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Trafficking in Human Beings

Case law on trafficking in human beings 2009-2012

An analysis

Colophon

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Acronyms

A-G	Advocate-General
Art.	Article
BNRM	Office of the National Rapporteur on Trafficking in Human Beings
BW	Dutch Civil Code
CJIB	Central Fine Collection Agency
CoMensha	Coordination Centre for Trafficking in Human Beings
c.s.	<i>cum suis</i>
DCC	Dutch Criminal Code
EC	European Commission
ECPAT	End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes
ECRIS	European Criminal Record Information System
EU	European Union
LJN	National Case Law Number
LOVS	National Consultative Body for Presidents of Criminal Sectors of Courts
MTV	Mobile Security Monitoring
NJCM	Dutch Section of the International Commission of Jurists
NRM	National Rapporteur on Trafficking in Human Beings
NRM1	First Report of the National Rapporteur on Trafficking in Human Beings
NRM3	Third Report of the National Rapporteur on Trafficking in Human Beings
NRM4	Fourth Report of the National Rapporteur on Trafficking in Human Beings
NRM5	Fifth Report of the National Rapporteur on Trafficking in Human Beings
NRM6	Sixth Report of the National Rapporteur on Trafficking in Human Beings
NRM7	Seventh Report of the National Rapporteur on Trafficking in Human Beings
NRM8	Eighth Report of the National Rapporteur on Trafficking in Human Beings
NRM9	Ninth Report of the National Rapporteur on Trafficking in Human Beings
OSCE	Organization for Security and Cooperation in Europe
OJ	Official Journal of the European Communities
PPS	Public Prosecution Service
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
WODC	Scientific Research and Documentation Centre

Foreword

Since my appointment as the National Rapporteur on Trafficking in Human Beings in 2006, I have followed the judgments rendered in human trafficking cases with particular interest. This will come as no surprise given that I have spent my entire working life in the administration of justice. In my first report (NRM5), I discussed the problems of interpretation faced by judges in applying Article 273f of the Dutch Criminal Code (DCC) because of the complexity of that article. That prompted me at the time to make recommendations concerning specialisation by judges and training for members of the judiciary. Following an extensive study of the case law in 2009, I repeated those recommendations, adding the further observation that there was not enough consistency in sentencing.

In light of the findings of the study in 2009, I decided to repeat the analysis of the case law. In addition to a quantitative study of judgments rendered in 2010, this study contains a qualitative evaluation of the judgments rendered in the last three years. This study again gives cause for concern - concern about the handling and disposition of human trafficking cases by the courts. It is unacceptable that out of a total 138 judgments in first instance, a number led to acquittals or declarations that the indictment was null and void solely because of insufficient knowledge of the law, the legislative history, international instruments and judgments of higher courts.

Greater priority has been given to combating human trafficking in recent years. A lot is being done and a great deal has already been accomplished. However, human trafficking itself remains difficult to suppress. Victims find it difficult to report trafficking in human beings for various reasons, but even if they do report an offence, the charges are often difficult to prove. This study does not give a value judgment on the evidence in the cases that were analysed, which is impossible to do without having studied the case file and knowing what was said during the hearing. What this study does address is how the manner in which the indictment is drafted and the way in which the charges are formulated can make a difference to the outcome of a case. It is also concerned with the way in which judges interpret the facts that they find to have been proven and the extent to which they follow established legal frameworks in arriving at their findings.

The article of the Dutch Criminal Code relating to human trafficking is a complex provision. It contains various elements, each of which has to be weighed up differently. The article is the result of developments in national and international law, which produces a degree of complexity that is not always recognised when cases are being heard. There are numerous pitfalls that regularly lead to disparity in the assessment of the legal consequences. Human trafficking outside the sex industry was also only criminalised quite recently. The point at which poor working conditions tip over into exploitation remains a question that can only be answered in the context of all the circumstances of a specific case. Proceedings

of an experimental nature could help to define the boundaries of the concept of human trafficking, and it is pleasing to note that those limits are currently being explored in the case law. Obviously, this will increase the workload not only of the Public Prosecution Service (PPS), but also of the courts.

Without specialisation and proper training in this field, there is a significant risk that judges will be unable to avoid the pitfalls. My analysis has revealed cases where the indictment would not have been declared null and void or where suspects would not have been acquitted if the judges concerned had possessed the deeper knowledge of the subject matter that is required to handle these complex cases. Errors were occasionally rectified on appeal, but that is not sufficient, particularly when the suspects are often from other countries and have no permanent place of residence in the Netherlands. The case files are voluminous; time is short: specific knowledge must be part of the basic equipment of the judges who hear these cases. This is precisely why I consider specialisation and training in human trafficking for criminal judges to be so important. I am therefore delighted that at its plenary meeting on 21 September 2012, the National Consultative Body for Presidents of Criminal Sectors of Courts (LOVS) adopted a number of measures relating to specialisation and training for judges hearing human trafficking cases.

In a judgment on 29 April 2010, Rotterdam District Court, sitting in Leeuwarden, found that human trafficking is *starting to become* a worldwide problem. It is not 'starting to become', it is a worldwide problem that undermines society and the urgency of which is widely felt. That urgency lies in the large number of young women from Central and Eastern Europe who are exploited in the sex industry in the Netherlands, as well as the unremitting number of underage girls, still children, some of whom have run away from home or have been staying in juvenile care facilities, who are manipulated and prepared for prostitution and the fact that it is still not possible to prevent that from happening. The urgency is further reinforced by the growing number of men and women who are exploited at work, in what amounts to modern forms of slavery. Dealing with these problems does not stop at prosecution.

