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# Improving Prosecutions of Human Trafficking for Labour Exploitation: Lessons Learned from Two European Jurisdictions (England and Wales and Belgium)

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## Abstract

*The increasing number of identified victims of human trafficking for labour exploitation and the low number of associated prosecutions calls into question the effective implementation of anti-trafficking measures in European countries.*

*This paper will focus on two European jurisdictions (England and Wales and Belgium) and consider the low prosecution rates for human trafficking for labour exploitation. In brief, the number of referrals of potential victims of human trafficking for labour exploitation to the National Referral Mechanism has, in England and Wales, increased exponentially from 393 to 2,840 between 2012 and 2017, whereas in Belgium it has remained stable. Overall, prosecutions remain low, as the complexity of the human trafficking phenomenon creates challenges for the investigatory and judicial process, namely, the operationalisation of the principle of irrelevance of consent, where the victim demonstrates apparent consent to exploitative working conditions, the participation of victims in criminal proceedings, and the complexity of the factual circumstances.*

*In addition to relevant literature, this paper will draw on the findings of a comparative analysis of criminal cases from 2010 to 2017 in the two domestic jurisdictions. This paper will identify the main obstacles for the identification, investigation and prosecution of these cases, and provide some insight into what is needed to secure more effective access to justice for victims of human trafficking.*

## I. Introduction

The increasing number of identified victims of human trafficking for labour exploitation and the low number of associated prosecutions

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in European countries calls into question the effective implementation of anti-trafficking measures.<sup>1</sup> In this paper, the focus will be on two European jurisdictions (England and Wales and Belgium), and consider the low prosecution rates in the context of human trafficking for the purposes of labour exploitation.<sup>2</sup> In brief, the number of referrals of potential victims of human trafficking for labour exploitation to the National Referral Mechanism (NRM) has, in England and Wales, increased exponentially from 393 to 2,840 between 2012 and 2017,<sup>3</sup> whereas in Belgium the number of NRM referrals has remained stable.<sup>4</sup> In England and Wales, the prosecution of human trafficking for labour exploitation has gradually increased, but not at the same rate as the number of NRM referrals. In Belgium, however, the number of prosecutions is also stable. Overall, prosecutions remain low, as the complexity of the human trafficking phenomenon creates challenges for the judicial process (section 2).

Section 3 will outline how human trafficking has been criminalised, emphasising divergences from the international and regional definitions. This will be followed by consideration of the implementation of national criminal law by drawing on findings from comparative research of criminal cases of human trafficking for labour exploitation from 2010 to 2017 in the two domestic jurisdictions (section 4).<sup>5</sup> From this insight into the implementation of the law, three challenges to the judicial process when identifying, investigating and prosecuting human trafficking for labour exploitation will be highlighted and discussed (section 5).

Section 5.1 will first consider the role of workers and their apparent consent to exploitative working conditions.<sup>6</sup> The legal definition of human trafficking clearly provides for the irrelevance of consent where means such as deception, coercion, or abuse of a position of vulnerability are used to achieve the action

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<sup>1</sup> European Commission, 'Report on the Progress Made in the Fight against Trafficking in Human Beings as required under Article 20 of Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims' COM (2016) 267 final; Council of Europe, '7th General Report on GRETA's Activities Covering the Period from 1 January to 31 December 2017' (2018) 197.

<sup>2</sup> N Ollus, Anniina Jokinen and Matti Joutsen, 'Exploitation of Migrant Workers in Finland, Sweden, Estonia and Lithuania: Uncovering the Links between Recruitment, Irregular Employment Practices and Labour Trafficking' (ADSTRINGO 2016) 9.

<sup>3</sup> National Crime Agency, 'National Referral Mechanism Statistics 2012-2017' <<https://national-crimeagency.gov.uk/who-we-are/publications>> accessed 31 March 2020.

<sup>4</sup> Myria, 'Federal Migration Centre Annual Reports 2011-2017' <<https://www.myria.be/fr/publications>> accessed 31 March 2020.

<sup>5</sup> A Weatherburn, 'Clarifying the Scope of Labour Exploitation in Human Trafficking Law: Towards a Legal Conceptualisation of Exploitation' (DLaw thesis, Vrije Universiteit Brussel & University of Tilburg 2019).

<sup>6</sup> Circulaire du 23 Décembre 2016 relative à la Mise en Œuvre d'une Coopération Multidisciplinaire Concernant les Victimes de la Traite des Êtres Humains et/ou Certaines Formes Aggravées de Trafic des Êtres Humains (Belgian Official Gazette, 10 March 2017); House of Lords, 'House of Lords Committee: Modern Slavery Bill 1st Sitting' (2014) cols 1132-1133.

