that [if] he’s under detention, we are safe. . . . Yeah, [we] walk little bit freely’ (Interview #19). Concerned for the safety of others, a third participant thought that it was important for her traffickers to be arrested and incarcerated ‘so they can’t hurt anyone else’ (Interview #14).

Some interviewees viewed punishment as a means of rehabilitating their traffickers. Reflecting this approach, most of these participants declined to specify an appropriate length of incarceration, but rather indicated that the duration should be tied to the time it takes for the offender to be rehabilitated. One of these women believed that her trafficker should be incarcerated until it is ‘clear that the bad man in him has gone forever’ but stated that she did not know how much time this would take (Interview #12). An interviewee who expressed that rehabilitation is possible but challenging ‘because something that is part of somebody’s life is difficult to do away with’ emphasized the importance of ensuring that the trafficker is a ‘genuine changed person’ prior to release (Interview #35). Those who viewed incarceration as a means of rehabilitation primarily saw it as an opportunity for offenders to engage in ‘penitent reflection’ (Cotton 2000: 1317). One woman believed that this should be facilitated with ‘therapy . . . going [for] a long time (Interview #3). A participant who remained hopeful that time in prison would be rehabilitative for her trafficker, as it had been for her, explained:

What I want is that this person is in the jail, think ‘ok, what I do, no is good’. Change. And maybe apologize, you know, for say me, ‘sorry for what I did for

you'. Sorry is so easy for say this but so much people don't say this. But I don't want this. I want to know that this person is feeling bad for what he do. Because no is good, exploitation the people because ok, we are human, all the people, you know. Nobody deserves this. (Interview #27).

Two women believed that rehabilitation was possible but would take a long time to achieve and thus required a lengthy sentence. One of them reasoned:

[Not] less than twenty years [in prison is necessary.] . . . So they can realize what they've done. Because five or six years, there's no way that they can get it. Because they will get out and will continue from where they started. And they're going to be even more cruel to women and to the prostitutes. 'Cause this will not stop them. Five years is nothing. Half of their lives should be prison so when they get out to be happy that they are free, finally. Because when somebody spends five years, they're living and they're just more angry and they're more evil. And then they're going to go and do revenge. This is my opinion and I strongly believe it is like that. (Interview #17).

In contrast, several interviewees explicitly stated that they did not think it would be possible for their traffickers to be rehabilitated. As mentioned above, a woman favouring the lifelong incapacitation of her traffickers believed that the tendency to exploit others is 'part of them' (Interview #4). Another who thought that her trafficker should receive a life sentence recounted how she had unsuccessfully tried her 'best' to help him to become a better person by being kind to him and 'giv[ing] him everything that [she] can' (Interview #30). She explained that her efforts had failed 'because he's a person, like, he do what he want. He doesn't think about others. He was like, "if I wanna do something then I do"' (ibid.). She did not believe that punishment could be rehabilitative for her trafficker (who had also previously been incarcerated), stating, 'I think he doesn't learn from [being sent to prison]' (ibid.).

E. *Impact of Religion and Culture*

Religious beliefs and cultural background featured in some participants' explanations of their views on the punishment of their traffickers. While cultural contexts undoubtedly impacted the sample's perspectives since '[p]unishment reactions and the related cognitive and affective

processes are learned responses' (Vidmar and Miller 1980: 570), this section only addresses responses where this influence is apparent.

For several interviewees, their religious convictions mitigated the severity of the punishment they perceived as appropriate for their traffickers. These participants primarily referred to rules about forgiveness and judgment in Christianity. In explaining why she did not want her trafficker to receive any punishment, one interviewee stated, 'I don't see why I make someone suffer. I'm Christian, I forgive. We learn to forgive' (Interview #26). Another woman echoed this explanation but pointed out the difficulty of following it in practice:

I will forgive because . . . God will say you have to forgive who have give you pain or people who, um, give you bad, you don't give them bad, you give good, you know, you be good to them and nice to them, so it's also a challenge when you get into a hard situation to be that or to do that, you know. But you have to . . . forgive and be nice to them, like nothing happened. (Interview #15).

