15

Exploring the Role of Decisions by Judicial, Quasi-Judicial and Specialised Non-Judicial Bodies in Advancing Anti-Trafficking Efforts

NOEMI MAGUGLIANI AND JEAN-PIERRE GAUCI

15.1 Introduction

In the last two decades, the international community has increasingly turned its attention towards the phenomenon of trafficking in human beings. Since the adoption of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), as well as subsequent regional conventions,[1] many States have progressively sought to align their domestic legislation with the standards required by international law. Although the majority of States have adopted legislation criminalising trafficking in human beings,[2] and many have also passed legislation aimed at protecting trafficked persons, States' compliance with international and domestic standards has often been questioned.

This chapter explores proceedings before judicial, quasi-judicial and specialised non-judicial bodies[3] as determinants of advances in anti-trafficking efforts. In this context, 'determinants' are understood as

[1] Including the Council of Europe Convention on Action against Trafficking in Human Beings, signed 16 May 2005, entered into force 1 February 2008, CETS No 197; the ASEAN Convention against Trafficking in Persons, Especially Women and Children, signed 21 November 2015, entered into force 8 March 2017; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, signed 11 July 2003, entered into force 25 November 2005.

[2] According to the United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2020* (2020) 23: 'Twenty years [after the adoption of the Palermo Protocol], over 90 per cent of the United Nations Member States have established a specific offence for the criminalisation of trafficking, and the definition of trafficking in persons is almost universally based on the UN Protocol.'

[3] Including United Nations Special Procedures, and in particular the United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children.

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

factors shaping governments' anti-trafficking efforts and influencing compliance with and implementation of international standards. This contribution outlines how the role of such proceedings is perceived by anti-trafficking stakeholders, and, critically, the various ways in which proceedings influence anti-trafficking efforts. Importantly, the chapter explores how proceedings before judicial, quasi-judicial and specialised non-judicial bodies interact with other determinants in influencing anti-trafficking efforts at the domestic level.

While there is significant analysis of States' anti-trafficking efforts, it is necessary, in our view, to shift the focus of inquiry towards the determinants of anti-trafficking efforts in trying to understand *why* States adopt, or comply with, protective and progressive legislation to tackle human trafficking. While some determinants are readily identifiable (e.g., the presence of political will, the ratification of international instruments and pressure by monitoring mechanisms or external donors), others have not yet been sufficiently explored, such as the decisions of judicial, quasi-judicial and specialised non-judicial bodies. The complex, non-linear and often hidden interactions between different factors have equally not been adequately addressed. Decisions of international and regional courts and quasi-judicial bodies are relevant determinants of States' anti-trafficking efforts, as identified by, *inter alia*, the Organization for Security and Co-operation in Europe (OSCE).[4]

This chapter builds on existing literature on the role of regional courts in shaping changes in anti-trafficking action,[5] taking a step beyond the existing focus on judicial bodies and on the European Court of Human Rights (ECtHR) in particular. We have identified 19 individual communications to the United Nations Treaty Bodies,[6] 342 communications of the United Nations Special Rapporteur on Trafficking in Persons,[7] 12 judgments of the ECtHR,[8] and 2 judgments of the Inter-American

[4] See Organization for Security and Co-operation in Europe (OSCE), 'Highlights of the International Conference "The Critical Role of the Judiciary in Combating Trafficking in Human Beings"' held in Tashkent, 13–14 November 2019.

[5] See H Duffy, 'Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution' (2016) 14(2) *Journal of International Criminal Justice* 375; V Milano, 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?' (2017) 17(4) *Human Rights Law Review* 701.

[6] Available at https://juris.ohchr.org/, searched using keywords 'human trafficking'.

[7] Available at https://spcommreports.ohchr.org/Tmsearch/TMDocuments, searched filtering by mandate 'trafficking in persons'.

[8] Available at https://hudoc.echr.coe.int/, searched using keywords 'human trafficking' and filtering by language (English, French) and Article (4, 4–1, and 4–2).

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

Court of Human Rights (IACtHR)[9] that tackle issues related to the implementation of anti-trafficking legislation.[10] Deploying a comparative approach, this chapter evaluates four case studies (Argentina, Brazil, Cyprus and the United Kingdom) in order to assess the role of judicial, quasi-judicial and specialised non-judicial bodies, including supervisory bodies, in effecting change at the domestic level. The chapter draws on a large-scale research project exploring the determinants of anti-trafficking efforts globally.[11] The project assesses the links and sequencing of specific factors that have yielded improved political will and capacity in national governments to address trafficking in persons and which have led to sustained and comprehensive anti-trafficking efforts. It explores findings from literature reviews, expert interviews, a global survey and a series of fourteen case studies (of which the above are four).

15.2 Decisions by Judicial, Quasi-Judicial and Specialised Non-Judicial Bodies as Determinants of Anti-Trafficking Efforts

Research on human trafficking and anti-trafficking efforts highlights a broad range of factors which influence governments' anti-trafficking responses. These encompass factors instrumental in, for example, bringing about compliance and implementation of international standards, as well as causing governments to improve, hinder or regress efforts. Determinants of anti-trafficking efforts do not work in isolation. However, there is no single framework or sequencing; rather, the processes through which anti-trafficking laws, policies and measures emerge and co-exist are particular, varied and, crucially, contextual and interdependent.

A number of determinants have been discussed in the literature over the last two decades, including political will, international standards and mechanisms, structural conditions, the role of civil society organisations and funding and resource allocation. Although literature may be lacking on the role of the jurisprudence of regional and international courts and bodies due to the limited number of cases in the past two decades,

[9] Available at www.corteidh.or.cr/casos_sentencias.cfm?lang=en.

[10] The first trafficking communication before the African Commission on Human and Peoples' Rights, *J v Namibia*, is currently pending.

[11] British Institute of International and Comparative Law (BIICL), 'Determinants of Anti-Trafficking Efforts', available at www.biicl.org/projects/determinants-of-anti-trafficking-efforts.

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

regional and international bodies as well as some scholars have highlighted how decisions by international courts, tribunals and quasi-judicial bodies can be a decisive factor in the implementation of international standards, and in influencing national anti-trafficking responses.[12]

Crucially, decisions by domestic courts can trigger legislative change and oblige legislative compliance with international standards. For example, the general reports of the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) identify specific domestic jurisprudence which has triggered legislative change and pushed governments to adopt the advised change. They highlight, *inter alia*, *Hussein v Labour Court*,[13] which triggered legislative changes in Ireland through the enactment of the Employment Permits (Amendment) Act 2014 on 27 July 2014, and *NN v Secretary of State for the Home Department*,[14] where a United Kingdom Home Office policy was found to be unlawful and incompatible with the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and which resulted in the introduction of a new process and guidance to assess the support needs of survivors beyond the previous exit timescales. More recently, and beyond the European context, in the case of *LVCO v AG*,[15] the Colombian Constitutional Court ordered structural measures to improve protection of trafficked persons at the national level, including: designing a protocol to identify trafficked persons; training public servants with functions related to human trafficking; and protecting the human rights of trafficked persons as soon as signs of trafficking are detected, independently of what occurs in criminal proceedings.

