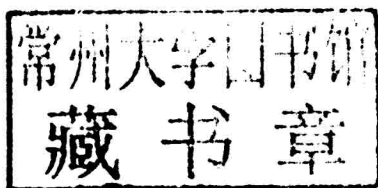


# The Role of Consent in Human Trafficking

Jessica Elliott

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# The Role of Consent in Human Trafficking

Human trafficking is consistently featured on the global political agenda. This book examines the trafficking of adult female victims for sexual exploitation, and specifically the understanding of consent and its influence in establishing the identity and treatment of trafficking victims.

Jessica Elliott argues that when applied to situations of human trafficking, migration and sexual exploitation, the notion of consent presents problems which current international laws are unable to address. Establishing the presence of 'coercion' and a lack of consent can be highly problematic, particularly in situations of human trafficking and illegal prostitution, activities which may be deemed inherently coercive and problematically clandestine.

By examining legal definitions of human trafficking in international instruments and their domestic implementation in different countries, the book explores victimhood in the context of exploitative migration, and argues that no clear line can be drawn between those who have been smuggled, trafficked or 'consensually trafficked' into a situation of exploitation. The book will be of great use and interest to students and researchers of migration law, transnational criminal law and gender studies.

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# 1 Introduction

## 1.1 Introduction

Human trafficking has, since the turn of the century, consistently featured on the global political agenda,<sup>1</sup> and recognition of the growing dimensions of this criminal activity has been the catalyst for a host of legal and policy responses aimed at the prevention of trafficking, the prosecution and punishment of traffickers and, more recently, for making provisions for identifying, assisting, supporting and protecting the victims of this phenomenon.

The trade in human beings has flourished as a result of increased economic and social integration, and has been facilitated by the ease of movement of workers, capital and goods, all of which are aided by increasingly sophisticated global networks of communication and transport. One consequence has been the globalisation of certain criminal activities, which has generated its own reaction: 'We are compelled by the globalization of crime to globalize law and law enforcement'.<sup>2</sup> Under this umbrella of globalised law and law enforcement we find the anti-trafficking regime, in the forms of international criminal law and international human rights law, which form part of a global campaign against modern slavery-related practices.

The body of persons engaging in transnational movement includes economic migrants – regular and irregular – students, visitors and asylum seekers. Those entitled to enter for non-economic purposes may abuse their status, or those with economic objectives may present themselves as being in one or another of the categories. Such persons may be subject to deportation and/or criminal proceedings for breach of immigration law or engagement in unlawful activities in the destination state, and will have access to, for example, procedural rights as regards deportation or criminal trial.

This body of persons involved in transnational movement also includes adult

<sup>1</sup> Particularly, although not exclusively, over the past decade or so. This is evident through discussion throughout the book of the central anti-trafficking instruments adopted at a United Nations (UN), Council of Europe (CoE) and European Union (EU) level, within that time period.

<sup>2</sup> US Senator John Kerry, cited in P Andreas and E Nadelmann *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press, New York, 2006).

female victims of human trafficking for the purpose of sexual exploitation, the latter being the chief concern of this body of work. As a system of bespoke rights for trafficked victims has been increasingly brought into the anti-trafficking regime,<sup>3</sup> the role of consent – or lack thereof – in human trafficking has become increasingly important in traffick-related debate, and it has become apparent that this element has a significant role to play in terms of establishing who the victims are, and how they should be treated.

The economic attractions of destination states are a significant motivating factor behind the global movement of persons and the individual choice to migrate (through regular or irregular channels). Consequently, the facilitation of illicit, clandestine entry into destination states presents a lucrative opportunity for those who can organise it, and the varying estimates<sup>4</sup> as to the magnitude of this phenomenon and its victims indicate that it is a significant international problem which requires an international response.