(recruitment, transfer, harbour etc). However, as will be explained in section 3, the domestic definitions of human trafficking exclude the means as a constituent element but do include the principle of irrelevance of consent. As such, the principle's practical application is in need of further scrutiny.

Section 5.2 will then turn to the participation of victims in criminal proceedings. Whilst the participation of victims in criminal proceedings is a condition of victim support and assistance in Belgium,<sup>7</sup> in England and Wales, prosecutors are turning to victimless prosecutions (or evidence-based prosecutions), making the investigatory process more complex. Given the often transnational nature of human trafficking and the lengthy judicial process, it is imperative that law enforcement agencies maintain good connections with victims and witnesses (regardless of their participation) – who, in the meantime, may have returned to their country of origin – to keep them informed of the status of proceedings and to ensure access to a remedy.

Section 5.3 will discuss a third and final challenge to securing successful prosecutions of human trafficking for labour exploitation. The complexity of the factual circumstances means that the indictment pursued will be extremely lengthy, consisting of multiple victims, defendants and offences, including offences against the person, sexual offences, fraud offences, immigration offences and (in Belgium only) social criminal offences (including violations of labour and social security law such as non-payment of wages, employment of undocumented foreigners, non-payment of social security contributions, etc).<sup>8</sup> This can be challenging when it comes to the judicial process and, in particular, where there is a trial by jury that requires a simple and clear presentation of the factual circumstances by prosecution and defence counsel and judge's directions on the law.

## 2. Low Number of Prosecutions of Human Trafficking for Labour Exploitation

A discrepancy between the number of potential human trafficking victims referred to the NRM and the prosecution rates is encountered by many European countries who are seeking to ensure effective implementation of anti-trafficking measures.<sup>9</sup> Despite increased and, in certain cases, improved efforts to accurately identify potential victims of human trafficking, the number

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<sup>7</sup> Circulaire du 23 Décembre 2016 (n 6).

<sup>8</sup> Since 2010, with the introduction of the Social Criminal Code, all violations of employment law, industrial relations law and social security law were consolidated. The Social Criminal Code provides for administrative fines and/or criminal sanctions (including imprisonment for the most severe violations).

<sup>9</sup> European Commission, 'Report on the Progress made in the Fight against THB' (n 1).

of prosecutions does not correspond.<sup>10</sup> A significant challenge to prosecution has been the wide-ranging differences in the understanding of what constitutes trafficking for labour exploitation. Indeed, the scope of the meaning of forced labour, slavery and servitude and, in some instances, restrictive interpretations by courts, lead to acquittals or cases being prosecuted under alternative criminal offence provisions.<sup>11</sup> Of course, it is also important to remember that a decision to prosecute and, what is more, a successful prosecution, is the end of a long line of a complex process. In this process, many factors can act as a barrier to pursuing a prosecution including, *inter alia*, difficulty collecting sufficient evidence, the availability of resources, and the lack of training of key actors.<sup>12</sup>

The limited number of prosecutions and convictions also has significant implications from the perspective of the victims. In particular, acquittals or cases being prosecuted under alternative criminal offence provisions impact on the victims' rights to support and assistance, as well as access to justice and the right to a remedy. The right to effective compensation – including unpaid wages and statutory contributions for social security benefits<sup>13</sup> – for those victims where the perpetrators are successfully convicted, is problematic, as they are often awarded compensation but are unable to recuperate the compensation in practice.<sup>14</sup> Thus, for those who do not have the opportunity to pursue a human trafficking prosecution or where criminal proceedings end in an acquittal, the chances of restitution of pecuniary and non-pecuniary damage are even slimmer. A lack of access to remedy and protection can prolong the position of precarity of victims and increase the risk of re-exploitation/victimisation.

The implications of low prosecution levels will be discussed when comparing Belgium and England and Wales. Between 2012 and 2017, the number of NRM referrals for potential victims of human trafficking have, in England and Wales, increased exponentially – from 393 in 2012 to 2,840 in 2017<sup>15</sup> – due to law and policy changes that increased the emphasis on detecting and identifying modern slavery victims. However, despite a gradual increase of prosecutions, there is still more to be done to secure access to justice for all victims of human traffick-

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<sup>10</sup> European Commission, 'Study on Case-Law relating to Trafficking in Human Beings for Labour Exploitation: Final Report' (2015) 45.

<sup>11</sup> Council of Europe (n 1) 66-67; European Commission, 'Study on Case-Law relating to THB' (n 10) 101.