The OSCE has further noted that the reasoning and findings of domestic courts, for example, can be instrumental 'to ensure consistency of judicial practice and correct understanding and interpretation of anti-trafficking legislation'.[16] Interpretation and clarifications by higher courts also play an important role, especially when they are binding on lower courts.[17] Such decisions also reinforce international legal obligations and

[12] See, *inter alia*, Duffy (n 5); Milano (n 5); OSCE (n 4).
[13] *Hussein v Labour Court* [2012] IEHC 364.
[14] *NN v Secretary of State for the Home Department* [2019] EWHC 1003 (Admin).
[15] [2021] T-236-21. Available at www.corteconstitucional.gov.co/relatoria/2021/T-236-21.htm.
[16] OSCE (n 4) 8.
[17] Ibid.

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

encourage harmonisation and co-operation across different judicial interpretations.

With respect to the role of regional courts, an evaluation by Duffy found that courts reinforce 'duties to prevent, regulate, investigate, cooperate, criminalize and punish'.[18] Her analysis focusses on decisions by the ECtHR, the African Commission on Human and Peoples' Rights, the Court of Justice of the Economic Community of West African States, the Inter-American Commission on Human Rights (IACmHR) and the IACtHR. According to Duffy, these decisions can shed light on the shortfalls of legal frameworks and State policies, and they can be instrumental in clarifying and underlining States' positive obligations.[19] Duffy highlights four key examples:

> In some cases, such as *CN v. UK* or *Fazenda Brasil Verde*, the litigation has led to legislative changes to enhance criminal law and jurisdiction over these offences. Many other cases, however, including *Mani*, or *Periera v. Brazil*, reveal something quite different, which is laws that exist on paper but are not understood or given effect in practice, for varying reasons including the lack of capacity and knowledge of prosecutors or judges themselves, the insensitive and ineffective handling of investigations or direct corruption and collusion of state agents.[20]

The sustained impact of strategic litigation before regional courts is further explored by Milano, with specific reference to the ECtHR. Milano recognises the influence of the ECtHR's landmark case *Rantsev v Cyprus and Russia*, [21] although she is critical of the Court's ruling in *LE v Greece*, [22] which, she argues, failed to meet the expectations set out in *Rantsev* and therefore represents a regression.[23]

The role of decisions of regional courts has also been highlighted in a series of expert interviews conducted as part of the research that informed this chapter. A member of the secretariat of the ECAT emphasised how the ECtHR has triggered positive changes through the judgments of, *inter alia*, *Rantsev v Cyprus and Russia*,[24] *Chowdury and others*

[18] Duffy (n 5) 402.
[19] Ibid.
[20] Ibid. 401.
[21] App no 25965/04 (ECtHR, 7 January 2010).
[22] App no 71545/12 (ECtHR, 21 January 2016).
[23] Milano (n 5).
[24] App no 25965/04 (ECtHR, 7 January 2010).

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

v Greece[25] and *Siliadin v France*,[26] causing changes in national laws and the adoption of action plans.[27] The same reasoning could be applied in the future to the more recent cases of *VCL and AN v the United Kingdom*[28] and *Zoletic and others v Azerbaijan*.[29] Other participants in the research project also noted that judicial reviews have the potential to trigger direct change in obliging the enforcement of international or regional legal obligations.[30] A similar observation was made with respect to strategic litigation, which interviewees argued can be an influential tool in creating legal and policy changes.[31] With regards to the influence of UN Special Procedures, including UN Special Rapporteurs, the system of country visits and subsequent reports and recommendations have been deemed influential when rapporteurs focus on a specific policy area. Governments are responsive because country visits take place in the context of broader discussions and engagements about legislative change and improvements. Concerns of reputation and international relations are at play, but what is important to enable such influence is trust and dialogue. While there is minimal influence from governments who do not engage and co-operate with country visits, where there is a dialogue and a receptiveness to visits, changes are likely to follow.[32]

More broadly, judicial and quasi-judicial decisions can be decisive in identifying gaps in national legislation and outlining where the law needs to be improved.[33] However, the impact of litigation, and more broadly of decisions, depends on whether there is a system of precedent, or whether or not such decisions are binding. It has been noted, for example, that in Southeast Asia, court decisions are rarely written, published or translated, reducing the influence that precedent-setting may have in the region (even if influential within the specific country).[34] A similar issue was

[25] App no 21884/15 (ECtHR, 30 March 2017).
[26] App no 73316/01 (ECtHR, 26 July 2005).
[27] Interview with a member of the Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (25 November 2020).
[28] Apps nos 77587/12 and 74603/12 (ECtHR, 16 February 2021).
[29] App no 20116/12 (ECtHR, 7 October 2021).
[30] Interview with Thomas Harré (8 April 2020); Interview with Euan Fraser (16 April 2020).
[31] Interview with the president of an anti-trafficking organisation (7 January 2020); Interview with a member of an international organisation (23 April 2020); Interview with Federica Toscano (5 March 2020).
[32] Interview with an independent expert on trafficking in human beings (16 December 2020).
[33] Interview with a member of a specialised international organisation (17 April 2020).
[34] Interview with a member of an international organisation (17 April 2020).

raised in the context of our research in Guyana.[35] In addition, integral to the influence of judicial and quasi-judicial decisions are judges', or more broadly, decision-makers', own understanding and awareness of trafficking in persons and anti-trafficking law.[36] Examples have emerged of judges having a lack of awareness and understanding of how international legal instruments ratified by their country apply,[37] as well as a lack of understanding around specific provisions (with the non-punishment principle being a key example).[38] Moreover, sight should not be lost of the fact that social and cultural contexts may influence judges and decision-makers. For example, it has been suggested that in Brazil judges and decision-makers do not always see 'the gravity of the situation' because of an underlying and embedded 'culture of exploitation',[39] a reality that would seem to normalise certain behaviours that fall within the scope of the trafficking definition. These socio-cultural contextual factors, alongside the limits to judges' understandings and the difficulties of ensuring victim co-operation in prosecutions, limit the impact of courts and judges.[40]

Indeed, judicial and quasi-judicial decisions do not operate in a *vacuum*; their influence is determined by several other factors beyond understanding of the law and social and cultural contexts. Other determinant factors identified are, for example, a State's political situation and political will to act in the aftermath of a judicial or quasi-judicial decision.[41] For example, it has been noted that the rule of law in the United Kingdom facilitates a role for court decisions, which are often based on the ECAT, in enforcing regional obligations domestically.[42] In contrast, in Moldova and Cambodia (amongst other countries), it has been noted