## 1.2 Defining trafficking and smuggling

As with all transnational criminal projects, it is necessary to begin with the definition of the prohibited conduct which states are obliged to criminalise in their national legal systems.<sup>5</sup> In order to launch a coherent and cohesive multi-pronged attack on human trafficking, particularly one invoking the criminal law, there is need to reach consensus as to what human trafficking actually is in a legal sense, so that there is clarity as regards both the meaning of ‘trafficking in persons’, and the obligations placed on state parties to the various agreements and legislation which form the anti-trafficking regime. The most recent international legal definition of ‘trafficking in humans’ is provided within Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol),<sup>6</sup> and is replicated verbatim in Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings (CoE Trafficking Convention).<sup>7</sup> More recently, this definition has been for the

3 See ch 6 for discussion of state obligations as to the identification, assistance, support and protection of victims.

4 See ch 2, Introduction, for estimates as to the magnitude of this clandestine activity.

5 It may also be necessary to recognise that, although the central instruments comprising the international legal anti-trafficking regime for the most part appear to provide for situations of purely ‘internal’ trafficking as well as those which involve the crossing of international borders, destination states may view the identification of conduct taking place wholly within their territory as a matter exclusively for them to regulate. This may mean that sex trade activities and conditions which are deemed to amount to ‘exploitation’ may vary between jurisdictions.

6 Article 3 of Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted November 2000 by United Nations General Assembly Resolution A/RES/55/25, entered into force 25 December 2003) (Trafficking Protocol).

7 Article 4 of Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (adopted 3 May 2005, entered into force 1 February 2008) Warsaw, 16.V.2005, Council of Europe Treaty Series No 197 (CoE Trafficking Convention).

most part replicated verbatim in Article 2 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims<sup>8</sup> with the additional aspect of specifically including begging as a form of ‘forced labour or services’. These instruments form the legal ‘anti-trafficking regime’ as discussed throughout this book, and their respective provisions define human trafficking in the following way:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services,<sup>9</sup> slavery or practices similar to slavery, servitude or the removal of organs.

This definition has taken significant and at times controversial steps in clarifying what human trafficking is in a legal sense. The definition is comprised of three elements – the ‘action’, the ‘means’ and the ‘purpose’ (of exploitation), all of which must be present in order for the activity in question to constitute human trafficking. The ‘action’ element is characterised by the ‘recruitment, transportation, transfer, harbouring or receipt of persons’. The ‘means’ is ‘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’, and the ‘purpose’ is ‘exploitation’, the meaning of which is expanded upon within the provision above. These terms of ‘action’, ‘means’ and ‘purpose’ will be used henceforth to refer to each component element of the tripartite trafficking process. When referring to the definition of human trafficking throughout the book, this will always be taken to refer to the above-mentioned definition unless explicitly stated otherwise.

From the outset, trafficking must be distinguished from smuggling. There can be a tendency to view trafficking through a lens of immigration offences, thereby effectively treating it as something closer to smuggling than trafficking, which is an incorrect approach.<sup>10</sup> Smuggling is defined by the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Smuggling Protocol) as:

8 Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2001] OJ L101/1 (EU 2011 Directive).

9 Here, the EU 2011 Directive includes the words ‘including begging’.

10 Home Affairs Committee ‘Sixth Report: The trade in human beings: human trafficking in the UK’ (2009) para 86.



... the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.<sup>11</sup>

The trafficking/smuggling divide is dealt with in Chapter 2 and is material to the understanding of how we classify 'victims' in the context of forced and voluntary migration. Where a person has been smuggled, there is no formally recognised 'victim'. Smuggling is viewed as a consensual process (correctly or otherwise) and so the classification of a putative victim as trafficked, smuggled or otherwise plays a pivotal role in determining what happens to that person on discovery in the destination state, or in transit. This book will argue that the perceived 'neat' legal divide between the two categories is in fact anything but, and that instead there is a spectrum of persons on the voluntary/involuntary smuggled/trafficked scale, a body of whom are being failed by the current system(s) in place.

### 1.3 The role of consent

The current international legal definition of human trafficking adds the following specific caveat that:

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>12</sup>

No such qualification was included in early traffick-specific instruments, which tended toward defining 'trafficking in persons' as transportation of women for the purpose of exploitation of prostitution, regardless of any consideration of consent.<sup>13</sup> The inclusion of a 'lack of consent' element in current accepted international legal definition has been the subject of some debate,<sup>14</sup> and has been the catalyst for this book.