These responses reflect the 'absolute moral duty' of Christians to forgive those who sin against them (van Dijk 2008: 19-20; see also van Dijk 2009: 5-6). In doing so, Christians are not permitted to indulge feelings of vengefulness and must refrain from engaging in retaliation (ibid.). Thus, it makes sense that these victims would not want their traffickers to be punished or made to suffer. Van Dijk (2009: 7-8; 2008: 19-20) contends that victims' moral obligation to forgive is much more salient in Christianity than it is in either Judaism or Islam. He attributes this difference to the example of Jesus Christ as the original *victima*—the Latin word for 'sacrificial object' first employed only with reference to Jesus (and source of the English term)—who preached forgiveness even during his crucifixion (van Dijk 2008: 13, 19; van Dijk 2009: 4-5). Through the lens of Christianity, the 'ideal victim' is one who forgives the offender voluntarily, completely, and unconditionally (van Dijk 2008: 20; van Dijk 2009: 7-8). However, in line with the excerpt above from Interview #15, van Dijk (2008: 20-21) also recognizes the

difficulty crime victims may have in fulfilling the duty to forgive unconditionally, as it is natural for them to feel angry and desire revenge. He asserts that '[m]any crime victims may see forgiveness as an impossible demand and feel guilty about their failure to live up to it' (ibid. 20). Consequently, though beneficial for offenders and the community as a whole, the obligation to forgive may be a source of secondary harm for crime victims (ibid. 20-21).

Somewhat similarly, another woman who identified as Christian explained her opposition to the death penalty for her trafficker in terms of her religious values. She asserted that she 'believe[s] in God and you cannot—because there's a scripture in the Bible you can't . . . judge anyone [or you too will] be judged. So I can't send someone to death. I cannot do that. . . . But any life punishments, you deserve what you done' (Interview #2). Unlike the previous two participants, this one did not refer to forgiveness and interpreted Christian principles as allowing for punitiveness with the exception of the death penalty. Yet, her religious beliefs placed certain limits on retribution.

Culture influenced views on punishment type for a few participants as well. One woman stated that her trafficker 'should be beaten' because 'if we do something like that in our country, we beat. . . . [M]y people do this to people who don't know how to behave' (Interview #13). For a Hungarian woman who believed that her traffickers should be sentenced to death by hanging, her view on appropriate punishment for them was impacted by her knowledge of punishments historically imposed in her culture. She explained that a '[l]ong time ago it was a punishment . . . in Hungary, but it's a very long time ago. If they would have the same punishments, sentences [today] that [they had] then they would think about how to treat a woman' (Interview #1). A third participant explicitly acknowledged the variation of punishment types existing across cultures when she declined to specify an appropriate sentence for her traffickers, stating, 'I am

not from Holland and I don't know how punishment is [done] here. I don't know how they punish people. The only thing I want, I want them to give them severe punishment' (Interview #20).

VI. Conclusion

Victims' rights to meaningful participation in criminal proceedings against their traffickers are key elements of a victim-centred HRBA. Encouragingly, there have been recent developments across many jurisdictions, including the Netherlands, toward enhancing victims' participatory rights (Government of the Netherlands 2016b; McGarry and Walklate 2015: 102-105; Pemberton 2014: 32). However, this trend also poses new challenges that need to be addressed. One such challenge is how to ensure that victims' views about how and whether they exercise these rights are elicited and respected. Given the tendency of states to use victims as prosecutorial tools to serve their own interests (Marmo and La Forgia 2008: 173), it is essential that victims are not coerced into 'exercising their rights'. Doing so would undermine the empowerment potential that is meant to accompany the granting of rights in the first place. Another challenge is managing victim expectations. If being granted certain participatory rights leads to victims gaining a false impression about their ability to influence the course or outcome of criminal proceedings, this can result in dissatisfaction with the criminal justice system (see Erez and Tontodonato 1992: 403). This is a potential risk associated with victims' newfound statutory right to make sentencing recommendations in the Netherlands (see *ibid.*), which should be mitigated by clearly informing victims about the limits of their influence and typical outcomes for similar cases. In spite of these and other challenges, enhancements of victims' rights to participation and inclusion in criminal proceedings represent positive steps towards the realization of a victim-centred HRBA. Going forward, it is essential to evaluate whether the

modalities of victim participation are effective and to make adjustments as necessary, in order to ensure that victims are able to access and benefit from these rights in practice.