[35] BIICL, 'Determinants of Anti-Trafficking Efforts: Guyana Country Report' (2021).
[36] Interview with a member of an international non-governmental organisation (9 April 2020).
[37] Interview with a member of an international organisation (14 April 2020).
[38] Interview with Gary Craig (15 April 2020). See also Human Rights Council, 'Implementation of the Non-Punishment Principle: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Siobhán Mullally' (17 May 2021) UN Doc A/HRC/47/34. BIICL has recently started a project together with the International Bar Association (IBA) on the application of the non-punishment principle in law and practice across different jurisdictions, available at www.biicl.org/projects/the-non-punishment-principle-in-trafficking-in-persons.
[39] Interview with a member of an international organisation (n 30).
[40] Ibid.
[41] Interview with a member of a national anti-trafficking organisation (15 May 2020).
[42] Ibid.

that the courts have minimal impact due to corruption, thus limiting their ability to trigger policy or legislative change.[43]

Against this background, however, it is relevant to note that the impact of judicial and quasi-judicial decisions, as well as of specialised non-judicial bodies' observations, can be amplified when decisions are used as levers and accountability tools by, *inter alia*, civil society and the media. This is demonstrated, for example, by the cases of fishermen from Indonesia being trafficked to New Zealand on Korean boats where 'fishing companies were bringing these migrant labourers into New Zealand under a very specific provision of the Fisheries Act'.[44] International Law Aid and the International Transport Workers' Federation, as well as other non-governmental organisations (NGOs), joined forces in pressuring the New Zealand Government to change specific provisions of the Fisheries Act 1996 – pressure that resulted in a ministerial inquiry. In parallel, the Supreme Court in New Zealand also heard cases in relation to wage claims. Together, these factors brought about significant changes in practice.[45]

15.3 The Role of Judicial, Quasi-Judicial and Specialised Non-Judicial Bodies in Argentina, Brazil, Cyprus and the United Kingdom

For the purpose of this chapter, we have selected four case studies (Argentina, Brazil, Cyprus and the United Kingdom) from amongst the fourteen undertaken as part of the broader project on determinants of anti-trafficking efforts.[46] These four were selected because they represent

[43] Ibid. See also Interview with Professor Cathy Zimmerman (14 February 2020).
[44] Interview with Thomas Harré (n 23).
[45] Ibid.
[46] In the framework of the project, fourteen case studies (Algeria, Argentina, Armenia, Bahamas, Bahrain, Brazil, Chile, Cyprus, Georgia, Guyana, Mozambique, the Philippines, Thailand and the United Kingdom) were implemented by national research consultants with expertise in trafficking frameworks and/or policymaking within the country. Each case study involved in-depth, cross-temporal, national level desk research including analysis of policy documents and (where available) *travaux préparatoires* of such policies and legislation, interviews with relevant experts and stakeholders and focus group discussions. Stakeholders consulted include people working for governments and legislatures/parliaments, academics, lawyers, criminal justice stakeholders, service providers and those working for relevant NGOs and other civil society organisations, and the private sector (if applicable and relevant), trying to maintain a 'representation balance'. Each national research consultant was provided with a literature review compiled by the BIICL team and concerned with the research question of what factors determine governments' anti-trafficking efforts. National research consultants were expected to complete

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

different levels of engagement of judicial, quasi-judicial and specialised non-judicial bodies across two distinct geographical areas. These are four exploratory, or hypothesis-generating, case studies, selected according to three baseline criteria: the presence of engagement of judicial, quasi-judicial or specialised non-judicial bodies; the availability of proof of such engagement; and the presence of different qualitative levels of engagement of such bodies.[47]

15.3.1 Argentina

As recognised by the United Nations Office on Drugs and Crime in its Global Report on Trafficking in Persons of 2018, Argentina reported the highest numbers of prosecution and convictions of trafficking and trafficking-related offences in the South American region.[48] By July 2020, Argentina had reported a total of 405 decisions on human trafficking and exploitation, of which 282 were convictions for human trafficking, 62 were convictions for exploitation and 61 were acquittals. [49] Argentina was one of the countries that promoted the adoption of the Palermo Protocol, driven by its political will to fight human trafficking in minors and by its strategic motivations of dealing with human trafficking as a form of transnational organised crime.[50] Argentina ratified the Palermo Protocol in August 2002 through Law 25.632,[51] and in 2008 it enshrined the crime of human trafficking in domestic law through Law 26.364.[52]

In the Argentinian context, the influence of judicial cases as determinants for public policies and legislation on anti-trafficking has always been

fifteen interviews with relevant stakeholders, trying to maintain a balance in terms of State and non-State actors. Interviews were conducted either online (including over the phone or videoconference), or in person. National research consultants also moderated focus groups, one with non-State actors, and another with State actors.

[47] J Gerring and L Cojocaru, 'Selecting Cases for Intensive Analysis: A Diversity of Goals and Methods' (2016) 45(3) *Sociological Methods & Research* 392, 399–400.

[48] UNODC, *Global Report on Trafficking in Persons* (2018) 78.

[49] Ministerio Público Fiscal, 'En Once Años Hubo 405 Sentencias en Todo el País por Trata de Personas' (31 July 2020), available at www.fiscales.gob.ar/trata/en-once-anos-hubo-405-sentencias-en-todo-el-pais-por-trata-de-personas.

[50] A Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 77.

[51] Law 25.632 (2002), available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/75000-79999/77329/norma.htm.

[52] Law 26.364 (2008), available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/140000-144999/140100/norma.htm.

critical. Indeed, judicial cases influenced the enactment of all three of the main anti-trafficking laws, namely Law 26.364 (2008) creating the crime of human trafficking; Law 26.842 (2012)[53] modifying Law 26.364, including eliminating the 'means' element from the crime; and Law 27.508 (2019),[54] creating a fund to assist and compensate trafficked persons.

At the time of the first landmark case involving Marita Verón, Argentina did not have any criminal provision punishing human trafficking. Marita Verón was kidnapped and subjected to sexual exploitation in 2002. Through the establishment of the NGO Fundación María de los Ángeles, Marita's mother advocated for the case of her daughter and for the recognition of human trafficking in Argentina. Although the defendants were at first acquitted in 2012, the acquittal was met with widespread outrage, and on appeal the Supreme Court of Tucumán convicted ten out of the thirteen suspects (seven men and six women). The case of Marita Verón exposed the inadequacy of the Argentinian legal framework, the absence of legal provisions enabling an effective investigation into her disappearance, and difficulties in the prosecution of her alleged traffickers. Though the trial did not start until 2012, the legislators – taking into account the events of this particular case – were prompted to recognise the need to adopt provisions criminalising trafficking in persons, which led to the adoption of Law 26.364. When the first instance Court acquitted the thirteen defendants in 2012, extraordinary legislative debates were summoned, and Law 26.842 was adopted in December 2012. Amongst the modifications introduced, the law eliminated the 'means' element from the definition of the crime of human trafficking – which is now only considered to be an aggravated circumstance. According to the legislative debates, it is evident that the poor decision rendered in the case of Marita Verón was one of the main determinants for the enactment of Law 26.842.