<sup>12</sup> European Commission, 'Study on Case-Law relating to THB' (n 10) 88-97.

<sup>13</sup> R203 - Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), para 12; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L168, art 6(1).

<sup>14</sup> J Cusveller and E Kleemans, 'Fair Compensation for Victims of Human Trafficking? A Case Study of the Dutch Injured Party Claim' (2018) 24(3) *International Review of Victimology* 297; COMP.ACT, 'Findings and Results of the European Action for Compensation for Trafficked Persons' (2012).

<sup>15</sup> National Crime Agency (n 3).

ing.<sup>16</sup> Efforts are being made to determine the reasons why cases referred to the Crown Prosecution Service are not meeting the evidential threshold for charge and prosecution.<sup>17</sup> The difference in prosecutions of criminal offences related to labour exploitation in the two case study jurisdictions is stark as outlined in Table 1. In Belgium, the difference in prosecution of criminal offences during the same time period and the number of victims referred to the NRM has remained stable.<sup>18</sup>

| Year | England and Wales                  |                                   | Belgium                            |                                   |
|------|------------------------------------|-----------------------------------|------------------------------------|-----------------------------------|
|      | No. of NRM referrals <sup>19</sup> | No. of prosecutions <sup>20</sup> | No. of NRM referrals <sup>21</sup> | No. of prosecutions <sup>22</sup> |
| 2010 | Not available                      | 21                                | Not available                      | Not available                     |
| 2011 | Not available                      | 52                                | Not available                      | 165                               |
| 2012 | 393                                | 32                                | 89                                 | 164                               |
| 2013 | 820                                | 46                                | 79                                 | 184                               |
| 2014 | 1093                               | 49                                | 86                                 | 115                               |
| 2015 | 1605                               | 79                                | 61                                 | 124                               |
| 2016 | 2034                               | 69                                | 62                                 | 112                               |
| 2017 | 2840                               | 143                               | 65                                 | 116                               |

*Table 1: Number of NRM Referrals and Prosecutions for Labour Exploitation Offences in England and Wales and Belgium (2010-2017)*

In addition to the discrepancies between the number of NRM referrals and the prosecution rate, the way in which human trafficking for labour exploitation

<sup>16</sup> The Anti-Trafficking Monitoring Group, 'Before the Harm is Done Examining the UK's Response to the Prevention of Trafficking' (September 2018) 42.

<sup>17</sup> National Audit Office, 'Report by the Controller and Auditor General Home Office Reducing Modern Slavery' (HC 630, 2017) 44-45.

<sup>18</sup> Myria (n 4).

<sup>22</sup> For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (n 21) 128-131; for 2012-2017 see Myria, 'Rapport annuel traite et trafic des êtres humains 2018' (2019) 137 and 139.

<sup>21</sup> For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, 'Rapport annuel traite et trafic des êtres humains' 2011: l'argent qui compte (2012) 136; for 2012-2016 see Myria, 'Rapport annuel 2017 en ligne' (2017) 136; for 2018 see Myria, 'Rapport annuel traite et trafic des êtres humains 2018: Mineurs en danger majeur' (2019) 142.

<sup>20</sup> For 2010-2011, see HM Government, 'First Annual Report of the Inter-Departmental Ministerial Group on Human Trafficking' (2012) 32; for 2012-2013, see HM Government, 'Second Report of the Inter-Departmental Ministerial Group on Human Trafficking' (2014) 26; for 2014-2016, see HM Government, '2017 UK Annual Report on Modern Slavery' (2017) 19; for 2017, see HM Government, '2018 UK Annual Report on Modern Slavery' (2018) 19.

<sup>19</sup> National Referral Mechanism Statistics are only available as of 2012 and refer to the total number of adults and minors referred to NRM for labour exploitation and domestic servitude. National Crime Agency (n 3).

has been criminalised in both domestic legal frameworks reveals divergences with the international and regional definitions that can impact upon the implementation of the law on the books in practice.

### 3. Criminalisation of Human Trafficking for Labour Exploitation in Domestic Law

In England and Wales, human trafficking is prohibited under Section 2 of the Modern Slavery Act 2015:

1. A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.
2. It is irrelevant whether V consents to the travel (whether V is an adult or a child).
3. A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.
4. A person arranges or facilitates V’s travel with a view to V being exploited only if—
  - (a) the person intends to exploit V (in any part of the world) during or after the travel, or
  - (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

It is important to note that the action is limited to the facilitation or arrangement of travel (Section 2(1)). The remaining actions that are included in the international and regional definitions are then intrinsically connected to the facilitation or arrangement of the travel (Section 2(3)) implying that trafficking requires the movement of a person – a factor that has been disregarded in the international and regional interpretation of human trafficking.<sup>23</sup>

The meaning of exploitation is provided in Section 3 of the Modern Slavery Act 2015 and, for the purpose of this paper, will be limited to slavery, servitude and forced or compulsory labour. These forms of exploitation are also criminalised as standalone offences under Section 1 of the Modern Slavery Act 2015 and are to be construed in accordance with Article 4 of the Human Rights Convention (Section 1(2)).