CONCLUSION

Conducting empirical research with victims of human trafficking is complex and challenging due to various ethical, administrative, and logistical obstacles. Yet, it is a worthy endeavour as it has the potential to provide valuable insights into the thought processes, experiences, and views of this hard-to-reach and important stakeholder group. Utilizing a feminist, reflexive approach to the research allowed me to effectively navigate many of these obstacles and obtain rich empirical data while remaining sensitive to participants' vulnerabilities and my own positionalities. The result provides an evidence base that can inform the development of victim-centred, human rights-based law and policy. Equally as important as the substance of the data is the 'political act of making space for the voices of those traditionally spoken for' (Moore and Hofeller 2019: 80). Trafficked women have traditionally been spoken for by law enforcement, policymakers, and even well-intentioned service providers/NGOs—but it is essential to create a platform for victims to use their own voices in order to effectively empower them and enable them to create first-hand knowledge of their lived experiences and perspectives. This research aims to serve as such a platform.

I. The Research Question

As stated in the Introduction, this thesis set out to shed light on the extent to which a victim-centred HRBA to THB is realized. In exploring this question, both the THB legal framework and the practices of state agents responsible for respecting, protecting, and fulfilling victims' rights were analysed through a human rights lens. First, while the THB legal framework enshrines important categories of trafficking victims' rights in positive law, it contains too many loopholes and allows for too much state discretion. For example, states are given wide discretion regarding victims' rights to legal representation, special measures,

compensation, and non-punishment. As a result, states can avoid providing victims with much in the way of rights and entitlements in practice while still being in compliance with the letter of the law. Furthermore, the link embedded within the legal framework between victims' entitlements to assistance measures beyond the reflection period, including residence permits and safe accommodation, and their cooperation in and usefulness to investigations and prosecutions constrains victims' exercise of agency and is contrary to a victim-centred HRBA.

Second, the data show that compliance with a victim-centred HRBA among the state agents responsible for carrying out the Netherlands' substantive obligations within the THB context varies quite a bit. Encouragingly, the majority of participants reported that police, shelter staff, and lawyers had engaged with them in a respectful, victim-centred manner. This included sensitivity and responsiveness to their needs and facilitating their access to tangible assistance measures. However, a significant minority of interviewees recounted treatment that was inconsistent with a HRBA. This took the form of failures to fulfil their substantive rights, non-compliance with core human rights principles, or both. As a result, the victims who were subjected to this treatment were disempowered, secondarily victimized, and many suffered severe consequences, including remaining trapped in their trafficking situations for longer periods, losing or being denied access to safe accommodation, medical treatment, and other victim assistance measures, losing the right to remain in the Netherlands legally, and a complete loss of trust in those who should have been helping them.

Following the disempowering experience of being trafficked, victims who are granted the reflection period must decide whether or not they will press charges against their traffickers and participate in the criminal justice process. The data demonstrate that trafficking victims take this decision-making process very seriously and weigh multiple factors, which typically fall on both

sides of the equation, prior to finalizing their decisions. While probing these factors, it became apparent that many victims are unaware of the very low likelihood that their traffickers will be prosecuted, and the even lower likelihood that they will be convicted and receive sentences commensurate with the seriousness of their crimes. Victims are often surprised when, after pressing charges and fully cooperating with authorities, their cases are closed due to a lack of evidence or an inability to locate the perpetrator. Once this occurs (and when, in all likelihood, their application for residency on humanitarian grounds is denied), they lose their right to remain in the shelter and foreign victims lose their temporary residence permits based on their status as trafficking victims. As one interviewee who experienced this explained, the police gave her protection from her trafficker and empowered her to press charges, but when her case was closed and she was told, ‘you should go back to your country’, the Dutch authorities ‘are now losing [her] again to the danger’ (Interview #35). This example demonstrates how linking residence permits and other benefits to usefulness in criminal cases undermines the realization of a victim-centred HRBA in practice. Furthermore, structural and proximate factors within the broader socio-legal context impose constraints upon victims’ ability to make genuinely ‘free’ choices about their participation in the criminal justice process. It is also important to recognize how erroneous beliefs about the likely outcomes of pressing charges cast doubt on victims’ ability to make an ‘informed decision’ about whether to cooperate with authorities, as they should be able to do pursuant to the CoE Convention (Art. 13(1)) and Directive 2004/81/EC (Art. 6(1)).