A second landmark case, Montoya, highlighted the lack of provisions with respect to adequate redress for trafficked persons. In this case the claimant, who had been trafficked for the purpose of sexual exploitation, acted as a *querellante* (complainant) in the trial against the traffickers, seeking civil damages. She also sued the municipal State for lack of prevention and for the facilitation of the exploitation. The tribunal

[53] Law 26.842 (2012), available at www.argentina.gob.ar/normativa/nacional/ley-26842-206554/texto

[54] Law 27.508 (2019), available at www.argentina.gob.ar/normativa/nacional/ley-27508-325439/texto

sentenced three individuals to up to seven years in prison, and most notably it ruled in favour of the *querellante* in the civil damage case, ordering the municipality to pay 780,000 pesos (ca. €7,000). As in the case of Marita Verón, the Montoya case exposed gaps in the domestic anti-trafficking legal framework. Following the judgment, the Federal Council for the Fight against Human Trafficking and Exploitation and for the Protection and Assistance of Victims[55] proposed the creation of a fund to allow for the compensation of trafficked persons. In 2019, Law 27.508 was enacted, establishing a trust fund comprised of traffickers' seized assets. Notably, Law 27.508 also introduced a requirement for criminal courts to award trafficked persons restitution at the time of the traffickers' conviction and provided for the possibility of filing civil suits to receive additional restitution. In the year of its enactment, criminal courts applied Law 27.508 in seven cases, granting restitution to trafficked persons.

In 2010, the United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo, conducted a country visit to Argentina at the invitation of the government.[56] The Special Rapporteur welcomed the adoption of Law 26.364 and the creation of dedicated offices within the executive to provide trafficked persons with assistance and to investigate trafficking in persons, but also observed a number of challenges. In particular, she noted the weak coordination of anti-trafficking activities, and the lack of identification and referral mechanisms for trafficked persons. The Special Rapporteur called on the Argentinian Government to, *inter alia*, establish:

> . . . a federal central agency to enhance coordination, not only among federal offices and units that have already been set up to combat trafficking in persons and assist victims, but also between them and authorities at the provincial and municipal levels [and to consider establishing] a special fund for the compensation of trafficked persons.[57]

UN Treaty Bodies have also raised concerns, over the years, with particular reference to the implementation of existing legislation. The Committee on the Elimination of Discrimination Against Women, in

[55] An organ established through Law 26.842 and composed of members from the executive, legislative and judiciary, as well as from international organisations and NGOs.

[56] Human Rights Council, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo: Addendum, Mission to Argentina' (24 May 2011) UN Doc A/HRC/17/35/Add.4.

[57] Ibid.

its 2016 Concluding Observations on the Seventh Periodic Report of Argentina, recommended that the State party '[e]stablish a referral and identification mechanism, increase funding for shelters and provide counselling, rehabilitation services and psychosocial assistance for women and girls who are victims of trafficking and exploitation of prostitution'.[58] In 2018, the Committee on Economic, Social and Cultural Rights (CESCR) made similar recommendations in the context of exploitation beyond forced prostitution, and with respect to trafficked persons regardless of biological sex. The CESCR noted that 'most of the State party's mechanisms for combating trafficking in women are geared towards emergency care and there are no programmes of sustained medium- or long-term assistance for victims'.[59] The Committee recommended 'that the State party strengthen public policies for the prevention and punishment of trafficking in persons [and] that the principle of exemption from criminal liability be respected and that, accordingly, victims of trafficking in persons not be detained or prosecuted'.[60] Similar recommendations were also made as recently as 2020 by the Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW). In its Concluding Observations on the Second Periodic Report of Argentina, the CMW recommended that Argentina '[a]llocate sufficient resources in each province for the provision of psychological, legal and medical assistance to victims, in addition to shelters or specialized care centres for child, adolescent and women victims of trafficking in persons'.[61]

While the Special Rapporteur's recommendation to establish a federal central agency to enhance anti-trafficking co-ordination was addressed in 2012 through Law 26.842, a special fund was only created in 2019, following the judgment in the Montoya case, and the recommendations from UN Treaty Bodies have had limited impact, including in terms of pressure, in effecting change. The Argentinian case study highlights the

[58] Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Observations on the Seventh Periodic Report of Argentina (25 November 2016) UN Doc CEDAW/C/ARG/CO/7, para 23.

[59] Committee on Economic, Social and Cultural Rights, Concluding Observations on the Fourth Periodic Report of Argentina (1 November 2018) UN Doc E/C.12/ARG/CO/4, paras 41–42.

[60] Ibid.

[61] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding Observations on the Second Periodic Report of Argentina (4 February 2020) UN Doc CMW/C/ARG/CO/2, paras 50–51.

role of judicial decisions in improving anti-trafficking efforts – including where a 'negative' judicial decision is reached – and it reflects both the cumulative effect of various determinants and the broader context and timescales within which determinants must be considered.

15.3.2 Brazil

Over the past two decades, Brazil has seen notable shifts in developing trafficking policy, legislation and initiatives. Brazil ratified the Palermo Protocol in 2004, through Decree n. 5.017. Upon coming into force, a series of anti-trafficking efforts were undertaken domestically. For example, in March 2005, Law n. 11.106 amended the Brazilian Criminal Code, specifically Article 231, which criminalised the 'traffic of women', and changed it to the offence of 'traffic[king] in persons for sexual exploitation'.[62] In addition, internal traffic in persons for sexual exploitation was criminalised under Article 231-A. Similarly, in 2006, Decree n. 5.948 was enacted, which approved the National Policy to Combat Trafficking in Persons and established an inter-ministerial working group to draft a proposal for a national plan.[63] The first National Plan for Combating Human Trafficking was then approved by Decree n. 6.347 in 2008.[64]

While decisions of judicial, quasi-judicial and non-judicial bodies have not been identified as key determinants of anti-trafficking efforts broadly in the Brazilian context, interviewees have highlighted the role played by such decisions in a particular sphere – that of trafficking for the purpose of forced labour. Labour trafficking is widely recognised as an issue in Brazil, so there is a pre-existing, well-developed legislative background for protecting workers' conditions,[65] in addition to an established network to tackle modern slavery (or 'work analogous to slavery', as

[62] Law n. 11.106 (2005), available at https://presrepublica.jusbrasil.com.br/legislacao/96809/lei-11106-05. This was later changed by Law n. 13.344 (2016), available at https://presrepublica.jusbrasil.com.br/legislacao/392619946/lei-13344-16.

[63] Decree n. 5.948 (2006), available at: https://presrepublica.jusbrasil.com.br/legislacao/95318/decreto-5948-06.

[64] Decree n. 6.347 (2008), available at: https://presrepublica.jusbrasil.com.br/legislacao/94100/decreto-6347-08.

[65] International Centre for Migration Policy Development (ICMPD), 'Guia de Assistência e Referenciamento de Vítimas de Tráfico de Pessoas' (2020) 41.