We can see therefore that the trafficking definition makes it clear that some form of 'means' is necessary to vitiate consent or deem it irrelevant where adult victims are concerned. Lee asserts that:

11 Article 3 of Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (adopted November 2000 by United Nations General Assembly Resolution A/RES/55/25, entered into force 28 January 2004) (Smuggling Protocol).

12 UN Trafficking Protocol art 3(b); CoE Trafficking Convention art 4(b); EU 2011 Directive art 2(4).

13 Early anti-trafficking legislation is considered at various points in ch 3, but see, in particular, section 3.2 ff.

14 See, for example, K Abramson 'Beyond consent, toward safeguarding human rights: implementing the United Nations Trafficking Protocol' (2003) 44 *Harvard International Law Journal* 473; B Balos 'The wrong way to equality: privileging consent in the trafficking of Women for sexual exploitation' (2004) 27 *Harvard Women's Law Journal* 137; J Doezma 'Who gets to choose? Coercion, consent and the UN Trafficking Protocol' (March 2002) 10(1) *Gender and Development* 20–27.

... dichotomies of 'legal' vs 'illegal' migration, 'trafficking' vs 'smuggling', and consent vs use of force and deception within the trafficking debate may be artificial and unhelpful; they draw attention away from the broader context of exploitation, patterns and processes of exclusion, and complex conditions of migratory movements within and beyond borders.<sup>15</sup>

Potentially, then, a recasting of consent and victimhood in a trafficking and exploitative migration context is needed. As will be seen, lack of consent plays a pivotal role in the determination of who is and who is not a victim of human trafficking, and consequently what rights and protections they are or are not entitled to. Consent is an elastic concept, which can be perceived in a variety of ways. In stating that consent to exploitation is irrelevant where the 'means' have been employed, the wording of the definition clearly recognises the potential for consensual exploitation to take place. It is submitted at this point that this book recognises that an individual can consent to being exploited, and essentially argues that the 'lack of consent' requirement creates a false dichotomy between consent and coercion and that this, along with the effect of economic coercion,<sup>16</sup> creates a 'grey area' category of persons who fall somewhere on the spectrum between trafficked and smuggled.

When referring to a 'spectrum' of trafficking/smuggling or consent/coercion in this body of work, it should be noted at this point that this is a descriptive device to help elucidate the range of considerations that might go toward determining whether or not any particular decision (of the victim) might be said to be autonomous but that, in making legal determinations – for example – 'Is X a trafficker? Is Y a victim?', it will always be necessary to come down on one side of the line or the other. Has the prosecution shown that there was no consent? Can it be shown that the woman did not, in fact, consent? There can be no spectrum of convictions, only guilty or not guilty but the issue for consideration here is that there might be (and indeed it is argued that there is) a range of victims, of whom the most favoured are victims of trafficking, the next, 'victims' in a 'grey area' and those who are perhaps not victims at all, i.e. smuggled migrant workers.

The current terminology used in defining human trafficking places great emphasis, then, on lack of consent and the presence of some form of coercion, or other 'means'. The 'lack of consent' element is therefore a condition precedent to identifying a victim of human trafficking, and it is here that the difficulty lies. If it is to be accepted that consent (or lack thereof) is relevant in the context of human trafficking – and therefore the trade in women for sold sex – then this renders it difficult to determine who are, and who are not, victims of human trafficking, and leaves those who may have consented (or for whom there is no objective evidence of coercion) in a state of limbo; they have been more than smuggled (at least in a moral, if not in a legal sense), but less than trafficked.

15 M Lee *Trafficking and Global Crime Control* (Sage 2011) 10.

16 See ch 7 for discussion of the role of 'economic coercion of circumstances' in the making by a migrant of the decision to migrate, and what this might mean for the migrant.

'Lack of consent' and 'coercion' are central to the anti-trafficking regimes but they are inherently elusive of definition and difficult in terms of application. Consideration of both (consent/coercion) will be a central concern of this book, including the taxing matter of the effect of severe and pressing economic circumstances.<sup>17</sup> A proportion of those whose movement is facilitated by people smugglers or 'migration facilitators' will travel in a fully informed and voluntary manner. They may have formed their own expectations about what to expect in the destination state. The facilitators may have presented an utterly false view of what the prospects will be in the destination state, the typical example being a promise of work in, say, the catering trade when in reality the person involved is destined for the sex trade. In even more extreme cases, the person will have been taken abroad against her will, invariably to severe conditions, typically some form of exploitation.