Participation in criminal proceedings is both a right and a potential source of harm for victims. The data reveal participants’ resilience as most felt that they would be capable of testifying against their traffickers, though many believed that it would be emotionally challenging for them. Despite the aim of special measures to mitigate this difficulty, the sample

was divided as to whether they would want to utilize the special measures of testifying without the defendant present in the courtroom and testifying outside of the courtroom via video-link. This is a notable finding given the presumption in favour of using such measures with trafficking victims in EU Directives and Dutch practice, which can constrain victims' exercise of agency in this context. In line with a victim-centred HRBA, victims should be empowered to choose among a variety of special measure options, including ones that participants believed would be helpful, such as having a support person of the victim's choosing next to her while she testifies, allowing testimony in an informal setting, keeping the number of people present during the testimony as low as possible, and arranging for a trafficking victim who has already been through the process to support a victim who is preparing to testify.

In light of the research findings, there are a number of ways to improve the realization of a HRBA to THB. First, there is a need for clearer and firmer obligations towards trafficking victims within international and regional law. The existing framework contains significant loopholes and makes it difficult to hold to account states that provide little by way of assistance and protection to victims. While the European Court of Human Rights has made considerable progress with establishing concrete obligations for states regarding the criminalization, investigation, prosecution, and removal of victims from situations of THB, its case law is limited in scope and does not address many of the issues that significantly impact upon victims, such as the need for safe accommodation, medical and psychological treatment, restitution from the perpetrator, and protective measures.

On the national level, the Netherlands has developed an extensive legal framework related to trafficking victims. While this framework provides victims with an array of entitlements, central features of it run counter to a HRBA. First, assistance to foreign victims is

linked to criminal investigations or prosecutions being pursued. Though there is an exception to the requirement that victims press charges in order to receive assistance and extended legal residence beyond the reflection period, based on a serious threat and/or medical or psychological limitation, Dutch authorities do not always accept NGO assessments demonstrating that this exception should be applied (GRETA 2018a: 26). Second, foreign victims—who risk retaliation against themselves and their loved ones by pressing charges against their traffickers—lose Dutch assistance and protection when their cases are closed, through no fault of their own, which occurs the majority of the time. Third, though Dutch victims do not have to worry about legal residency, they are not legally entitled to certain benefits provided to foreign victims, such as official access to specialized shelters. This discrepancy violates the core human rights principle of ‘non-discrimination and equality’ (Rijken 2009: 215). In order to better realize a HRBA, the Netherlands needs to address the preceding issues within its domestic legal framework.

Notwithstanding, the Netherlands has made recent progress in the recognition of victims’ rights. Though approximately two-and-a-half years later than required (Directive 2012/29/EU Art. 27), the entry into force of legislation implementing Directive 2012/29/EU (‘Besluit slachtoffers van strafbare feiten’) in April 2017 considerably enhanced legal protections for victims’ rights to information, support, protective measures, and individualized needs assessments within the domestic sphere. Notably, this law requires authorities to consider victims’ wishes, including the wish not to claim special measures. This is important for victims’ empowerment and their ability to exercise agency, which are key aims of a HRBA.

Beyond the legal framework, the qualitative, empirical research with trafficking victims in the Netherlands forming the heart of this thesis provides insight into the extent to which a victim-centred HRBA is realized on the ground. Based on these findings, there are several

concrete steps the Netherlands should take to improve the fulfilment of its obligations towards victims and better comport with human rights norms and values in practice. First, it should implement organizational checks and safeguards to prevent files from being lost, unnecessary repetition of interviews about traumatizing events, financial stress, and victims ‘falling through the cracks’ due to a lack of due diligence or human error. Second, it should ensure that every trafficking victim is offered the opportunity for high-quality, culturally-sensitive, individual therapy with a trained mental health professional at regular intervals. This type of support is essential during the post-trafficking period, when victims are dealing with the effects of trauma and are faced with the major decision of whether or not to press charges against their traffickers. Third, only individuals who are committed to treating and communicating with victims respectfully and compassionately should be hired for victim-facing positions, and efforts should be made to guard against the development of compassion fatigue among these professionals. These efforts can include trainings about how to develop a self-care plan, build and effectively utilize a social support network, and recognize the signs and symptoms of compassion fatigue (Figley and Figley 2017: 390, 393-394, 396). Fourth, resources devoted to combating THB and assisting its victims must be increased for the preceding three steps to be achieved and for the Netherlands to move towards, rather than away from, fully realizing a HRBA. Recent cuts to these resources are deeply troubling and should be reversed as they will undoubtedly undermine the Netherlands’ ability to meet its obligations to victims under international, regional, and domestic law.