In Belgium, there are no standalone offences of slavery, servitude and forced or compulsory labour, since the human trafficking definition is, according to

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<sup>23</sup> Office of the United Nations High Commissioner for Human Rights, ‘Human Rights and Human Trafficking, Fact Sheet No. 36’ (2014) 3.

the legislative, sufficiently broad to encompass the standalone offences.<sup>24</sup> Human trafficking for labour exploitation is criminalised in Article 433quinquies of the Criminal Code:<sup>25</sup>

The offence of human trafficking constitutes the recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person for the purposes of:

1. the exploitation of prostitution or other forms of sexual exploitation;
2. the exploitation of begging;
3. *carrying out work or providing services in conditions contrary to human dignity;* [emphasis added]
4. removal of organs in violation of the law of 13 June 1986 on the removal and transplantation of organs, or human tissue in violation of the law of 19 December 2008 on the acquisition and use of human tissue for the purposes of medical applications in humans or scientific research;
5. or having this person commit a crime or a misdemeanour against his or her will.

Except in the case referred to in 5, the consent of the person referred to in paragraph 1 to the proposed or actual exploitation shall be irrelevant.

The meaning of ‘conditions contrary to human dignity’ is to be interpreted by the judges. However, some preliminary guidance was offered by the *travaux préparatoires* whereby indicators of conditions contrary to human dignity can be derived from the number of hours worked, the level of pay and the health and safety conditions of the working environment.<sup>26</sup>

Both case study jurisdictions have adopted slightly different approaches to criminalising human trafficking as compared to the international and regional definitions of human trafficking.<sup>27</sup> For instance, both have exhaustive lists of

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<sup>24</sup> C Clesse, *La traite des êtres humains. Législation belge éclairée des législations française, luxembourgeoise et suisse* (Larcier 2013) 268; C Huberts and J Minet, ‘La Loi du 29 avril 2013 visant à modifier l’Article 433quinquies du Code Pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains: Analyse et mise en perspective’ (2014) *Revue de Droit Pénal et de Criminologie* 34.

<sup>25</sup> Loi du 29 avril 2013 visant à modifier l’Article 433quinquies du Code Pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains (Belgian Official Gazette, 23 July 2017).

<sup>26</sup> Belgian Senate, ‘Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil, Rapport fait au nom de la Commission de la Justice’ (2005, no 3-1138/4) 3.

<sup>27</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) art 3(a); 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, OJ L101, art 2; Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197, art 4.



form of exploitation and there are only two constituent elements of the offence, namely, the action (eg recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control) and the purpose (for the purpose of exploitation). In both domestic provisions, the means – the third constituent element of the international and regional definitions – are absent altogether. In Belgium, the means are instead listed as aggravating factors (Article 433*septies*). These differences impact on the principle of irrelevance of consent which, in the international and regional definitions, applies where any of the means are used to secure the action. In Belgium, the principle of irrelevance of consent applies to consent to the exploitation and in England and Wales, despite efforts to broaden the scope of the application of the principle during the legislative drafting process,<sup>28</sup> the irrelevance of consent is restrictively applied to the travel only.<sup>29</sup> The implications of these definitional divergences will be further discussed below in section 4.

#### 4. Methodology

The analysis of criminal cases of human trafficking for labour exploitation consisted of two comparison groups: Belgium and England and Wales. The comparative research used empirical data to consider the information recorded by the courts.<sup>30</sup> The sample included cases where the judgment was handed down between January 2010 and December 2017. The choice of this timeframe is representative, in both jurisdictions, of relevant reforms to the law that deals with labour exploitation in both criminal and civil matters. In England and Wales, two reforms occurred, the first on 6 April 2010,<sup>31</sup> when standalone offences were criminalised, and again in 30 March 2015, when the labour exploitation offences were consolidated into one Act of parliament. In Belgium, the criminal code was updated in 2013 providing clarification to the meaning and scope of trafficking for economic exploitation.<sup>32</sup> A total of 72 cases were analysed as outlined in Table 2: 25 in England and Wales and 47 in Belgium.

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<sup>28</sup> House of Lords (n 6) cols 1132-1133.