Various individuals and organisations helped in the writing of this report. BNRM is very grateful to the LOVS, the Council for the Judiciary, the PPS, the Central Fine Collection Agency (CJIB) and the Violent Offences Compensation Fund for their cooperation and for the information they provided.

I would especially like to thank the employees, former employees and interns of my office for their valuable contributions to the production of this report.

C.E. Dettmeijer-Vermeulen

National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children

A study of the case law on human trafficking in the period from 2007 up to the middle of 2009 showed that courts sometimes take different approaches in addressing various legal issues and that they are inconsistent in their assessment of the context of violence, force, deception and the possibility for victims to escape from their situation. The study also highlighted disparity in both the sentences demanded and the sentences imposed in human trafficking cases.¹ The findings in that study led to a number of recommendations relating to specialisation by judges and the recommendation to develop orientation points to promote consistency in sentencing.²

Those recommendations have not yet been adopted. Nevertheless, they have been the subject of debate within the judiciary during the last three years. For example, the feasibility of formulating orientation points has been explored³, the number of judges attending courses on human trafficking has increased⁴ and, in the context of the act to redraw the division of court districts, the Judicial Map (Revision) Act (*Wet herziening gerechtelijke kaart*⁵), proposals were made for concentration of cases to be heard by specialised judges.⁶ Legal practitioners have also indicated that the judiciary is devoting greater attention to human trafficking cases, which is being translated into a greater focus on concentration, specialisation and training. These aspects are equally important for the PPS, which, in 2009, appointed dedicated regional public prosecutors for human trafficking cases⁷ who had to meet certain requirements in terms of training. However, although they do promote and coordinate activities in this field in their regional offices, those public prosecutors do not handle all the human trafficking cases. These aspects therefore also remain relevant for the PPS and must continue to receive constant attention.

1 These and other results of the previous study are presented in NRM7, Chapter 11 (Case law on exploitation in the sex industry) and Chapter 12.6.2, which can be found at www.dutchrapporteur.nl.

2 NRM7, recommendations 39 and 40.

3 See §6.1 (Guidelines and orientation points).

4 Since 2010, 27 judges have followed the advanced course on trafficking in human beings at the Dutch Training and Study Centre for the Judiciary (SSR). Written information from the SSR, 17 September 2012.

5 Act of 12 July 2012 amending the Judiciary Territorial Division Act [*Wet op de rechterlijke indeling*], the Organisation and Administration of Courts Act [*Wet op de rechterlijke organisatie*] and various other laws in connection with the reduction of the number of districts and subdistricts (Judicial Map (Revision) Act) [*Wet herziening gerechtelijke kaart*], *Bulletin of Acts, Orders and Decrees*. 2012, 313.

6 The Judicial Map (Revision) Act entered into force on 1 January 2013. *Bulletin of Acts, Orders and Decrees*. 2012, 314.

7 NRM7, p. 371 ff.

The earlier study of the case law on human trafficking has been repeated, and the findings are presented in this report. The quantitative study covers all judgments (in first instance) in human trafficking cases in 2010, and is supplemented with qualitative research into judgments rendered since the publication of NRM7 in 2009.⁸ The range of subjects studied include the method of formulating an indictment, the reasons given by the courts for a conviction or acquittal and their findings of fact, as well as the congruence and consistency of the judgments. Consideration is given to a number of pitfalls in the application of the relevant article, including the meaning of exploitation, the role of coercion and free will, and the difference in the frame of reference between sexual exploitation and other forms of exploitation.⁹ The sentences demanded, the actual sentencing and compensation are other aspects that are addressed at length. Like the previous study, this report also shows that legal issues are not always assessed uniformly and that the factors that are taken into account in the sentence demanded, the sentence imposed and in awarding compensation are also not applied consistently. It is not yet possible to say with certainty to what extent the growing attention by the judiciary to concentration of cases, specialisation and training has already or will shortly bring about a change in this.

Concentration

The Judicial Map (Revision) Act should lead to a certain concentration of human trafficking cases. From 1 January 2013, the number of courts of first instance will be reduced to ten.¹⁰ The LOVS sees this as an opportunity to assign human trafficking cases to the principal seat of the 10 (or 11) newly created courts from 1 January 2013.¹¹ The PPS' National Office and Office for Financial, Economic and Environmental Offences will also bring human trafficking cases before four courts: the District Courts of Rotterdam, Amsterdam, Oost-Brabant (with its seat in Den Bosch) and Oost-Nederland (with its seat in Zwolle).¹² It is questionable whether this latter assignment of cases will bring about any fundamental change with respect to human trafficking cases. Six of the 138 judgments in 2010 were rendered in cases brought by the Office for Financial, Economic and Environmental Offences¹³ and also no more than six in cases brought by the National Office.¹⁴

8 With a few exceptions, up until 1 August 2012.

9 The explanation of the research methods can be found in Appendix 2.

10 During the debate on the Judicial Map (Revision) Act, the Senate adopted a motion by Senator Beuving et al. asking the government, in brief, to quickly table a bill that would create the district courts of Gelderland and Overijssel, *Parliamentary Documents I* 2011/12, 32 891 G. This would mean that there will be eleven district courts.

11 The intention is to concentrate human trafficking cases in a single back-office in each court; in a wider context, the LOVS will also discuss whether human trafficking cases should in time be heard by a smaller number of courts. Written information from LOVS, 21 September 2012.

12 Agreements between the Board of Procurators-General and the Council for the Judiciary on the assignment of cases from the National Office and the Office for Financial, Economic and Environmental Offences, appendix to *Parliamentary Documents I* 2011/12, 32 891 E.

13 The Hague District Court: one investigation, four judgments; Roermond District Court: one investigation, two judgments.