II. Victims: The Missing Link

A strategy towards realizing certain norms and values underlying the human rights approach involves the expansion of the ‘Chain Partners Approach to Human Trafficking’.

Victims should not only be viewed as the recipients of services from chain partners, but should also be recognized as a chain partner in their own right. As evidenced by this research, there are significant shared interests and goals among trafficking victims and other partners in the chain, most notably, bringing traffickers to justice and preventing re-victimization and the victimization of others. Victims are able to meaningfully contribute to the achievement of these goals and should be viewed as potential collaborators in these efforts. It is important to recognize that their contributions are not limited to providing information and testimony about the crime they experienced and the perpetrator of that crime. For example, the data demonstrate that they can empower other victims and ‘giv[e] [them] the courage to go forward with press[ing] charges’ against their traffickers (Interview #10). As an interviewee pointed out, victims are uniquely situated to help each other, as people who have not experienced trafficking victimization first-hand ‘cannot talk to you about how the people really feels’ (Interview #32). She emphasized, ‘I can help somebody who going through the same things as me [because] I *know* what the . . . person feels’ (ibid.). Furthermore, victims are able to train other chain partners in how to detect THB and facilitate victims’ departure from their trafficking situations. For instance, a participant in this study was working with the Dutch military police at the time of the fieldwork to teach them strategies for detecting and approaching suspected trafficking victims. If victims are reconceptualised as partners and collaborators in the fight against THB, it is less likely that they will be treated as ‘passive objects’ (Jordan 2002: 30) or ‘prosecutorial tools’ (Marmo and La Forgia 2008: 173) and more likely that their perspectives will be recognized and valued, they will be treated with respect, and they will feel empowered. Moreover, communication and transparency will be improved, as those in a chain partner relationship are more inclined to explain the reasons motivating their actions and decisions to each other than is likely with those

in a strictly hierarchical relationship.²¹⁸ As a participant explained, interacting with professionals with authority, such as police detectives, can make ‘you feel so small’ and they should make efforts ‘to make you feel that you’re in same level with [them] and [they’re] in the same level with you’ (Interview #38).

It is useful to borrow from the field of organizational behaviour to gain additional insights into the concept of ‘collaboration’ as a ‘mode of interaction’ (Kinnaman and Bleich 2004: 311), despite the differences between the contexts. Although there is no universally-accepted definition of the term, many scholars and practitioners agree on several of its key features: ‘mutual respect, differing but complementary competencies, a distributive balance of power between the parties’, and eschewal of hierarchies (ibid. 311, 317-318; see also Shipper et al. 2013: 100, 107; Power 2017). Collaborators are committed to mutual success and embrace a win-win relationship (Shipper et al. 2013: 100, 107; Kinnaman and Bleich 2004: 318). While collaboration typically involves shared goals (Hord 1981: 2), Nkhata, Breen, and Freimund (2008: 2) assert that it is a process that advances both ‘common and individual interests’. It is often viewed as a behavioural and communication strategy that is well-suited to advanced problem-solving, and that fosters innovation (Kinnaman and Bleich 2004: 311, 316) and empowerment (Power 2017). In terms of these characteristics and values, collaboration aligns well with a HRBA. A collaborative mode of interacting with victims would empower them, recognize their knowledge contribution (see Kinnaman and Bleich 2004: 317), and ensure that they are treated with respect, which the core human rights concept of inherent human dignity requires (Ward 2009: 115-116, 125). By avoiding traditional modes of hierarchical communication, it would help to prevent victims from feeling ‘so small’ when interacting with

²¹⁸ The National Rapporteur (2013: 279) notes the absence of a hierarchical relationship among chain partners.

police officers and other chain partners (Interview #38). Furthermore, conceptualizing victims as collaborators would increase the attention given to their interests and goals—both individual and those they share with other chain partners—which is an essential part of a victim-centred HRBA. More broadly, as one of the world’s most complex and ‘pressing problems’, THB would certainly benefit from the ‘advanced problem-solving and innovation’ that collaboration fosters (see Kinnaman and Bleich 2004: 311-312).