<sup>29</sup> NB the irrelevance of consent in Northern Ireland and Scotland is not restricted to the travel, but encompasses all acts Section 1(5) The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, Section 1(3) Human Trafficking and Exploitation Act (Scotland) 2015.

<sup>30</sup> R Lawless, J Robbenolt and T Ulen, *Empirical Methods in Law* (2nd edn, Aspen Select Series 2016) 56.

<sup>31</sup> The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010.

<sup>32</sup> Huberts and Minet (n 24) 6.

| Year                     | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | TOTAL |
|--------------------------|------|------|------|------|------|------|------|------|-------|
| <b>England and Wales</b> | 0    | 1    | 4    | 4    | 2    | 4    | 4    | 6    | 25    |
| <b>Belgium</b>           | 6    | 3    | 3    | 10   | 7    | 11   | 5    | 2    | 47    |

Table 2: Overview of Cases Analysed in England and Wales and Belgium from 2010 to 2017

## 5. Challenges to the Judicial Process

As it has been seen in section 2, prosecution rates remain low, as the complexity of the phenomenon creates challenges for the judicial process. This section will consider the implications of such challenges in the case studies, including the operationalisation of the principle of irrelevance of consent, where the victim demonstrates apparent consent to exploitative working conditions, the participation of victims in criminal proceedings, and, finally, the complexity of the factual circumstances.

### 5.1. The Operationalisation of the Principle of Irrelevance of Consent

A challenge to the prosecution of human trafficking for labour exploitation is the role of the worker themselves, and their apparent consent to exploitative working conditions.<sup>33</sup> The irrelevance of consent is made explicit in both jurisdictions; in practice, the application of the irrelevance of consent requires further consideration.

In Belgium, the absolute nature of the irrelevance of consent has been reiterated in law, policy and the judicial handling of human trafficking, emphasising that even where a person gains an economic advantage from conditions that are contrary to human dignity,<sup>34</sup> it is important for the criminal prosecution to focus upon the mens rea of the offender and not on the victim's assessment of the position they are in.<sup>35</sup> Any analysis of the situation should be on the objective elements that constitute human trafficking, and not on the subjective experience of the individual's understanding of their treatment and acceptance of working

<sup>33</sup> Circulaire du 23 Décembre 2016 (n 6); House of Lords (n 6) cols 1132-1133.

<sup>34</sup> Belgian Senate, 'Rapport fait au nom du groupe de travail traite des êtres humains par Mme DÉSIR' (2012 Doc 5-1073/1 23). Original: 'une personne qu'on aurait recrutée dans le but de l'exploiter économiquement et alors même que cette personne aurait consenti aux conditions de travail parce qu'elle en tire effectivement un avantage économique, pourrait donc être considérée comme une victime de la traite.'

<sup>35</sup> Huberts and Minet (n 24) 15; Myria, 'Rapport annuel 2017 en ligne' (n 21) 77.

in inhumane conditions.<sup>36</sup> Accordingly, in order to avoid social dumping and tolerance of unacceptable working conditions,<sup>37</sup> the judicial assessment should be made on the basis of standards in Belgium.<sup>38</sup> Indeed, a subsequent analysis of the case law demonstrates that consent to exploitative working conditions is deemed to be irrelevant.<sup>39</sup>

The notion of human dignity should not be assessed on the basis of the perception of the facts, which was possibly that of [the individual] at the beginning of the employment relationship.<sup>40</sup>

In England and Wales, such instances of apparent consent have subsequently been characterised by the exercise of control and manipulation by the exploiters, which has meant that, due to an imbalance of power, the individuals were conditioned to the extent that their free will was overborne. For instance, the manipulation and the subsequent imbalance of power between the exploiter and the victim meant that the ‘imbalance [was used] as a tool in his coercion of [victim] and his overbearing of [victim’s] will.’<sup>41</sup> The absence of a complaint does not mean that there was no exploitation, as this could be an indicator of the conditioned status of the individual.

In Belgium, whilst the consent of the individual to the exploitation is categorically irrelevant to the determination of the constituent elements of the offence, there has nevertheless been an emphasis on the agency of the individual when discussing their vulnerability, and their so-called contribution to creating such a precarious position as a mitigating factor. Namely, the judiciary refers to the creation of vulnerability in the context of an illegal administrative status when ruling on the admissibility of pecuniary damage for back pay of wages.<sup>42</sup> The principal reason for enforcing such a mitigating factor was the need to secure the public interest, with the illegal employment deemed to be the pursuit of an illegitimate interest. Consequently, compensation was initially denied since the wages from illegal employment were identified as an unlawful advantage. Further, when determining the award of non-pecuniary compensation,

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<sup>36</sup> Centre fédéral pour l’analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (n 21) 25.