14 Rotterdam District Court: two investigations, four judgments; Leeuwarden District Court: one investigation, two judgments.

Our review of the assignment of human trafficking cases to each district court¹⁵ and to each judge during 2010 shows that the 138 judgments in first instance in human trafficking cases involved 111 cases of sexual exploitation and 29 cases of other forms of exploitation.¹⁶ The district courts in Breda, Maastricht, Zutphen and Middelburg did not hear a single human trafficking case in 2010. Interestingly, the district courts in Rotterdam and Amsterdam heard no cases involving other forms of exploitation in 2010, while The Hague District Court rendered more than half of the 29 judgments in cases of that type in that year. These three courts together accounted for more than half of all human trafficking cases in 2010.¹⁷ The ratio was different in 2011, when these three courts accounted for 29% of all judgments in human trafficking cases involving both sexual and other forms of exploitation.¹⁸

The 138 judgments in human trafficking cases encompassed 71 different investigations and involved 166 different judges. Table 1 shows how often individual judges dealt with a human trafficking investigation.¹⁹

Table 1 Experience of judges (2010)

Number of human trafficking investigations dealt with in 2010	Number of different judges	
	N	%
1	128	77%
2	30	18%
3	6	4%
4	2	1%
Total	166	100%

As the table shows, more than three-quarters (77%) of the judges concerned dealt with just a single human trafficking investigation in 2010. Eight judges (5%) disposed of at least three different human trafficking investigations, accounting for 30 separate judgments; almost a quarter (22%) of all judgments rendered in 2010.²⁰ Not a single judge dealt with more than four different human trafficking investigations in 2010.

15 See Appendix 3, Table A1.2.

16 There is an overlap of two judgments in which both sexual and another form of exploitation were charged.

17 The District Courts in Amsterdam, Rotterdam and The Hague rendered twenty-two, twenty and sixteen judgments, respectively, with regard to sexual exploitation. The Hague District Court therefore dealt with fewer than a quarter ($15+16=31=22\%$ of the total of 138 judgments) of all human trafficking cases in 2010.

18 N: 129, according to PPS data, reference date 1 April 2012; see NRM9 (not yet published).

19 Naturally, some reservations have to be expressed. For example, the review only covers 2010. Experience gained by judges in preceding years is ignored here.

20 Some judgments were rendered by more than one judge who had dealt with at least three different human trafficking investigations in 2010.

Specialisation

Human trafficking cases have been treated as an area of specialisation for some time in the PPS;²¹ however, that does not yet apply for the judiciary. It remains to be seen whether the concentration as a result of the Judicial Map (Revision) Act will also automatically lead to specialisation in the judiciary. The example of the handling of human trafficking cases by the Leeuwarden Court of Appeal shows that even specialisation within a single court cannot be taken for granted. In 2011, the Court of Appeal rendered 15 judgments in 10 human trafficking cases, each involving one, two or three defendants. Ten of these judgments were rendered by four judges, thus safeguarding their combined experience. The other five judgments were rendered by 15 other judges; the judges in each of these combinations heard just one human trafficking case in 2011. Concentration *within* the court is also essential for specialisation and to build up expertise. Meanwhile, agreement has been reached within the LOVS that human trafficking cases will be handled by a limited number of judges in each court.²²

Training

Preserving knowledge and expertise is an important topic within the PPS.²³ The LOVS has also recently reached agreement that courts will ensure that the judges and legal staff possess sufficient knowledge of the subject to handle human trafficking cases properly.²⁴ This study devotes a lot of attention to factors that, correctly or otherwise, influence sentencing.²⁵ The treatment of victims is also covered. Victims of this offence are generally traumatised; the criminal proceedings should not lead to their re-victimisation. This is another aspect that should be covered in the training and specialisation.²⁶

Consistent sentencing

The PPS drew up Instructions on Human Trafficking concerning the sentences to be demanded in cases involving sexual exploitation in 2010 and for other forms of exploitation in 2012.²⁷ Discussions in the judiciary have not yet led to the formulation of orientation points. This study shows that the recommendation to formulate orientation points has lost none of its relevance, and the LOVS's Committee on Legal Uniformity is currently exploring the possibility of formulating orientation points for sentencing.²⁸ A similar investigation that was carried out earlier did not lead to the adoption of principles for sentencing, and it is not entirely clear why this option first has to be investigated again. The existence of the PPS's Instructions on Human Trafficking already shows that it is possible.

21 NRM7, p. 371 ff.

22 Written information from LOVS, 21 September 2012.

23 On 11 September 2009, the 'Manual on the approach to human trafficking' was presented. It is intended to help public prosecutors in preparing and handling human trafficking cases at trial, NRM7 p. 403. The manual is being revised at the time of writing.

24 The agreement was made at the plenary session on 21 September 2012. Written information from LOVS, 21 September 2012.

25 See §6.3 (Determination of sentences).

26 See §7.5 (Victims in the criminal process and the non-punishment principle).

27 See §6.1 (Guidelines and orientation points).

28 Written information on behalf of the chairman of LOVS, 31 August 2012; see also §6.1 (Guidelines and orientation points).

'Judge mild for pimps'?

In July 2012, the newspaper *Het Parool* published an article about a complaint by the public prosecutor for human trafficking in Amsterdam that the sentences imposed by Amsterdam District Court on pimps who were guilty of human trafficking were among the lowest in the Netherlands.²⁹ "The sentences I demand are systematically halved in Amsterdam. I can be happy if I can secure a sentence of two years for human trafficking," says the public prosecutor. An analysis by BNRM shows that in the cases in which a defendant was convicted solely of human trafficking relating to sexual exploitation and in which at least a partially unconditional prison sentence was imposed (in total 37 judgments), the Amsterdam District Court imposed lighter sentences than other district courts in 2010. Whereas other courts imposed an average unconditional prison sentence of 436.8 days,³⁰ the average sentence imposed by Amsterdam District Court was 215.7 days.³¹ The Amsterdam public prosecutor's complaint was therefore not entirely unfounded.