However, a dual role of victims as collaborators and service recipients is not without its complications, and pursuant to a HRBA, individual victims’ wishes regarding collaboration should be respected. Timing is also a crucial consideration, as victims’ views with respect to collaboration can evolve over time. But regardless of the path individual victims choose, conceptualizing trafficking victims as part of the ‘chain’ has the potential to improve relationships between them and existing chain partners. For example, rather than thinking in terms of victims’ ‘cooperation’ with criminal justice authorities, which, in this context, implies simply giving the authorities what they ask for and following their instructions, viewing the relationship as one of ‘collaboration’ can result in better communication, transparency, and mutual respect. This aligns with the core human rights principles of participation and inclusion, interdependence, equality, and accountability.

In addition to victims’ wishes, another consideration is potential resistance from existing chain partners to conceptualizing victims as collaborators. Rich and Seffrin (2013: 690, 692) identified resistance from police officers as a significant barrier to their collaboration with rape victim advocates during victim interviews. Reasons that officers provided for this resistance included a desire to maintain control over the process, suspicions that victim advocates harboured negative attitudes, a belief that victim advocates were ignorant about police

procedures, and having a set way of doing things which did not include collaboration with victim advocates (ibid. 690). These factors as well as others may lead to resistance among chain partners to viewing and treating victims as collaborators.

III. Directions for Future Research

The perspectives and experiences of human trafficking victims are an important topic that merits further investigation. Future research should be conducted with victims who have experienced all stages of the criminal justice process in order to gain insights into their views about and experiences with additional chain partners and criminal justice actors, procedures, and institutions. A longitudinal study design would be especially valuable as it could capture how and to what extent victims' perspectives evolve over time. Furthermore, it is important to conduct research with victims of different types of trafficking and across the full range of demographics to assess the generalizability of the present study's findings and to ensure that no type of victim remains invisible.

Research with victims who have had first-hand experience with criminal proceedings against their traffickers would yield valuable information about their views on participation in the criminal justice process and whether a HRBA is followed in practice. As noted in Chapter 6, there is a need to further explore victims' perspectives on the application of special measures, particularly the use of video-link to allow testimony from outside of the courtroom. The opportunity to ask adult victims retrospective rather than prospective questions about this and other protective measures would be helpful as most empirical studies of experiences with such measures have been conducted with samples consisting wholly or primarily of crime victims who were minors.

Lastly, to fully assess the extent to which the Netherlands employs a HRBA to THB, primary research should be conducted with the full array of stakeholders. Victims are an incredibly important piece of the puzzle, yet they are still only one piece. Information and perspectives must be sought from every chain partner in order to ascertain the full picture of Dutch responses to THB.

IV. In Closing

One of the goals of this research is to recognize the necessary role of the oft-invisible victim in law- and policy-making that directly impacts upon their interests and their lives. The aims and values of a HRBA reinforce this role and restore empowerment and agency to victims following the disempowering experience of being trafficked. Despite the challenges of implementing this approach, significant progress has been made in recent years, particularly in the development of positive law and in the recognition of its value on the part of influential parties. However, much work remains to be done, especially to ensure that the human rights of victims are promoted, protected, and realized in practice.

APPENDIX A

Semi-structured Interview Guide

Background

1. What languages do you speak? Which language are you most comfortable speaking?
Are you comfortable doing this interview in [X language]?
2. Where were you born?
3. Have you lived anywhere else?
4. How old are you?
5. How long have you been in the Netherlands?
6. How did you get to ACM? (If relevant). How long have you been at ACM?
7. What has your experience been like at ACM so far?
 - a. Is there anything you particularly like or don't like at the shelter?
 - b. Do you have any recommendations for how the shelter can better assist people who have been trafficked?
8. Have you had contact with any other organizations that support people who have been trafficked?

Participation in the Criminal Justice Process

1. Has anyone informed you about the reflection period? (Explain meaning if participant does not know what the reflection period is). If so, who did? Are you currently in or have you taken the reflection period?
2. Have you decided whether or not you will press charges against your trafficker?
3. What reasons are you/did you consider when making this decision?
 - a. Can you tell me about your decision-making process?
 - b. Were any reasons or factors more important than others?
 - c. If you haven't yet made your final decision, are you leaning one way or the other?