Apart from direct coercion of the individual by a trafficker, there may be 'coercion by circumstances', particularly economic disadvantage. It is necessary to consider whether or not this contextual coercion may amount to pressure of the kind which makes any subsequent transportation trafficking, rather than mere smuggling into better economic conditions. In the latter case, the economic coercion will have been central to the transaction but, in the former, whether or not there is lack of consent (amounting to coercion) may be problematic. The distinction is vital. If there is no ostensible coercion (or lack of consent on the part of the person transported) then the person is simply an economic migrant without access to the bespoke rights which are available under international arrangements applicable to formally trafficked persons.

Since people smuggling is frequently viewed as being of a voluntary nature, smuggled individuals will be liable to removal from the destination state owing to the voluntary commission of immigration offences, although they may not be liable simply for working there. However, a substantial proportion of those transported across national and international boundaries will have been transported so that (knowingly or not, willingly or not) they may engage in activities in the destination state which may be both exploitative and unlawful, such as working in illegal conditions (for example, for less than minimum wage, for excessive hours, or in severe or dangerous conditions) or to work in the sex trade.

Such people are often described as having been trafficked for the purpose of exploitation – an example of criminal activity which is defined by reference to lack of consent, or at least the presence of 'coercion' in some form. This is not without its difficulties, particularly with respect to some instances of engagement in the sex trade where, as is the case in the UK for example, mere participation in sex work is not unlawful, and may be seen by some of those engaged in it as comparable with the lawful activities of those who have been smuggled for economic ends (and will be seen as such by the authorities in the destination state). Yet, as will be explained in this body of work, it is in practice very difficult to maintain the

17 Addressed in ch 7.

distinction between prostitution as mere economic activity and prostitution as exploitation (consensual or otherwise) of the women involved.

The difficulties inherent in maintaining this distinction have particular significance in the context of human trafficking, where identifying lack of consent (of the women involved) – to being moved, for what purpose, and in what conditions – is no easy task. Furthermore, such is the nature of exploitation of women in the sex trade (whether or not the women have been transported in order to engage in it) that the conditions in which ‘smuggled prostitutes’ may find themselves may be little different from those encountered by ‘trafficked prostitutes’. Formally, the first category would, on the face of it, be seen as acting voluntarily – and would therefore be subject to such legal sanctions as any illicit economic migrant – whereas the latter would be seen to have been subject to some form of force or coercion and therefore not acting in a fully voluntary manner.

Treating such women differently may give the appearance of unfairness, save, perhaps, from the perspective of a state wanting to maintain border integrity by removing those encountered by the authorities. The appearance of unfairness derives from the recognition of women who can properly be described as ‘trafficked prostitutes’ or victims; persons with human rights and access to specific, bespoke protections under the anti-trafficking regime(s), which will in some cases – amongst other things – interfere with the right of the destination state to peremptory removal of the women unlawfully present in its territory.

Even the woman who is willingly smuggled into a country knowing that she will take part in the sex trade may not have anticipated how awful her conditions would be. It is here that the unfairness of treating such women differently from those who have been formally trafficked may be most apparent and most questionable. The question is explored as to whether this category of persons – those who may be tentatively referred to as ‘consensually trafficked’ – is to be offered protection beyond the ambit of ordinary human rights law.

#### 1.4 The identification and treatment of victims

As observed by Jones, ‘... perhaps the most perplexing obstacle to prevention of human trafficking lies in the inability of governments and nongovernmental organizations to properly identify victims of human trafficking and quantify their numbers’.<sup>18</sup> Misconceptions about trafficking, smuggling and consensual economic migration, coupled with a lack of understanding about trafficking and exploitative migration, lead to the misidentification of victims. The ramifications of misidentification include, amongst other things, the potential criminalisation of victims for offences committed as a result of trafficking-related compulsion.<sup>19</sup>

<sup>18</sup> S V Jones ‘Human trafficking victim identification: should consent matter?’ (2012) 45 *Indiana Law Review* 433, 434.