Compensation

Finally, this study also discusses the issue of compensation for victims. Here, too, there is no consistency in the factors that play a role in decisions on whether to award the claim of an aggrieved party. Neither the grounds for awarding compensation nor the methods used to calculate damages are sufficiently consistent to produce uniformity. The Committee on Legal Uniformity could perhaps include this point in its investigation. The fact that the claim has to be assessed under civil law is interpreted differently.³² In addition, the remedy of compensation can also be imposed *ex officio* by the court, as part of the package of sanctions, even without the need for a claim by an aggrieved party.³³ The courts did not use this power in any human trafficking case in 2010.³⁴

Not only criminal law

This study is concerned with the application of Article 273f DCC, and therefore with criminal law. However, human trafficking touches on other areas of law, including administrative law, immigration law,

29 'Amsterdamse District Court te mild van pooiers' [Amsterdam District Court too mild for pimps], *Het Parool*, 7 July 2012, available at: <http://www.parool.nl/parool/nl/4/AMSTERDAM/article/detail/3283320/2012/07/07/Amsterdamse-rechtbank-te-mild-van-pooiers.dhtml> (last accessed on 24 August 2012).

30 N: 32, SD: 421.0.

31 N: 5, SD: 53.0. One of these five cases involved a conviction solely under Art. 273f (1), subsection 3. The other four cases involved convictions under subsections 1, 3, 4, 6 and 9 of Art. 273f (1) DCC. In all of these cases, the victims were non-Dutch nationals. There was scarcely any difference in the unconditional part of the prison sentences imposed in these cases. The distribution between convictions solely under subsection 3 and for offences under other subsections is not much different for Amsterdam District Court than at national level (Amsterdam: one in five (20%) compared with seven of 32 (22%). See also *Het Parool*, 9 July 2012, letter from C.M.T.Eradus.

32 There are recommendations for the judiciary for the handling of aggrieved party claims but they do not appear to be applied consistently in human trafficking cases, *Aanbevelingen civiele vordering en schadevergoedingsmaatregel m.b.t. de Wet Terwee and de Wet ter versterking of the positie van het slachtoffer*, October 2011, <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-strafrecht/Documents/Wet-Terwee.pdf> (accessed on 23 September 2012).

33 Art. 36f DCC.

34 §8.4.2 (Compensation orders imposed *ex officio*).

children's law, civil law and labour law. The relevant victims are entitled to a (temporary) residence permit; brothels can be closed and other administrative measures can be taken; an underage victim who plays truant from school under the influence of a loverboy can invoke the non-punishment principle and can also be placed in care; and victims of exploitation outside the sex industry can, in addition to submitting a claim as an aggrieved party during the criminal trial, also separately claim payment of arrears of salary.

Pilot project by The Hague District Court

In the spring of 2011, The Hague District Court launched a pilot project, in association with BNRM and the PPS, with the aim of creating an intersectoral working group on human trafficking because of the highly specialised nature of human trafficking cases. The pretext was the so-called *Mehak* case,³⁵ in which one of the victims of human trafficking, a 19-year-old woman, was also the perpetrator of a violent crime. The woman was convicted by the criminal section of the district court and recognised as a victim; her immigration law procedures were handled by the administrative law sector of the same court and she submitted her claim for unpaid salary to the court's sub-district sector. The objective of the research group is to promote the quality of the interdisciplinary administration of justice and legal uniformity within the Criminal Law, Family and Juvenile Law, Administrative Law and Sub-district sectors in the area of human trafficking. The working group has its own section on the district court's website and serves as a helpdesk.³⁶

This report

The judiciary has devoted more attention to developing expertise since the publication of NRM7. It is encouraging that the number of judges following courses on human trafficking is now growing, and that more public prosecutors are also following human trafficking courses. This report attempts to illuminate potential pitfalls on the basis of a discussion of the case law and so provide guidance for the criminal justice system.

35 The Hague District Court 14 December 2007, *LJN*: BC1761; see NRM7, pp. 229-231 and 509-511.

36 Written information from the chairman of the intersectoral working group, 7 September 2012.

Human trafficking involves exploiting, or the intention to exploit, persons in the performance of work and services. The purpose of human trafficking can also be the removal of organs. Human trafficking is a serious violation of human rights and human dignity and constitutes an infringement of a person's liberty. These are also the terms the legislature has used to describe the offence of human trafficking:

“Briefly, human trafficking involves forcing – in the widest sense – people to make themselves available to perform (sexual) services or to make their organs available. (...) Human trafficking is exploitation or the intention to exploit. With the criminalisation of human trafficking, the interests of the individual always come first. Those interests are the preservation of his or her physical and mental integrity and personal liberty. The State must provide protection under criminal law against impairment of that right to personal integrity and liberty.”¹

The legislature chose to adopt a single provision for human trafficking, in which many different forms of conduct are criminalised. Article 273f of the Dutch Criminal Code (DCC) makes a distinction between the nature of different types of work and services and between adult and underage victims. The large number of subsections makes the provision the longest article in the Criminal Code. Most of the terms are taken from the international instruments on which the human trafficking provision is based, but they are not all explained in the law or the legislative history. For the interpretation of the article, therefore, it is important to consult international legislation as well as Dutch legal sources. For a proper understanding of the article, the legislative history and the case law on the precursors to Article 273f DCC, which were designed to suppress exploitation in prostitution and in the performance of other sexual services, are still relevant.²

2.1 Legislative history

The first legal provision relating to human trafficking in the Netherlands, Article 250ter (old) DCC, dates from 1911 and referred to trafficking in women for the purposes of exploitation in prostitution. The Dutch legislation pertaining to human trafficking has been repeatedly expanded over time, always following international developments. In 1927, the criminal provision was expanded to include trafficking

¹ *Parliamentary Documents II* 2003/04, 29 291, no. 3, p. 2.