Experiences with the Criminal Justice Actors and Institutions

Law Enforcement

1. Have you ever had contact with the police? If so, can you describe the circumstances and your experiences?
 - a. In the Netherlands?
 - b. In your home country?
 - c. In another country?
2. What are your thoughts about law enforcement officers in general?
3. What are your thoughts about law enforcement agents in the Netherlands?
4. Do you have any family members or friends who are police officers or other law enforcement agents?

5. If you have a problem, do you feel comfortable approaching the police for help? Do you think the police would help you with your problem if they were able to?
 - a. In the Netherlands?
 - b. In your home country?
 - c. In another country?
6. Have you heard anything about the police in the Netherlands from others?
 - a. Victims of human trafficking?
 - b. Sex workers?
 - c. Your trafficker(s)?
 - d. NGOs?
7. Have you had experiences of meeting with people who work for the border agency? If so, what were those experiences like?
 - a. In the Netherlands?
 - b. In another country?
8. Do you have any recommendations for how police or other law enforcement agents can better assist people who have been trafficked?

Lawyers

1. Have you ever spoken to a lawyer?
2. Are you currently represented by a lawyer? If yes, how did you get connected with this lawyer?
3. What has your experience been like with your lawyer?
4. Do you have any recommendations for how lawyers can better assist their clients who have been trafficked?

Courts

1. Have you ever been involved in a court proceeding? If so, please describe the circumstances.
2. If you have been involved in a court case as a victim of human trafficking, how did you find this experience?
 - a. Is there anything you particularly liked or didn't like?
 - b. Is there anything that you would recommend be changed about the process?
3. If you have testified against your trafficker(s), what was this experience like?
4. If you have not testified against your trafficker(s), have you given any thought to this possibility? What are your feelings about it?
5. Do you have any ideas about how testifying against traffickers can be made easier for victims? Or anything that could help with this process?
6. If you were given the choice of testifying in a courtroom with your trafficker(s) there, or without your trafficker(s) there, which would you choose?
7. If you were given the choice of testifying in a courtroom or testifying from a room that is outside of the courtroom, and that room has video camera that allows you to be seen on a

screen in the courtroom while you're testifying, which would you choose? (Give further explanation and clarification if necessary).

8. Is it important to you or not important to you that your trafficker(s) is punished?
9. What do you think would be the right sentence for your trafficker(s)?
10. Do you have any other thoughts about sentencing for traffickers?
11. Do you have any knowledge about sentences for convicted traffickers in the Netherlands? If so, how did you learn about them? What are your thoughts about these sentences?

Wrapping up

1. Do you have any ideas about how to make any part of the process or system better for people who have been trafficked?
2. Is there anything you'd like add?
3. Do you have any questions for me?
4. Why did you decide to participate in my research study?

APPENDIX B

Consent Form

‘Understanding Sex Trafficking Victims’ Experiences with and Perspectives on the Criminal Justice Process’

I, RACHEL WECHSLER, will make every effort to ensure that the collection and analysis of any data concerning you, as the interviewee, will be carried out in accordance with the assurances set out below and listed on the Participant Information form provided.

Researcher Signature _____ Date: _____

I _____ [name of participant in BLOCK CAPITALS] agree to take part in this research interview.

I understand that the purpose of the study is to understand the views of individuals who have been trafficked for sexual exploitation about the criminal justice process and giving testimony against traffickers. This thesis seeks to understand victims’ feelings and experiences, and whether there are any policies or measures that can make them more comfortable with the criminal justice process and testifying.

I have read the Participant Information form, have been given the opportunity to ask questions about the study, have received satisfactory answers to any such questions, and have been provided with any additional details requested.

I understand that this research is being conducted as part of a doctoral thesis, which will be published and stored in the Oxford University Research Archive.

I understand that I can refuse to answer any questions, that I can withdraw from the research at any stage without explanation, and that I can bring up additional relevant issues within the interview.

I agree that the interview can be tape-recorded, on the basis that the data will be securely held, my identity will be protected and the information anonymised as soon as possible.