<sup>37</sup> C Clesse and others, *Traite des êtres humains / Mensenhandel Mensensmokkel* (Die Keure 2010) 44 and 56.

<sup>38</sup> Circulaire du 23 Décembre 2016 (n 6).

<sup>39</sup> Bruges Court of First Instance, Corr. Bruges (17th ch.), 21 January 2015.

<sup>40</sup> Nivelles Court of First Instance, Corr. Nivelles (6th ch.), 26 June 2013. Original: ‘*La notion de dignité humaine ne doit pas s’apprécier sur base de la perception des faits qui était éventuellement celle de [individu] au début de la relation de travail.*’

<sup>41</sup> *R v WC, JJC, JC, MC, JC* (unreported, 12 July 2012) Luton Crown Court.

<sup>42</sup> Such a ruling is in contradiction with Directive 2009/52/EC (n 13) art 6(1) that has been transposed in Belgium by the Law of 11 February 2013 and provides for a presumption of three months employment relationship.

judges have, in some cases, withheld access to redress, based on an assessment of the judge who considers that the victim contributed to the precarious situation by knowingly working and residing illegally in Belgium:

The precarious situation in which they found themselves and which was exploited by some defendants is the result of a *situation created by the civil parties themselves: they knowingly left Brazil to come to work* in Europe in conditions that they must have known to be painful.<sup>43</sup> [emphasis added]

*The complainant must therefore have known about the conditions* that she would need to endure to survive in Belgium (...) there is, on her part *a tacit but aware acceptance of the risk she would run* of finding herself in such a situation.<sup>44</sup> [emphasis added]

In 2016 the Liège Court of Appeal<sup>45</sup> overruled these previous rulings and reinforced the absolute nature of the principle of irrelevance of consent, ruling that the fact of knowingly working illegally and contributing to the creation of a situation of precarity is not relevant to the determination of remedy: ‘the Court thus emphasises that it is irrelevant that the workers were recruited by the defendants after they arrived in Belgium of their own free will’.<sup>46</sup>

The courts, in their interpretation of the offences overall, have reinforced the principle of irrelevance of consent. The comparative analysis reveals that the principle applies to those who have solicited the work in the first instance, consented at the point of recruitment, facilitated the exploitation of others by having an active role in the recruitment of another and ‘appear’ to consent to the working conditions even if they are exploitative. The irrelevance of consent is of great importance to the successful prosecution of trafficking cases because the lack of recognition and acceptance by victims that they are being exploited leads to a lack of evidence and complainants in the first instance, and whilst

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<sup>43</sup> Brussels Court of First Instance, Corr. Bruxelles (69th ch.), 30 October 2014. Original: ‘*La situation précaire dans laquelle ils se trouvaient et qui a été exploitée par certains prévenus est issue d’une situation créée par les parties civiles elles-mêmes: celles-ci ont quitté le Brésil en connaissance de cause pour venir travailler en Europe dans des conditions qu’elles devaient savoir être pénibles.*’

<sup>44</sup> Brussels Court of First Instance, Corr. Bruxelles (69th ch.), 1 April 2015. Original: ‘*La partie civile devait donc se douter des conditions dans lesquelles elle allait être amenée à survivre en Belgique...il y a, dans son chef une acceptation tacite mais consciente du risque qu’elle courrait d’atterrir dans une telle situation.*’

<sup>45</sup> Liège Court of Appeal, 8 December 2016.

<sup>46</sup> Myria ‘Rapport annuel 2017 en ligne’ (n 21) 121. Original: ‘*la Cour souligne ainsi qu’il est indifférent que les travailleurs aient été recrutés par les prévenus après qu’ils aient rejoint la Belgique de leur propre gré.*’

prosecutions are possible, they are often for lesser offences, such as assault and offences against the person.<sup>47</sup>

## 5.2. The Participation of Victims in Criminal Proceedings

A report of the European Commission revealed that in the labour exploitation case law in European Union Member States the participation of the victim in criminal proceedings was a key component, with victims testifying in court in the majority of the cases.<sup>48</sup> However, there was also a reported lack of willingness on the part of victims to cooperate and participate, requiring a focus on the protection measures for victims to ensure that their wellbeing was safeguarded throughout the criminal justice process.<sup>49</sup> The same issue has been noted in the findings from the comparative research.