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

described by Article 149 of the Brazilian Criminal Code).[66] The underlying motivation for labour protection is rooted in Brazil's history and links with slavery,[67] and supplemented by external factors, including the IACmHR decision in *José Pereira v Brazil*.[68] As part of the amicable settlement agreement through which the government of Brazil accepted responsibility for the wrongdoings in this case, Brazil was called upon to, *inter alia*, pay financial compensation for the damages suffered by the claimant; commit to prosecute and punish the individuals responsible; and institute preventive measures, including legislative amendments, and measures to monitor and repress slave labour in Brazil. With regard to compensatory measures, the Brazilian State forwarded a bill to the National Congress which, adopted as a matter of urgency following a symbolic vote, allowed the claimant to be compensated. Through the case, it became apparent that there was a need for amendments in domestic legislation to provide a more precise definition of forced labour, which was prioritised and finally introduced through Law 10.803/2003, with the *José Pereira* case acting as a catalyst for this process.

Caso Trabalhadores da Fazenda Brasil Verde v Brazil,[69] a landmark judgment of the IACtHR, also dealt with practices of forced labour and debt bondage, but in a different context – a cattle ranch located in the municipality of Sapucaia, in the south of the state of Pará. Although the Brazilian Government made efforts to address slave labour during the 2000s, largely in response to key recommendations from the IACmHR in the *José Pereira* case, the anti-trafficking legal and policy framework in Brazil was – and remains – not fully compliant with the Palermo Protocol, nor the American Convention on Human Rights (ACHR). In 2016, the IACtHR ruled in this case that Brazil had violated the right not to be subjected to slavery, forced labour and human trafficking

[66] Interviewee BR09. Article 149 reads (in its original language): 'Reduzir alguém *a condição análoga à de escravo*, quer submetendo-o a trabalhos forçados ou a jornada exaustiva, quer sujeitando-o a condições degradantes de trabalho, quer restringindo, por qualquer meio, sua locomoção em razão de dívida contraída com o empregador ou preposto' (emphasis added). The translation of the Palermo Protocol reads, at Article 3: 'A exploração deverá incluir, pelo menos, a exploração da prostituição de outrem ou outras formas de exploração sexual, o trabalho ou serviços forçados, *a escravatura ou práticas similares à escravatura*, a servidão ou a extracção de órgãos' (emphasis added). The italicised terms are to be considered synonyms.

[67] Interviewee BR09.

[68] *José Pereira v Brazil* (IACmHR, 24 October 2003), discussed by Interviewees BR03 and BR06.

[69] *Caso Trabalhadores da Fazenda Brasil Verde v Brazil* (IACtHR, 20 October 2016).

(Articles 6(1) and 6(2) of the ACHR), among several other rights. The Court further ruled that the Brazilian government had to investigate the case, pay reparations to victims and stop applying the statute of limitations to cases that fell under the definition of slavery in international law. The decision was referred to in the context of two significant changes in anti-trafficking efforts. With respect to the duty to prosecute, following the IACtHR judgment, the Brazilian Government created a task force of prosecutors to identify and investigate situations of trafficking. With respect to the non-pecuniary measures ordered by the Court, an amendment to the Constitution was introduced in April 2017 to establish that the submission of a person to a condition analogous to slavery constitutes an imprescriptible crime. Although the owners of the cattle ranch filed a motion to dismiss in the Federal Court for the First Region, arguing that the statute of limitations had expired, in 2018 the Federal Court ruled that the statute of limitations did not apply, upholding the 2016 ruling by the IACtHR.

However, while important, the case of *Fazenda Brasil Verde* cannot be directly or conclusively linked with any substantive legislative anti-trafficking development in Brazil. Indeed, Law n. 13.344 (2016) was enacted in the same month as the IACtHR's decision, and only gave the judgment a 'symbolic weight'. There has also been very limited engagement of UN Treaty Bodies with respect to anti-trafficking efforts in Brazil. A rare instance has been the 2015 Concluding Observations on the Combined Second to Fourth Periodic Reports of Brazil by the Committee on the Rights of the Child (CRC). The CRC affirmed that it was 'deeply concerned about the trafficking in children, particularly girls, for the purposes of sexual exploitation and forced labour' and that it was 'particularly concerned about the high vulnerability of indigenous children to trafficking for the purposes of domestic labour, slave labour and sexual exploitation'.[70] Building on a recommendation issued by the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences,[71] the CRC recommended that the State party 'amend its Penal Code with a view to criminalizing all forms of

[70] Committee on the Rights of the Child, Concluding Observations on the Combined Second to Fourth Periodic Reports of Brazil (30 October 2015) UN Doc CRC/C/BRA/CO/2-4, para 85.

[71] See Human Rights Council, 'Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences, Gulnara Shahinian: Mission to Brazil' (30 August 2010) UN Doc A/HRC/15/20/Add.4, para 118.

trafficking, including for the purpose of economic exploitation', and that it '[e]stablish specialized shelters with adequate human, technical and financial resources'.[72] Yet, it appears that the determinants that influenced the 2016 legislative process pre-dated the result in the case of *Fazenda Brasil Verde*, and were not directly related to the recommendations of UN Treaty Bodies – in contrast with the impact the IACtHR had on anti-modern slavery efforts in Brazil through the case of *José Pereira*, which was identified as a key determinant by several in-country expert interviewees. The Brazilian case study highlights how the relevance and effectiveness (level of influence) of a determinant can vary across the range of anti-trafficking efforts, including in distinct areas of anti-trafficking law and policy. Regional judicial and quasi-judicial decisions have been significant in Brazil in influencing actions against trafficking for the purpose of forced labour, arguably compensating for a lack of interest and engagement with the phenomenon on the part of law-makers and domestic courts, but less significant in actions against other forms of trafficking (although some changes achieved through decisions on forced labour have had an impact across all types of exploitation, including the establishment of a task force of specialised prosecutors).

15.3.3 *Republic of Cyprus*

The Republic of Cyprus (RoC) enacted anti-trafficking legislation criminalising all major trafficking offences in 2014 through Law 60(I)/2014,[73] which transposes European Council Directives 2011/36/EU and 2004/81/EC. The 2014 legislation includes provisions on victim protection and the establishment of a national co-ordinator for anti-trafficking efforts and a multidisciplinary co-ordination group to provide more holistic insights into the State's and civil society's anti-trafficking initiatives and co-operation. Law 60(I)/2014 was amended in 2019,[74] to increase the maximum sentences for the crime of trafficking in persons. According to interviewees in the RoC, it was international pressure, including in the form of regional courts' case law (ECtHR), that led to the 2014 legislative

[72] Committee on the Rights of the Child (n 63) para 86.

[73] Law 60(I)/2014 on the Prevention and Combating of Trafficking in and Exploitation of Persons and Protection of Victims, available (in Greek) at www.ilo.org/dyn/natlex/docs/ELECTRONIC/100603/120777/F-1323565589/CYP100603%20Grk.pdf.

[74] Law 117(I)/2019 on the Prevention and Combating of Trafficking in and Exploitation of Persons and Protection of Victims (Amendment).

changes. Increasingly, they also argued, international standards are being used to draw attention to and demand better implementation of the law.