² For the history of the adoption of Art. 250a (old) DCC, see *Parliamentary Documents II* 1988/89, 21 027. The case law on this provision is also relevant: Supreme Court 27 October 2009, LJN: BI7097, consideration 2.4.1 ff.

in underage boys. In 1994, the term was changed to the gender-neutral ‘human trafficking’. Only then did the article also relate to exploitation of adult men – in prostitution. In 2000, Article 250ter DCC was replaced by Article 250a DCC, and profiting from human trafficking was also made a criminal offence. That was also the year in which the Netherlands abolished the general ban on brothels. Since 1 October 2000, the exploitation of voluntary prostitution by persons aged 18 or older has no longer been a criminal offence in the Netherlands. In 2002, the human trafficking provision was expanded to embrace exploitation in the sex industry in general (performing sexual acts *with or for* a third party for remuneration) and therefore no longer related exclusively to prostitution (*with a third party*).³

Human trafficking and prostitution policy

The scope and effect of the criminalisation of human trafficking in the sex industry are closely entangled with the Netherlands’ policy towards prostitution.⁴ Since the end of the 19th century Dutch government policy has moved successively from regulation to criminalisation to toleration and back to regulation, according to Alink and Wiarda: “These evolving social and political views about (the exploitation of) prostitution have been reflected in the criminal law on human trafficking. For example, human trafficking originally related solely to trafficking for the purposes of prostitution, and initially only to trafficking in women. Only much later was the definition of human trafficking expanded, under the influence of international developments”.⁵ The prospective future policy on prostitution is contained in the Bill to Regulate Prostitution and Combat Abuses in the Sex Industry,⁶ which is currently before the Senate, which was due to hold a plenary debate on the bill in October 2012.

The basis for the current law on human trafficking was laid in 2005 with the entry into force of Article 273a DCC on 1 January of that year.⁷ The new provision significantly expanded the range of acts that constituted human trafficking offences to include other forms of exploitation in the area of work and services and the forced removal of organs, in addition to sexual exploitation. Unlike Article 250a (old) DCC, the new article was inserted under the Title ‘Offences against Personal Liberty’, rather than the Title ‘Offences against Public Morals’, thus emphasising the nature of the criminal offence: it is not the sector in which exploitation occurs but the fact that the exploitation involves a violation of the victim’s personal liberty that makes the act a crime.⁸ The terms of Article 250a (old) DCC were replicated (although not literally) in Article 273f DCC,⁹ so that the further elaboration in the case law of the nature of the offence under the former provision has retained its relevance with respect to the new provision. The same applies for Article 250ter (old) DCC.

3 See NRM1, pp. 9-22, NRM3, pp. 13-19, NRM5, pp. 9-15 and NRM7, pp. 45-46. See also Alink & Wiarda 2010, pp. 175-262.

4 See §4.4.8 (The influence of the Dutch prostitution policy on the case law on sexual exploitation).

5 Alink & Wiarda 2010, p. 179.

6 *Parliamentary Documents I* 2011/12, 32 211 A.

7 In September 2006, it was renumbered as Art. 273f DCC without any substantive amendment.

8 NRM5, p. 211.

9 *Parliamentary Documents II* 2003/04, 29 291, no. 3, p. 13 (Explanatory Memorandum). In a similar sense, Arnhem District Court 12 December 2005, *LJN*: AU7821.

Maximum sentences

The human trafficking provision in Article 273f DCC was amended again on 1 July 2009. This latest amendment increased the maximum sentences but not the actual definition of the offence.¹⁰ Since July 2009, human trafficking without aggravating circumstances can be punished with a prison sentence of up to eight years.¹¹ For all qualified forms of human trafficking – committed under aggravating circumstances – the maximum sentence is at least 12 years in prison. Aggravating circumstances include human trafficking committed by two or more persons acting in concert, human trafficking committed against a victim under the age of 16, human trafficking resulting in serious physical injury or that threatens the life of another person and human trafficking that leads to death. Human trafficking can also be punished with a fine of up to €76,000 (fifth category).¹²

Increase in maximum sentences

A new bill to increase the maximum sentences again was tabled at the end of February 2012. This bill arose from a commitment made during the debate on the Bill to Regulate Prostitution and Combat Abuses in the Sex Industry.¹³ The bill proposes increasing the maximum sentence for unqualified human trafficking from eight to 12 years. Under the bill, the maximum sentence for human trafficking resulting in death would be a life sentence or a prison sentence not exceeding 30 years.¹⁴ The higher sentences also have consequences for the possibility of applying pre-trial detention in cases of unqualified human trafficking.¹⁵

The proposed increase in the maximum sentences corresponds with the recommendation made by the NRM on this point in relation to the bill to implement the EU Directive on Human Trafficking.¹⁶ The NRM advocated that – rather than repeatedly increasing the sentences – there should be a fundamental review of whether the maximum sentences should reflect the fact that *unqualified* forms of human trafficking should also be seen as crimes that threaten the legal order and that the sentences should be set accordingly. The logical consequence of that would be a maximum prison sentence of 12 years for unqualified human trafficking. Such a sentence would also shed a different light on the application of pre-trial detention, since by virtue of the current Article 273f DCC, a case where a single defendant has

10 Act of 12 June 2009, *Bulletin of Acts, Orders and Decrees*. 2009, 245.

11 From January 2005 until 1 July 2009, the maximum sentence for human trafficking without aggravating circumstances was six years' imprisonment. For qualified human trafficking, the maximum sentence rose to eight, ten, twelve and – when the offence led to the death of the victim – fifteen years.