<sup>19</sup> See ch 6.

Lee refers to the 'criminalisation of migrants', stating that:

... 'unwanted' migrants and a range of non-citizens are regarded as problem populations and subjected to an 'amplified process of penalization.' In this context, illegal migrants, bogus asylum seekers, border crossers who have been smuggled and trafficked, are the archetypal 'unwanted' migrants of the twenty-first century.<sup>20</sup>

Within these categories, we find those who are considered to be 'deserving' of some form of assistance, and those who are not. The difficulty lies in that '... the people moving in irregular ways often do not fit neatly into the category of either 'refugee' or 'voluntary economic migrant'.<sup>21</sup> The 'crimmigration'<sup>22</sup> approach, whereby the central focus would be on the immigration status of putatively trafficked persons, leads to the misidentification of those trafficked persons, i.e. genuine victims are, for some reason or other, determined to be 'not trafficked'.

As to consent and the identification of victims, '... the term draws upon certain embedded structures of political liberalism ...'.<sup>23</sup> Jones prefers a liberalist approach and rejects a more paternalistic stance.<sup>24</sup> He states that the latter, in deeming consent irrelevant, '... stands in sharp contrast to respect for the actors' human dignity'.<sup>25</sup> The focus within this book is not intended to ignore the validity of genuine consent, or to attempt to mirror the 'false consciousness'<sup>26</sup> argument historically levelled at prostitutes. Instead, the approach is to recognise that the 'lack of consent' requirement introduced to the international legal definition of trafficking leads to a series of problems affecting the identification of victims, which need to be addressed. There will, therefore, be a focus in this work on the exploitation and its effects and an attempt to find a way to mitigate genuine 'hard' cases, as simply returning trafficked and/or exploited migrants home may serve to put them back into the same conditions, economic or otherwise, that led to them leaving in the first place.<sup>27</sup>

Since isolating real instances of consent or coercion will in some cases be very difficult, mistakes and misidentifications will be made. The 'consensually trafficked' or 'smuggled' (yet exploited) woman will have such human rights protections as apply to her, such as the right to a fair trial,<sup>28</sup> and protection from removal

20 M Lee *Trafficking and Global Crime Control* (Sage, 2011) 6.

21 Alexander Betts 'Towards a "soft law" framework for the protection of vulnerable migrants' in Research Paper No 162 'New issues in refugee research' UNHCR 1.

22 J P Stumpf 'The crimmigration crisis: immigrants, crime and sovereign power' (2006) *ExpressO* 367.

23 Judith Butler 'Sexual consent: some thoughts on psychoanalysis and law' (2011–2013) 21 *Columbia Journal of Gender and Law* 216–17.

24 Which he refers to as the 'gendered' approach.

25 Jones (n 18) 503.

26 S Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998).

27 C Hoyle, M Bosworth and M Dempsey 'Labelling the victims of sex trafficking: exploring the borderland between rhetoric and reality' (2011) 20(3) *Social and Legal Studies* 313–92, 321.

28 Article 6 of Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) (ECHR).

to a place where a real risk of ill-treatment exists,<sup>29</sup> but she will not have the specific protections conferred upon victims by the anti-trafficking regime, such as protection from peremptory removal, or a right to assistance and support etc. A state would be able to rely upon its rights to deny the extension of these benefits of trafficked women to smuggled ones and it would of course be in the state's interests to classify as many trafficked women as 'smuggled' as it could.

There may be an analogy to be drawn here with the situation of refugee applicants. Those who satisfy the criteria of the Convention Relating to the Status of Refugees 1951 (Refugee Convention)<sup>30</sup> have access to the protections which it confers, as well as to any human rights provisions which are relevant to them. Such is the difficulty in establishing formal refugee status, so pressing may be the circumstances of some of those who cannot do so, that states have been willing to allow a number of such people a variety of discretionary remedial concessions on humanitarian grounds, such as exceptional rights to remain in their territories. These concessions do not make their beneficiaries 'refugees' but are an acknowledgement that the mechanical, standardised application of complex criteria combined with great evidential obstacles can result in genuine 'hard cases', which discretionary measures can to a degree mitigate without undermining the integrity of the refugee regime.