In *Rantsev v Cyprus and Russia*,[75] in assessing Cyprus' positive obligation to put in place an appropriate legislative and administrative framework, the ECtHR noted the applicant's complaint as to the inadequacy of Cypriot trafficking legislation but did not consider that the circumstances of the case gave rise to any concern in this regard. According to the Court, Cyprus' domestic anti-trafficking legislation reflected the provisions of the Palermo Protocol, prohibited trafficking and sexual exploitation, with consent providing no defence to the offence, and provided for a duty to protect trafficked persons, *inter alia*, through the appointment of a guardian.[76] The Court, however, noted, 'as regards the general legal and administrative framework and the adequacy of Cypriot immigration policy, a number of weaknesses',[77] finding that 'the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation'.[78] The ECtHR's reference to 'artiste visas' relates to the existence at the time of a visa system that allowed women to come to the country and work as dancers in cabarets – although it was widely acknowledged that many of these women were forced into prostitution. *Rantsev*, which was specifically concerned with trafficking for sexual exploitation purposes, has not only sensitised the RoC authorities to this type of trafficking and its victims (almost always women),[79] but also international organisations and local NGOs are more likely to place emphasis on this issue because of the RoC's history with it.

The ECtHR's finding was instrumental in abolishing the artiste visa. When the law changed, cabarets stopped being financially viable and most of them closed, which provides an example of how one anti-trafficking determinant (international standards) contributed to another (economic conditions) in a way that had a positive impact on anti-trafficking efforts. The standards communicated to the RoC, including in the form of a decision of the ECtHR, pressured the RoC to change the

[75] App no 25965/04 (ECtHR, 7 January 2010).
[76] Ibid., para 72.
[77] Ibid para 291.
[78] Ibid para 293.
[79] This was among the conclusions of the Ombudsman's Report on the Framework for the Preventing and Combatting of Human Trafficking in Cyprus (17 October 2013). The Ombudsman stated that: 'The *Rantsev* case provided the starting point for the development of a substantially improved legislative and institutional framework on human trafficking in the last decade' (our translation, para 125).

existing legislative framework and to undertake more consistent and genuine efforts to address human trafficking. The impact of international pressure – which also continued to be exerted in the form of international reporting from the United States Department of State, GRETA and UN Treaty Bodies[80] – on the enactment and monitoring of anti-trafficking legislation was acknowledged in interviews by key stakeholders working for the government. Yet this only appears to have had a superficial or transient effect: the decrease in sexual exploitation in clubs and cabarets has been followed by an increase in prostitution and sexual exploitation in private houses and flats.[81]

While there are no individual complaints before UN Treaty Bodies with respect to the RoC and trafficking, the 2017 Law on Societies and Institutions,[82] regulating, *inter alia*, the operations of civil society organisations, was subject to scrutiny through UN Special Procedures. In March 2021, several mandates, including the mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, addressed with concern the information received on the deteriorating environment for civil society organisations in Cyprus in the context of a 2020 amendment to the Law on Associations and Foundations and Other Related Issues. In particular, the letter was concerned with the alleged deregistration of Action for Support, Equality and Antiracism (KISA) from the Register of Associations and Foundations on 14 December 2020.[83] KISA is an NGO that, *inter alia*, provides support to migrants,

[80] See in particular, Committee against Torture, 'Concluding Observations on the Fourth Report of Cyprus' (16 June 2014) UN Doc CAT/C/CYP/CO/4, para 10: 'The State party should: . . . (c) Monitor and assess the new visa regime to prevent its potential misuse by traffickers and urgently activate the national referral mechanism.'

[81] A Constantinou, 'Is Crime Displacement Inevitable? Lessons from the Enforcement of Laws Against Prostitution-Related Human Trafficking in Cyprus' (2016) 13(2) *European Journal of Criminology* 214; Fondation Scelles, 'Cyprus' (2019) 3, available at http://fondationscelles.org/pdf/RM5/CYPRUS_Excerpt_5th_Global_Report_Fondation_SCELLES_2019.pdf. This remains the situation despite recommendations issued by UN Treaty Bodies, including CEDAW, Concluding Observations on the Eighth Periodic Report of Cyprus (4 July 2018) UN Doc CEDAW/C/CYP/CO/8, para 29; and Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Cyprus (28 October 2016) UN Doc E/C.12/CYP/CO/6, para 33.

[82] Law 104(I)/2017 on Societies and Institutions and Other Related Matters, available (as amended) at www.moi.gov.cy/moi/moi.nsf/pagede1a_gr/5D832FF3EA6E4154C225855F00377B3B/$file/The%20Societies%20law%20(English%20translation).pdf.

[83] Letter to the government of Cyprus from UN Special Rapporteurs (31 March 2021) AL CYP 1/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26312.

asylum seekers and trafficked persons. In addressing the government of Cyprus, the Special Rapporteurs drew attention to the Palermo Protocol, ratified by the RoC in 2003, which obliges State Parties to refrain from acts which would defeat or undermine the Protocol's objectives and purposes, including to prevent and combat trafficking in persons, to ensure assistance to trafficked persons and to provide effective remedies.

The Cypriot case study highlights the significant influence of regional judicial decisions in improving anti-trafficking efforts. Yet it also highlights that without a meaningful and holistic follow-up and without political will among State actors, the change(s) derived from such judicial decisions might be formalistic or superficial changes that conceal a reality of continued exploitation and weak responses in practice.

15.3.4 United Kingdom

Over the last decade, the United Kingdom's anti-trafficking response has undergone considerable development and progression. Dedicated statutes have been enacted: the Modern Slavery Act 2015 ('MSA 2015')[84] in England and Wales, the Human Trafficking and Exploitation (Scotland) Act 2015[85] and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.[86] These statutes have, *inter alia*, created the role of the Independent Anti-Slavery Commissioner[87] and introduced new provisions designed to tackle labour exploitation in supply chains,[88] to place the principle of non-prosecution of trafficked persons on a statutory footing[89] and to better support child victims through the appointment of Independent Child

[84] Modern Slavery Act 2015 (MSA 2015).
[85] Human Trafficking and Exploitation (Scotland) Act 2015.
[86] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.
[87] MSA 2015 (n 76) Part 4.
[88] Ibid. section 54, which applies to any commercial organisation (wherever incorporated or formed) with over £36m turnover that carries on a business, or part of a business, in any part of the United Kingdom. In 2021 the government launched a central public registry for modern slavery statements, available at https://modern-slavery-statement-registry.service.gov.uk/.
[89] MSA 2015 (n 76) section 45; Human Trafficking and Exploitation (Scotland) Act (n 77) section 8; and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) (n 78) section 22.

Trafficking Guardians.[90] These measures are supported by statutory and non-statutory guidance.[91] Central and devolved governments have also produced modern slavery strategies[92] and published annual reports.[93]

The ratification of international and regional legal frameworks, combined with the sustained efforts of civil society organisations and survivor networks and the role of regional and domestic courts in holding the government to account, have placed significant pressure on the United Kingdom's government to develop its anti-trafficking domestic law and policy. The adoption of the National Referral Mechanism (NRM) in 2009, for example, was a result of the obligations flowing from the ECAT. The ECAT was also instrumental in the ECtHR's analysis in the case of *CN v United Kingdom*,[94] where the core of the claim was whether the absence, at the time of the events, of a specific prohibition on servitude and forced labour was at the basis of the failure to properly investigate the applicant's complaints. Indeed, although domestic authorities did investigate the applicant's complaints, it was submitted that the investigation was deficient because the lack of specific legislation criminalising domestic servitude meant that it was not directed at determining whether or not she had been a victim of treatment contrary to Article 4 of

[90] MSA 2015 (n 76) section 48 (not yet commenced); Human Trafficking and Exploitation (Scotland) Act (n 77) section 11; Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) (n 78) section 21.