12 On the grounds of Art. 251 DCC, a convicted person may be deprived of certain rights, such as the right to hold public office, to serve in the armed forces, to serve as a counsel before the courts and to act as a court-appointed administrator. A person who is guilty of human trafficking in a professional capacity may be disqualified from practising that profession. Furthermore, a confiscation order may be imposed pursuant to Art. 33 DCC ff.

13 Motion by Van Toorenburg and Van der Steur, *Parliamentary Documents II* 2010/11, 32 211, no. 36.

14 *Parliamentary Documents II* 2011/12, 33 185, no 2.

15 See Art. 67a (1) in conjunction with (2) (1) of the Dutch Code of Criminal Procedure.

16 Letter from the NRM of 13 October 2011 to the Minister of Security and Justice concerning the implementation of EU Directive 2011/36/EU on preventing and combating trafficking in human beings, appendix to *Parliamentary Documents II* 2011/12, 33 309, no. 3.

exploited more than one victim for a longer period (several years, for example) is also a form of *unqualified* human trafficking. A situation like that could also be said to threaten the legal order.

EU Directive on Human Trafficking (2011)

The bill to implement the EU Directive on Human Trafficking was published in June 2012. This bill¹⁷ includes not only a proposal to amend the definition of human trafficking¹⁸ in Article 273f DCC in a number of respects, but also elucidates aggravating circumstances and one of the means of coercion referred to in Article 273f DCC.¹⁹

2.2 International principles

The international aspects of human trafficking are and will remain important in combating it at national level, not least because Dutch legislation on human trafficking is largely based on international agreements. It is therefore important to be aware of the relevant instruments and to understand their most important aspects, since international law impinges on national legal practice.²⁰ Even the Supreme Court is affected by the growing influence of EU law and the law of the European Court of Human Rights in the performance of its task: “The more the law is derived from supranational sources, the more the Supreme Court’s position is that of a link: a filter between the highest European courts and the national legal system”.²¹

A number of binding agreements made at United Nations (UN) and EU level are of primary relevance for the most recent Dutch legislation on human trafficking. These include the UN Protocol to Prevent, Suppress and Punish Trafficking in Human Beings, Especially Women and Children (2000)²² and the EU Directive on Human Trafficking, which replaces the earlier Framework Decision of 2002.²³ These instruments require states to make human trafficking a criminal offence and combat every form of exploitation of persons, regardless of the sector in which that exploitation occurs. The international definition

17 *Parliamentary Documents II* 2011/12, 33 309, no. 2. The bill is discussed, for example, in §4.3.1 (Coercion and free will) and Chapter 6 (Sentencing).

18 See §2.2 below (International principles).

19 See §4.4 (Coercion and free will) and Chapter 6 (Sentencing).

20 See also Alink & Wiarda, 2010, p. 254.

21 G.J.M. Corstens and R. Kuiper, ‘De Hoge Raad als knooppunt van rechterlijke samenwerking’ [The Supreme Court as hub of judicial cooperation], *Trema* 2012- 7, p. 234 ff. For the time being, the Act on Requests for Preliminary Rulings by the Supreme Court [*Wet prejudiciële vragen aan de Hoge Raad*] only allows questions to be referred to the civil chamber, *Bulletin of Acts, Orders and Decrees*. 2012, 65.

22 Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), *Bulletin of Treaties*. 2001, 69 and 2004, 35 (further referred to as the UN Palermo Protocol).

23 Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JBZ, 5 April 2011 (further referred to as the EU Directive on Human Trafficking). The directive was published in the Official Journal of the EU, OJ 2011, L 101/1, on 5 April 2011, and must be transposed into Dutch legislation before 6 April 2013.

of human trafficking encompasses exploitation not only in prostitution, but also in other sectors (further referred to as 'other forms of exploitation') and forced organ donation.²⁴ These instruments form the basis for Article 273f DCC. The UN Protocol defines human trafficking as:

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

According to the Protocol, 'exploitation' includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The Protocol also explicitly states that the consent of a victim of human trafficking to the intended exploitation is irrelevant if any of the above means are used.²⁵ The EU Directive adopts a broad definition of human trafficking that is based on the UN Palermo Protocol and – in the same words – the Convention of the Council of Europe.²⁶

EU Directive on Human Trafficking

The EU Directive adopts a broader concept of human trafficking than the definition in the lapsed EU Framework Decision. For example, the definition of human trafficking now also refers to human trafficking for the purposes of the removal of organs, as do the UN Protocol and the Council of Europe's Convention on Action against Trafficking in Human Beings. In contrast to those instruments, the EU directive explicitly refers to **begging** as a form of forced labour or service, as well as the **exploitation of criminal activities** ('criminal exploitation'). This latter form of exploitation would include exploitation by getting persons to commit pickpocketing, shoplifting, drug dealing and similar criminal offences that yield financial gain. The non-punishment principle would have to be a consideration here.²⁷ The definition also encompasses other behaviour, such as illegal adoption or forced marriage "in so far as they fulfil the constitutive elements of human trafficking".²⁸ The directive also expressly provides that the consent of the victim of human traf-

24 In October 2009, a lengthy report was published on this subject by the Council of Europe and the United Nations. See Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs (2009), available at http://www.coe.int/t/dghl/monitoring/trafficking/docs/news/organtrafficking_study.pdf (accessed on 30 August 2012). See also National Rapporteur on Trafficking in Human Beings, Trafficking in human beings for the purpose of the removal of organs and forced commercial surrogacy (2012), available at www.dutchrapporteur.nl.