In Belgium, the participation of victims in criminal proceedings is a condition of victim support and assistance.<sup>50</sup> In order for victim status to be conferred on an individual, the prosecutor will base their assessment on whether the victim has: 1) cut ties with the traffickers; 2) agreed to receive support and assistance from one of the three recognised specialised human trafficking centres (including psychosocial assistance) and 3) is willing to cooperate with the authorities.<sup>51</sup> The analysis of Belgian criminal cases revealed that the involvement of the victim in the proceedings is of great importance in the evidentiary process, with a significant emphasis accorded to the victims' testimony showing a reliance on the role of the victims in the criminal proceedings. Nevertheless, where the subjective testimony of the victim is relied upon, for it to be credible, it must be corroborated with other objective evidential elements. This requires significant cooperation between different actors involved in the investigation and prosecution. From the perspective of the victim's participation, it must be assured that they are adequately supported and given sufficient information about the process so that any risk of secondary victimisation is minimised.

In England and Wales, whilst the provision of victim support and assistance is not conditional on the participation of victims in criminal proceedings, prosecuting authorities are increasingly encountering situations where victims do not always recognise their victimhood and self-identify as victims. Such a situation leads to a lack of evidence and ultimately prosecutions for lesser offences

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<sup>47</sup> HM Parliament, *Parliamentary Debates House of Commons Official Report General Committees Public Bill Committee Modern Slavery Bill First Sitting* (2014) 8.

<sup>48</sup> European Commission, 'Study on Case-Law relating to THB' (n 10) 10-11.

<sup>49</sup> *ibid* 88-89.

<sup>50</sup> Circulaire du 23 Décembre 2016 (n 6).

<sup>51</sup> *ibid*.

such as assault and offences against the person.<sup>52</sup> Similarly, victims who have an irregular migration status are hesitant to receive victim support and assistance,<sup>53</sup> and thus participation in criminal proceedings is superseded by concerns over their migration status. As a result, we now see the emergence of victimless prosecutions (or evidence-based prosecutions)<sup>54</sup> that do not require reliance on the victim's evidence but can instead prioritise the use of other investigatory techniques to gather forensic evidence, financial records and evidence retrieved from suspects' residence, workplace or vehicles.<sup>55</sup> However, it is important to note that evidence-based prosecutions will require more resources, in an already resource intensive area of law enforcement.

Victims must be informed of the status of proceedings. Given the often transnational nature of human trafficking and the lengthy judicial process, this can be problematic where victims return to their country of origin. This is particularly the case for EU nationals who are more likely to return to their country of origin or move to a different EU Member State to seek employment than third country nationals. Therefore, it is imperative that law enforcement agencies maintain good connections with victims and witnesses where they have returned to their country of origin, requiring additional resources for safeguarding and welfare checks.

The participation of victims (or not) in proceedings should not affect their access to remedy and protection. For instance, it is important to ensure that those victims who do not engage with proceedings nevertheless receive compensation.<sup>56</sup> In addition, it is imperative that access to victim support and assistance be unconditional.

### 5.3. The Complexity of Factual Circumstances

The complexity of the factual circumstances in human trafficking cases means that the indictment is often extremely lengthy, consisting of

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<sup>52</sup> HM Parliament (n 47) 8.

<sup>53</sup> The inability to work during reflection and recovery needed does not reflect the economic imperative of workers who are supporting their family. See K Roberts, 'Human Trafficking: Addressing the Symptom, Not the Cause' in G Craig and others (eds), *The Modern Slavery Agenda: Policy, Politics and Practice in the UK* (Policy Press 2019) 147. EU nationals who are referred to the NRM are more likely to receive a positive decision than non-EU nationals. See H Lewis and L Waite, 'Migrant Illegality, Slavery and Exploitative Work' in the same work of Gary Craig and others (eds).

<sup>54</sup> A 'victimless prosecution' is one where no evidence is directly adduced from the complainant. This is only likely to take place where a victim is a) unwilling to give evidence, and b) it is in the public interest to continue with the prosecution without the victim.

<sup>55</sup> HM Prosecution and Inspectorate, 'The CPS Response to the Modern Slavery Act 2015' (December 2017) 40.

<sup>56</sup> HM Parliament, 'Independent Review of the Modern Slavery Act 2015: Final Report' (May 2019) 65.

multiple victims, defendants and offences. Multi-count indictments consist of a high number of wide ranging offences, including offences against the person, sexual offences, fraud offences, immigration offences and (in Belgium only) social criminal offences. This can be challenging when it comes to the judicial process and, in particular, where there is a trial by jury that requires a simple and clear presentation of both the factual circumstances by prosecution and defence counsel and legal directions from the judge.