A similar humanitarian response to marginal cases of trafficked women, even of women who have not formally been trafficked might be appropriate, given the circumstances in which women are recruited into the transportation of and trade in humans and the severity of the exploitative conditions in which they find themselves in the destination states. It is therefore suggested that governments may be able to adopt a policy parallel to a humanitarian right to remain as a response to this transnational criminal activity, which must be seen in its proper context and addressed from a perspective which not only aims to criminalise the traffickers, but also to protect their victims.

Primarily, owing to the problematic nature of correctly determining the presence of coercion and lack of consent and, secondly, owing to the fact that there may at times be little difference between the conditions experienced by women falling into either category, a proposal will be made in this book as to how the impact of the reluctance of states to concede too much as regards 'merely' smuggled, exploited prostitutes may be mitigated, without undermining significantly the purposes of the anti-trafficking regimes.

## 1.5 Structure and chapter outlines

This research set out to investigate the legal nature of the trafficking of women for sexual exploitation. However, it soon became apparent that consent (or lack thereof) had an important part to play in determining who the victims are and how they should be treated, and that there are ramifications of inclusion of this

29 Article 3 of the ECHR, and art 33(1) of the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

30 *ibid.*

controversial element for putative victims of trafficking or smuggling for the purpose of exploitation. This is what the book aims to explore. A chapter-by-chapter breakdown of structure and content is provided below.

### ***1.5.1 Chapter 2: The contextual and legal background***

Chapter 2 primarily provides analysis of the ‘push’ and ‘pull’ factors that lead individuals to make the decision to migrate, as it is accepted that many trafficking situations may at least begin on a voluntary and consensual footing. This includes, *inter alia*, poverty, discrimination, and the influence of organized crime groups.

Secondly, this chapter provides an analysis of the vexed nature of the trafficking/smuggling divide, correct determination of which is essential in order for victims to be identified as such.

Finally, the relevant obligations on states to address the trafficking phenomenon in terms of prevention, prosecution, punishment and the support and protection of victims are outlined, so that those most central to the arguments advanced in this book (i.e. those relating to the treatment of victims) may be dealt with in more depth at a later point, in Chapter 6.

### ***1.5.2 Chapter 3: Defining trafficking: the evolution of an international legal definition***

The scope of the legal definition of human trafficking is analysed in Chapter 2 with reference to the main anti-trafficking instruments, which form ‘the anti-trafficking regime’. Unless stated otherwise, this will always refer to the UN Trafficking Protocol, the CoE Trafficking Convention and the EU 2011 Directive. The analysis in this chapter primarily includes discussion of the ‘action’ element of ‘recruitment, transportation ...’ etc of the victim, and considers matters such as the requirement and legitimacy of border crossing.

This is followed by analysis of the more controversial and problematic ‘means’ element of trafficking – that of ‘coercion, force ...’ etc. Examples and anecdotal excerpts are used to elucidate each element of the ‘means’, which are not clearly separable. This part of the chapter also tests the ambit and scope of the ‘means’ element, particularly the limits of ‘coercion’.

As regards the ‘purpose’ elements of trafficking (i.e. the manifestations of ‘exploitation’ as provided for within the definition), human rights law is drawn upon to elucidate the meaning of some of the terms used within these instruments. Justification for this cross-treaty interpretation is discussed in terms of Articles 31 and 32 of the Vienna Convention on the Law of Treaties,<sup>31</sup> and the meaning of terms such as ‘slavery’, ‘forced labour’ and ‘sexual exploitation’ are discussed. The determination that human trafficking is a tripartite process defined by reference

31 Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969, entered into force on 27 January 1980, in accordance with Article 84(1)) United Nations, Treaty Series, vol 1155 (Vienna Convention). See ch 3 at section 3.3 for discussion of this issue.

to lack of consent leads into the specific discussion of consent to exploitation in Chapter 4.

### ***1.5.3 Chapter 4: Consent in the law, and consent to sexual exploitation***

The basic conditions for a valid consent are analysed, drawing upon and discussing various areas of the law where such a notion is employed and thereby paving a pathway for analysis of the specific role of consent in the context of human trafficking, undertaken in Chapter 5.