[91] Home Office, 'Modern Slavery: Statutory Guidance for England and Wales (under section 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland' (first published March 2020, latest version dated 14 June 2021); Home Office, 'Statutory Guidance: Transparency in Supply Chains: A Practical Guide' (first published in 2015, latest version dated 22 July 2021); Welsh Government, 'Code of Practice; Ethical Employment in Supply Chains' (2017); Welsh Government, 'Tackling Modern Slavery in Government Supply Chains; A Guide for Commercial and Procurement Professionals' (2019), Welsh Government, 'Tackling Modern Slavery in PPE Supply Chains': Practical Guides for Both PPE Suppliers and Public Bodies (April 2021); Home Office, 'Interim Guidance on Independent Child Trafficking Guardians' (May 2021) which should be read in conjunction with the Department for Education statutory guidance for local authorities, 'Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery' (November 2017).

[92] UK Modern Slavery Strategy (November 2014), Scottish Government Trafficking and Exploitation Strategy (2017); Northern Ireland's Modern Slavery Strategies.

[93] UK Annual Reports on Modern Slavery and Scottish Government Annual Progress Reports on Trafficking and Exploitation Strategy.

[94] App No 4239/08 (ECtHR, 13 November 2012).

the European Convention on Human Rights (ECHR).[95] The ECtHR found, similar to *Siliadin v France*,[96] that the offences existing at the time of the events (trafficking, false imprisonment, kidnapping, grievous bodily harm, assault, battery, blackmail and harassment) were 'inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention'.[97] In other words, according to the Court, 'the criminal law in force at the material time did not afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention'.[98] Although section 71 of the Coroners and Justice Act 2009 was enacted on 6 April 2010,[99] hence before the decision of the ECtHR in 2012, the 2013 Draft Modern Slavery Bill ECHR Memorandum confirms that the 'offence in section 71 was enacted to addresses the criticisms of the United Kingdom in the

[95] Article 4 of the ECHR provides that:

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term 'forced or compulsory labour' shall not include:
   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention;
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
   (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
   (d) any work or service which forms part of normal civic obligations.

[96] App no 73316/01 (ECtHR, 26 July 2005).

[97] *CN v United Kingdom* App No 4239/08 (ECtHR, 13 November 2012) para 76.

[98] Ibid., para 77.

[99] This Article provided as follows:

Slavery, servitude and forced or compulsory labour

(1) A person (D) commits an offence if –
   (a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or
   (b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.
(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

https://doi.org/10.1017/9781009373913.022 Published online by Cambridge University Press

[ECtHR's] *CN v UK*'.[100] This is a situation where the filing of the case, highlighting deficiency in the law and policy, was enough to engage positive change.

Section 71 of the Coroners and Justice Act 2009 is not the only development in anti-trafficking efforts heavily influenced by decisions (and processes) of courts, tribunals or non-judicial bodies in the United Kingdom. Lawyers and the courts, in applying regional legal frameworks to enforce victim's rights enshrined in ECAT, ultimately compelled government action in several other instances. Domestic courts have also played an important role in shaping law and policy. The following are non-exhaustive examples of significant case law: *Atamewan v Secretary of State for the Home Department* led to amended guidance ensuring the proper identification of historic victims of trafficking;[101] *L v Children's Commissioner for England* resulted in new Crown Prosecution Service guidance on the non-punishment of victims provisions in ECAT and the EU Directive;[102] *Hounga v Allen* enabled some employment law rights to be applicable to irregular migrants insofar as the Supreme Court held that the doctrine of illegality arising from the employment of an 'illegal migrant' did not defeat a claim of employment discrimination brought by the same trafficked migrant worker;[103] in *Benkharbouche and Janah* the Supreme Court found the application of State immunity to employment claims brought by members of embassy staff in the United Kingdom to be incompatible with Article 6 of the ECHR, and led to the disapplication of those provisions to claims founded in EU law;[104] in *PK (Ghana) v Secretary of State for the Home Department*, the Court declared the government's policy guidance relating to the grant of discretionary leave for victims of trafficking to be unlawful for failure to give effect to the objectives of Article 14(1)(a) of the ECAT, and emphasised that new guidance should make clear that a renewal residence permit should be issued to a trafficked person where their stay is necessary, through a test that is simply one of necessity – meaning that there is no additional

[100] Home Office, 'Draft Modern Slavery Bill: European Convention on Human Rights Memorandum' (2013) para 6.
[101] *Atamewan v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin).
[102] *L v Children's Commissioner for England* [2013] EWCA Crim 991.
[103] *Hounga v Allen* [2014] UKSC 47.
[104] *Secretary of State for Foreign and Commonwealth Affairs v Benkharbouche and Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62.

requirement for the individual to show compelling circumstances;[105] in *K and AM v Secretary of State for the Home Department* the Court found the reduction of 42 per cent in subsistence rates for trafficked persons to be unlawful, and an employment contract change which took effect on 1 March 2018 was quashed;[106] and the case of *NN v Secretary of State for the Home Department* resulted in the introduction of a new process and guidance to assess the support needs of survivors beyond the previous NRM exit timescales.[107]

As in the case of the RoC, while there are no individual complaints before UN Treaty Bodies, the UN Special Procedures have engaged with the UK Government on a number of occasions with respect to anti-trafficking efforts.[108] In May 2021, for example, the Special Rapporteurs on Contemporary Forms of Slavery, on Human Rights of Migrants and on Trafficking in Persons addressed concerns around changes to the overseas domestic worker visa and the Immigration Act.[109] Under the

[105] *PK (Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98. Under the new guidance, '[in] seeking to [decide whether a grant of leave is necessary,] decision makers should primarily: assess whether a grant of leave to a recognised victim is necessary for the UK to meet its objective under the [ECAT] – to provide protection and assistance to that victim, owing to their personal situation'. See Home Office, 'Discretionary Leave Considerations for Victims of Modern Slavery Version 4.0' (2020) 6.

[106] *K and AM v Secretary of State for the Home Department* [2018] EWHC 2951.

[107] *NN v Secretary of State for the Home Department* (n 14). See also Home Office, 'Recovery Needs Assessment Guidance' (2019).