In Belgium, the multi-count indictments appeared to be well accepted in the criminal proceedings, where proceedings are often overseen by specialised prosecutors and judges that frequently deal with human trafficking cases. In addition, significant guidance on the interpretation of the offence of human trafficking for economic exploitation has been provided as to the meaning of 'conditions contrary to human dignity'. Namely, level of remuneration in comparison to the number of hours worked, number of rest days, average monthly minimum income of less than the national minimum wage, working conditions, living conditions, restriction of freedom of movement, violation of physical integrity, confiscation of identity and travel documents. Such indicators are to be used to facilitate the assessment of a situation, in order to determine whether or not it amounts to exploitation.<sup>57</sup>

Conversely, in England and Wales, despite one of the principal aims of the legal reform being the facilitation of the operational aspects of prosecuting modern slavery offences, in practice the reality is that the cases before the courts are extremely complex. Consolidation of the offences was supposed to make the prosecution of trafficking and exploitation offences easier, by ensuring that they are flagged up, making it much clearer and easier for prosecutors, investigators and the courts to understand.<sup>58</sup> In reality, the complexity of exploitation cases has led to an increased number of multi-count indictments. In some extremely complicated cases involving multiple defendants and victims, the indictments have been severed leading to separate trials. In order to improve the implementation of the newly consolidated legislation, there should be a systematic review of all existing guidance for all anti-trafficking legislation with a view to ensuring that all prosecuting advocates and judges share knowledge and information on the application of offences.<sup>59</sup> Identifying the acts which support the charged offence is also of use for the defence counsel as it permits the defence advocate and defendant to know the material scope of the alleged criminal

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<sup>57</sup> Belgian Senate (n 26) 3; Annexe Circulaire no. COL 10/2004 du Collège des procureurs généraux près les cours d'appel, politique de recherches et poursuites en matière de traite des êtres humains – Adaptation de la Directive du Ministre de la Justice (30 April 2004) 35-38; Annexe 2 Circulaire no. COL 1/2007 du Collège des procureurs généraux près les cours d'appel, Traite des êtres humains – Directive ministérielle relative à la politique de recherches et poursuites en matière de traite des êtres humains (17 January 2007) 4-8.

<sup>58</sup> HM Parliament (n 47) 8.

<sup>59</sup> The Anti Trafficking Monitoring Group (n 16) 81.

acts. Updated guidance for judges that include legal directions on Modern Slavery Act offences would facilitate the judge's legal directions to the jury of a complex matter of law that suffers from a lack of certainty and a limited availability of case law.<sup>60</sup> This improvement would also ensure the jury's understanding of a complicated offence.<sup>61</sup>

## 6. Conclusion

The challenges to the judicial process reveal some differences between the victims who are nationals and EU nationals as opposed to third country nationals. When seeking to apply the principle of irrelevance of consent, the agency of the victim – particularly undocumented victims – before, during and after the exploitation should not be taken into account. Similarly, any prosecutorial decision should not adversely impact on the rights of victims to access to support and assistance and their right to an effective remedy. Access to support and assistance should be unconditional, regardless of their participation in proceedings. This is especially important for undocumented third country nationals who – when granted human trafficking victim status – will be entitled to a temporary residence permit. EU nationals, who are more likely to decide to return to their country of origin or another EU Member State, should also be assured access to effective compensation.

Furthermore, in light of the complexity of exploitative situations, legal professionals should receive clear guidance on how to deal with human trafficking cases. Clarity on how to objectively assess the existence of exploitation will also ease the difficulties encountered where a victim does not necessarily self-identify as a victim or appears to have consented to exploitation. Such guidance and clarity will also be particularly important where the role of the perpetrator is not always clear, for example where complex factual circumstances lead to multiple defendants on the indictment.

The focus on a criminal justice approach in combating human trafficking has generated criticism, and the low prosecution rates provide an evidence-base from which such proponents can further reinforce their position. This paper has not addressed all challenges and criticisms of a criminal justice approach, but has nevertheless highlighted a number of recurring issues that have emerged from the comparative analysis of the judicial approach to handling labour exploitation cases in criminal proceedings in England and Wales and Belgium.

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<sup>60</sup> C Haughey, 'Independent Report, Modern Slavery Act 2015 Review: One Year On' (2016) 23-24. See Recommendation 19 to update the Crown Court Bench Book.

<sup>61</sup> *ibid.* See Recommendation 14 and Recommendation 16: During the summing up, the trial judge should direct the jury in terms similar to those articulated in the Crown Court Compendium Part 1 May 2016 Chapter 20-1 the danger of assumptions.



In particular, the implications for victims' effective access to justice and remedy should be at the forefront of efforts that seek to improve prosecution rates.