Furthermore, this chapter considers the autonomy/liberalist *v* paternalist approaches taken to prostitution and exploitative prostitution. This includes specific discussion of sex work as a legitimate form of labour, what constitutes 'exploitative' labour and also whether prostitution/sex work is inherently exploitative.

Competing feminist perspectives are drawn upon, as is conflicting evidence as to consent in the context of prostitution and sexual exploitation (which are not conflated here). The argument is explored as to whether we might ask for a high standard of consent in such contexts, where so much is at stake, and bearing in mind the evidence that points to a proportion (perhaps significant) of prostitution clearly being forced, but in some cases appearing to be uncoerced.

### ***1.5.4 Chapter 5: The effect of consent in human trafficking***

As has been noted above, this body of work has particular focus on the meaning and effects of 'consent' within and without of a trafficking context, juxtaposed against the meaning of 'coercion' and other 'means'-related aspects of the legal definition of human trafficking, although the approach taken here does not consider these two elements to be the only situations. As the detailed analysis undertaken in Chapter 5 will indicate, consent/coercion is treated here as a spectrum, as opposed to a dichotomous approach, which would have the putative trafficked person being deemed either to have consented or to have been coerced, as the latter would represent too simplistic a view of this complex phenomenon.

The intricacies of a valid consent in a trafficking context are considered, as are the realities of consent in a trafficking context. The final parts of the chapter address the effects of the inclusion of a consent element in the trafficking definition, and closes with discussion of possible alternatives to the current situation which has created a 'grey area' between the trafficked and the smuggled sex worker. This leads into Chapter 6, which addresses the treatment of victims and the effect that the 'lack of consent' requirement has here.

### ***1.5.5 Chapter 6: The 'victim-centred' approach to tackling trafficking: determining who the victims are, and how they should be treated***

The ramifications of positive or negative identification of an individual as a victim of human trafficking are considered in Chapter 6, which evaluates the legal and



policy issues surrounding the current framework applicable to the identification and treatment of victims once discovered in the destination state. The UK is used as a central example, following implementation of the requirements of the relevant international legal instruments with respect to the treatment of trafficked victims. The victim-specific provisions of the legal anti-trafficking regime are analysed, as is the implementation and success or otherwise of these requirements within the domestic legislative framework. This chapter essentially explores the bespoke regime applicable to victims of human trafficking, and argues that the threshold for the identification of victims is currently being set too high and that genuine victims of trafficking are being misidentified as a result.

### ***1.5.6 Chapter 7: Less than trafficked, more than smuggled: dealing with the ‘consensually trafficked’***

This chapter explores the issues surrounding those who fall short of the formal trafficking threshold, as well as those who might be deemed ‘consensually trafficked’. Traditional liberalist perspectives are drawn upon and considered, as to their suitability as a lens through which to view consensual exploitive migration.

Human trafficking is contextual, as the frequent flow of victims from poorer origin states to richer destination states indicates, and following consideration in Chapter 2 of the ‘push’ factors leading to global migration (and therefore a proportion of all instances of human trafficking), the effect of ‘economic coercion of circumstances’ (on what might otherwise be deemed consent) is considered.

From an immigration perspective, this form of coercion does not negate the commission of an immigration offence for which the state has a legitimate interest in prosecuting the putative victim. It is recognised that states have a legitimate interest in immigration control and therefore may be reluctant to adopt an approach which is too broad and encompassing. Nonetheless, the argument is made that in the sole context of human trafficking, severe pressing economic need may render consent less valid or less freely given than otherwise and may, in fact, amount to coercion, particularly where traffickers knowingly take advantage of the pressing economic need of putative victims in order to recruit them. The tentative nature of such an ambitious argument is acknowledged and discussed.

The latter part of this chapter focuses on the justifications for offering more favourable treatment to the consensually trafficked, and considers what those concessions might be. This body of work explores victimhood in the context of exploitative migration, and argues that there is no clear line which can be drawn between those who have been merely smuggled, those who have been trafficked or those who have been ‘consensually trafficked’ into a situation of exploitation.