[108] There has only been limited engagement of UN Treaty Bodies, e.g., Committee against Torture, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (7 June 2019) UN Doc CAT/C/GBR/CO/6, paras 58–59: 'The State party should: (a) Enhance its efforts to investigate claims of human trafficking and prosecute perpetrators and ensure that victims of trafficking obtain compensation, including by considering creating a civil remedy for victims of trafficking; (b) Ensure access to sufficient protection and support for all victims of trafficking and, in particular, ensure that the State party's establishment of a child trafficking protection fund results in an improvement in the availability of specialist care and support for child victims of trafficking'; and CEDAW, 'Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (26 February 2019) UN Doc CEDAW/C/GBR/CO/8, para 34: 'The Committee recommends that the State party: (a) Ensure that the definition of trafficking in persons in its national legislation is in line with the internationally agreed definition set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children . . .; (b) Adopt a comprehensive national strategy to combat trafficking in women and girls . . .; (c) Continue to improve the national referral mechanism . . . '.

[109] Letter to the government of the United Kingdom from UN Special Rapporteurs (27 May 2021) AL GBR 6/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26423.

amended Immigration Rules, all migrant domestic workers were granted the option to change employer, but only for the remaining term of their six-month visa, which was non-renewable. Migrant domestic workers found to be trafficked were granted the possibility of applying for limited leave to remain in the United Kingdom for up to two years, with permission to work as domestic workers. In its response to the letter, the government acknowledged that 'the UK gives careful considerations to all recommendations by human rights bodies' and that, on the basis of such recommendations, 'officials in the Home Office are in the process of developing proposals to reform the [tied visa] route from next year'.[110]

UN Special Procedures also engaged in March 2021 with the alleged role of *Omegle*, a live video-chat website based in the United States, in facilitating self-generated and live video-streamed sexual activities and material online that depicts or otherwise represents children appearing to engage in sexually explicit conduct.[111] In June 2021, the government provided its response, mentioning the intention 'to introduce legislation on tackling online harms, including child sexual abuse' and the publication of draft legislation in May 2021 (currently under parliamentary discussion).[112]

It is also worth mentioning that in January 2021 several mandates issued a letter to, *inter alia*, the UK Government with respect to the situation of the Al-Hol and Roj camps located in north-east Syria.[113] The letter called on States to be particularly mindful of 'the potential for coercion, co-opting, grooming, trafficking, enslavement and sexual exploitation when examining [womens' and girls'] agency, or lack thereof' in the context of their association with terrorist groups. The letter further emphasised the positive obligation on States to identify

[110] UK Mission Geneva, Note Verbale No 205 (28 July 2021), available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36472.

[111] Letter to the government of the United Kingdom from UN Special Rapporteurs (30 March 2021) AL GBR 3/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26076.

[112] See Draft Online Safety Bill, available at www.gov.uk/government/publications/draft-online-safety-bill.

[113] Letter to the government of the United Kingdom from UN Special Rapporteurs (26 January 2021) AL GBR 2/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25972. In the past, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Combatting Terrorism also intervened in the Shamima Begum case. Both interventions are available at www.ohchr.org/EN/Issues/Terrorism/Pages/AmicusBriefsExpertTestimony.aspx.

trafficked persons, as 'a failure to identify a trafficked person correctly is likely to result in a further denial of that person's right'. Although the government only partially agreed with the assertions made by the Special Rapporteurs, its response provided justifications of existing practices and policies that allow for a better understanding of, and arguably provide for better counter-argumentation against, such practices and policies. The engagement by the government with these assertions also reflects the weight given to the same by the government and their potential for influencing government discussions.

The UK case study provides, amongst the four case studies presented in this chapter, the most complex and comprehensive picture of how judicial, quasi-judicial and specialised non-judicial bodies influence anti-trafficking efforts, alone or in conjunction with one another. Decisions of judicial bodies tend to result in tangible changes in anti-trafficking efforts while the engagement of specialised non-judicial bodies has been instrumental in opening and fostering dialogue with State actors on activities or developments – in policy and in law – considered at risk, or as producing risks, of trafficking and exploitation.

15.4 Conclusion

In all four case studies, decisions of judicial bodies – either domestic or regional – have played a significant role in advancing anti-trafficking efforts and protecting trafficked persons' rights. The jurisprudence of regional human rights courts has influenced both government actions and domestic courts' interpretation of anti-trafficking law, as well as human rights law provisions relevant to anti-trafficking efforts. They have resulted in the introduction of new measures, the withdrawal of existing measures and more human rights-conformant interpretations of existing legislation. Quasi-judicial human rights bodies, including the UN Treaty Bodies, are not yet consistently engaged in human trafficking cases and – in their non-judicial role, do not consistently engage with anti-trafficking concerns during periodic reviews. Yet the potential of their impact on the improvement of anti-trafficking efforts should not be ignored. Indeed, quasi-judicial bodies can be viewed as contributors to international lawmaking – influencing the interpretation, clarification and refinement of State duties and responsibilities.[114] While courts and

[114] See e.g., M Tignino, 'Quasi-Judicial Bodies' in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar

quasi-judicial human rights bodies tend, by their very nature, to be reactive in nature, and the burden of initiating proceedings remains with individuals whose rights have been violated, specialised non-judicial bodies, including UN Special Procedures and Treaty Bodies in their reporting function, are, and can be, more proactive in nature. The engagement of the UN Special Rapporteurs, both in terms of country visits and thematic reports as well as through letters, has increased sharply in recent years. While responses from governments to communications of Special Rapporteurs might be circumstantial and may be labelled 'empty promises', our research has shown that the engagement that governments need to show – and for which they could be held accountable, at least in terms of international reputation – is a meaningful element in the development of anti-trafficking efforts.[115]

The analysis of decisions and observations in different contexts has shown the inter-dependence of judicial, quasi-judicial and specialised non-judicial bodies, which rely on each other – insofar as interpretation and standards are concerned – to safeguard the rights of trafficked persons and steer governments to comply with their international, regional and domestic obligations. It has also shown that the variety in the type of external pressure applied – for example, binding judgments and 'soft' pressure – can be used strategically to promote change and to ensure that change is sustainable. Because determinants of anti-trafficking efforts, understood as the factors shaping government responses, do not work in isolation, but rather are part of a broader process, it would be wrong to assume that decisions and observations of

Publishing 2016); BG Ramcharan, *United Nations Protection of Humanity and Its Habitat: A New International Law of Security and Protection* (Brill 2016) 47–53.

[115] This finding is consistent with research in other areas including in the context of economic, social and cultural rights (see C Golay, C Mahon and I Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *The International Journal of Human Rights* 299); country-specific mandates (see M Montoya and M Limon, 'History Shows that UN Country-Specific Special Procedures are Tools for Positive Change' (2021) OpenGlobalRights, available at www.openglobalrights.org/history-shows-that-un-country-specific-special-procedures-are-tools-for-positive-change); human rights and development (see I Biglino, C Golay and I Truscan, 'The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue' (2012) 9 (17) *SUR Revista Internacional de Direitos Humanos* 15; and human rights broadly (see I Nifosi Sutton, *The UN Special Procedures in the Field of Human Rights* (Intersentia 2006)).

judicial, quasi-judicial and specialised non-judicial bodies can in isolation yield the improved political will and capacity in national governments to address trafficking in persons. Yet, as demonstrated by the cases of Argentina, Brazil, the RoC and the United Kingdom, they are external points of pressure which can contribute to positive change.