I understand that only the Principal Investigator will have access to any identifying data provided, which will be stored securely and will not be retained for longer than necessary, in accordance with relevant UK legislation (the Data Protection Act 1998).

I understand that this study has been reviewed and approved by the University of Oxford Central University Research Ethics Committee (CUREC).

If you have a concern about any aspect of this project, please speak to Rachel Wechsler (rachel.wechsler@crim.ox.ac.uk; +447946082810) or her supervisor, Dr. Carolyn Hoyle (carolyn.hoyle@crim.ox.ac.uk; +441865 274452), who will do their best to answer your query. The researcher should acknowledge your concern within 10 working days and give you an indication of how she intends to deal with it. If you remain unhappy or wish to make a formal complaint, please contact the chair of the Research Ethics Committee at the University of Oxford (Chair, Social Sciences & Humanities Inter-Divisional Research Ethics Committee; Email: ethics@socsci.ox.ac.uk; Address: Research Services, University of Oxford, Wellington Square, Oxford OX1 2JD). The chair will seek to resolve the matter as soon as possible.

I agree – subject to the assurances provided above regarding anonymity, confidentiality and data protection – that the interview data I provide can be used for research and educational purposes.

Participant Signature _____ Date _____

NB Please keep your copy of this consent form and the Participant Information sheet for your records.

APPENDIX C

Participant Information Sheet

‘Understanding Sex Trafficking Victims’ Experiences with and Perspectives on the Criminal Justice Process’

You are being invited to take part in a research study about the experiences of people who have been trafficked for sex work. The study focuses on experiences with the criminal justice process and views about testifying in court cases. This information sheet sets out the purpose of the study and what will be involved.

Who is organising the research?

The Researcher is Rachel Wechsler, a doctoral research student at the University of Oxford. Her supervisor is Dr Carolyn Hoyle, a professor of Criminology at the same university. The project has been reviewed and approved by the University of Oxford’s Central University Research Ethics Committee (CUREC). In addition, Not For Sale is assisting the Researcher with the research study. This research is **not** sponsored by any government or law enforcement agency and no personal information will be shared with these institutions.

The Purpose and Value of the Study

This research seeks to understand sex trafficking victims’ feelings and opinions about testifying against their traffickers and their perspectives on the criminal justice process in general. It aims to make the approach to obtaining the evidence necessary to successfully prosecute traffickers less difficult for victims. It also seeks to understand the types of support and measures that victims believe would help them during the post-trafficking period. Participants’ views will be used to help make policy recommendations about how the criminal justice system and service providers can better meet the needs of victims.

Who is being invited to take part in the research and what does it involve?

The Researcher requests the participation of women over the age of eighteen who are victims of sex trafficking in the Netherlands. Participation in the study will involve being interviewed about your opinions of the criminal justice system, giving testimony, and various related matters.

Confidentiality and Anonymity

Identifying information collected during the course of the research will be accessible **only** by the Researcher. All identifying information will be removed from data before it is included in the doctoral thesis, and pseudonyms will be used.

What will happen to the results of the research?

The data will be securely held, participants' identity will be protected and the information anonymised when the interviews are transcribed, which will occur as soon as possible following the interviews. During the interviews, only first names will be used, and you will not be asked to provide your surname. Only the Researcher will have access to any identifying data provided, which will be stored securely and will not be retained for longer than necessary, in accordance with the Data Protection Act 1998.

The findings of the study will be published as a doctoral thesis. Research findings – which may include anonymised quotes – may also be included in the conference papers and journal articles.

Concerns and Complaints

If you have a concern about any aspect of this project, please speak to Rachel Wechsler (rachel.wechsler@crim.ox.ac.uk; +447946082810) or her supervisor, Dr Carolyn Hoyle (carolyn.hoyle@crim.ox.ac.uk; +441865 274452), who will do their best to answer your query. The researcher should acknowledge your concern within 10 working days and give you an indication of how she intends to deal with it. If you remain unhappy or wish to make a formal complaint, please contact the chair of the Research Ethics Committee at the University of Oxford (Chair, Social Sciences & Humanities Inter-Divisional Research Ethics Committee; Email: ethics@socsci.ox.ac.uk; Address: Research Services, University of Oxford, Wellington Square, Oxford OX1 2JD). The chair will seek to resolve the matter as soon as possible.

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