25 Art. 3 of UN Palermo Protocol.

26 Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), *Bulletin of Treaties*. 2006, 99.

27 Art. 8 of EU Directive on Human Trafficking. See also NRM7, Chapter 6 (Victims as offenders and the non-punishment principle), p. 229 ff.; see also §7.5 (Victims in the criminal process and the non-punishment principle).

28 Recital (11) of the EU Directive on Human Trafficking.

ficking to the intended or actual exploitation is irrelevant where any of the means listed in Article 2 (1) is used, such as coercion, violence or the threat of violence and deception.²⁹

In the Council of Europe's Convention (2005), the human rights dimension is an important facet of the approach to combating human trafficking.³⁰ The provisions of the new EU directive are based on that Convention and relate not only to punishment but also to prevention and the protection of victims.

*Rantsev versus Cyprus and Russia*³¹

In this important judgment, the European Court of Human Rights explicitly brought human trafficking within the scope of Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude and forced labour. Quite apart from the fact that there is little case law³² on Article 4 of the Convention, it is a landmark judgment because the Court formulated a number of obligations for member states of the Council of Europe in combating human trafficking, going beyond investigating and prosecuting the offence and also comprising prevention, protection of victims and international cooperation.³³ Furthermore, by classifying human trafficking under Article 4 of the Convention, the Court found that it is not merely a violation of human rights. The Court recalled that Article 4, like Articles 2 and 3, embraces a fundamental and absolute right, which means that – in contrast to most other provisions of the Convention – it is a right that must always be guaranteed by the State. Restrictions are not permitted, even in times of war or other emergencies.³⁴

Human trafficking threatens fundamental rights, or human rights. Human trafficking is a violation of human rights. Nevertheless, there are still occasions where, even when it has been found that there was exploitation, the question of whether there has also been a violation of human rights is explicitly ad-

29 See Art. 2 (4) of the EU Directive on Human Trafficking. See also Art. 1 (2) of the Council Framework Decision 2002/629/JHA on combating trafficking in human beings, 19 July 2002 (further referred to as the EU Framework Decision on Trafficking in Human Beings); Art. 3 sub b of the UN Palermo Protocol; Art. 4 sub b of the Council of Europe Convention on Action against Trafficking in Human Beings (2005), *Parliamentary Documents II* 2003/04, 29 291, no. 3, p. 19.

30 *Bulletin of Treaties*. 2006, 99. This treaty entered into force on 1 February 2008; the Netherlands became a party to it on 1 August 2010.

31 European Court of Human Rights 7 January 2010, no. 25965/04 (*Rantsev v. Cyprus and Russia*); see NRM8, p. 34.

32 At the end of July 2012, the European Court of Human Rights rendered a third judgment addressing Art. 4 of the European Convention on Human Rights: European Court of Human Rights 31 July 2012, no. 40020/03, (*M. et al. v. Italy and Bulgaria*). Cases concerning Art. 4 of the Convention that are currently pending are: Application no. 56921/09 (*Elisabeth Kawogo/UK*) and Application no. 4239/08 (*C.N. v. UK*). Two other cases were also halted by the European Court of Human Rights because the risk of deportation had disappeared: Application no. 49113/09, *L.R. v. UK* (14 June 2011) and Application no. 30815/09, *D.H. v. Finland* (28 June 2011).

33 See *Boot-Mathijssen* (2010). See also, *Beijer* 2010b.

34 European Court of Human Rights, 7 January 2010, no. 25965/04, (*Rantsev v. Cyprus and Russia*), consideration 283. See Art. 15 (2) of the European Convention on Human Rights.

dressed.³⁵ This second question is redundant when the court has found that the exploitation has occurred in the context of human trafficking.³⁶ Perhaps the term ‘fundamental rights’ sometimes leads to misunderstandings because it also refers to whether or not there has been a violation of physical and mental integrity and personal liberty, which are also human rights in themselves.

The Netherlands is also party to a number of other treaties relating to human trafficking, including the International Convention for the Suppression of the Traffic in Women of Full Age (1933), which obliges States to make it a punishable offence to procure a woman of full age for immoral purposes to be carried out in another country “even with her consent”.³⁷ The criminalisation required by this convention is created by Article 273f (1)(3) DCC, which makes it an offence for a person to “recruit, take with him or abduct a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country”. This provision does not contain the elements of coercion and exploitation.³⁸

2.3 The definitions of offences in Article 273f DCC

2.3.1 Subsection 1: acts, coercion and (intention of) exploiting

As in the UN Palermo Protocol and the EU Framework Decision (2002), this definition of the offence is formulated in terms of an act (recruiting, transporting, moving, accommodating and sheltering), using force or coercion, with the intention of exploiting another person.

As regards the **acts** specified in Article 273f (1)(1) and (2) DCC, the element of recruiting, transporting, moving, accommodating or sheltering is intended to encompass the entire series of actions that lead or could lead to the intended exploitation. These actions must therefore be interpreted broadly in accordance with the meaning given to them in common parlance.³⁹

There is a causal relationship between acts and **means of coercion**. For example, the means of coercion in the definition of the offence in Article 273f (1)(1) DCC are linked to the human trafficking acts (recruiting, transporting, moving, accommodating and sheltering). Those acts might be facilitated by the use of the means of coercion. For a conviction under subsection 1, therefore, there is always a causal link between those means and the acts. In subsection 4, the same applies *mutatis mutandis* with regard to forcing or inducing another person to make himself or herself available to perform work or services. Means of coercion are listed in Article 273f (1)(1) DCC:

35 See, for example, Arnhem District Court 17 November 2010, 05-702246-10 (not published); The Hague District Court 17 February 2010, LJN: BL4279; BL4298, in which the court found “that it has not been shown that there was a violation of any fundamental right” and that therefore there was no situation of exploitation and hence the intention to exploit was lacking. The opposite reasoning should have been used. If human trafficking is proved, there is by definition a violation.

36 NRM7, p. 498.

37 *Bulletin of Acts, Orders and Decrees*. 1935, 598.

38 On this point, see also §4.5 (Subsection 3).

39 See Machielse 2010 (NLR), Art. 273f DCC, Note 3.2 and the advisory opinion of A-G Knigge in Supreme Court 27 October 2009, LJN: BL7099, par. 19. See also Alink & Wiarda 2010, p. 215.

force, violence or other act, the threat of violence or other act, extortion, fraud, deception, the misuse of authority arising from the actual state of affairs, misuse of a vulnerable position, and giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person.

The means of coercion must lead to a person finding himself or herself in a situation of exploitation or to a person being prevented from escaping from a situation of exploitation.⁴⁰ There is no requirement that the means are used against the victim personally, since the means could also be used against a third party in order to induce or cause another person to submit to the will of the offender.

Means of coercion do not constitute an element of the offence in all of the subsections of Article 273f DCC. They only appear as an element of the offence in subsections 1, 4 and 9 of Article 273f (1) DCC. Means of coercion are irrelevant when the victims are minors.⁴¹ For example, accommodating a minor with the intention of exploitation is punishable as human trafficking even without the use of force or other means.⁴² Force is also not required where a person is recruited, taken or abducted with the intention of inducing that person to make themselves available for performing sexual acts with or for a third party for remuneration in another country (Article 273f (1)(3) DCC).⁴³

In view of the intention of the international instruments on which these provisions are based, terms like ‘force’, ‘fraud’ and ‘extortion’ must be interpreted broadly and not strictly according to the definitions of offences such as the use of force to compel a person to perform an action under Article 284 DCC or extortion in the sense of Article 317 DCC.⁴⁴ Human trafficking involves **exploitation**.⁴⁵ It follows from the use of the term ‘intention’ that exploitation does not have to have occurred.⁴⁶ Article 273f (2) DCC contains a non-exhaustive list of acts that must ‘at least’⁴⁷ be understood as falling within the definition of ‘exploitation’: exploitation of another person in prostitution, other forms of sexual exploitation,

40 Van Maurik/Van der Meij 2012 (*T&C DCC*), Art. 273f DCC, Note 9 (c).

41 Except with respect to Art. 273f (1)(9) DCC and subsection 4, which relates to other forms of exploitation.

42 In the provisions of Art. 273f (1)(2), (5) and (8) DCC, the means referred to under (1) are not elements of the offence.

43 In accordance with Art. 273f (1) (3) DCC. On this point, see also §4.4 (Coercion and free will) and §4.5 (Subsection 3).

44 Van Maurik/Van der Meij 2012 (*T&C DCC*), Art. 273f DCC, Note 9 (c).

45 *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 2 (Explanatory Memorandum). See also The National Action Plan on Trafficking in Human Beings, *Parliamentary Documents II* 2004/05, 28 638, no. 13.

46 How exploitation/the intention of exploiting was specifically defined in relation to other forms of exploitation in the indictments and judicial findings of fact in first instance in 2010 can be found in Appendix 3, Table A1.10.

47 Art. 273f DCC also implements the UN Protocol, including the phrase ‘exploitation shall include, at a minimum’ in section 2. The term ‘at least’ in Art. 273f (2) DCC indicates that the list of examples given is non-exhaustive. In this regard, the Dutch legislation is unique in international terms. The UNODC Model Law against Trafficking in Persons (2009) provides that, in light of the legality principle, other forms of exploitation must be included explicitly in national legislation. The UN Protocol does not contain a definition of exploitation.

forced or compulsory labour or services, slavery, slavery-like practices and servitude.⁴⁸ The fact that the scope of the term ‘exploitation’ is not entirely clear and has to be fleshed out in the case law is not, in the view of the Den Bosch Court of Appeal, contrary to the principle of *lex certa*.⁴⁹

The legislature and the Supreme Court refer to a situation of exploitation, in the context of the sex industry, if the circumstances of the individual’s situation are not the same as those normally experienced by an articulate prostitute in The Netherlands.⁵⁰ In this interpretation, the nature of the work to be performed assumes great weight. By definition, forcing a person to work in the sex industry involves exploitation, since that person’s physical integrity is always affected; the same applies for the forced removal of organs. In cases of other forms of exploitation, however, the Supreme Court requires that the actual situation must be assessed against a number of criteria. In contrast to exploitation outside the sex industry (‘other forms of exploitation’), poor living and working conditions are irrelevant for the question of whether there has been exploitation in the sex industry.⁵¹ The conclusions of the Supreme

48 Alink & Wiarda 2010, pp. 222-223, conclude as follows with respect to the terms ‘slavery’, ‘servitude’ and ‘forced work and services’: “[...] Slavery is the situation where the exploiter exercises a ‘right of ownership’ over another person, in other words exercises power that is connected with the right of ownership. The exploiter treats another person as his property. Slavery-like practices are forms of impermissible bondage, such as serfdom, forced marriage and exploitation of children. Servitude is subjection, a situation of dominance over the victim in the area of work and private life and of a dual or multiple dependency on the part of the victim, in which the victim is forced to perform work or services and reasonably believes that there is no practical alternative to performing it. Servitude constitutes a serious infringement of personal liberty and can be regarded as a milder form of slavery. The terms ‘slavery’, ‘slavery-like practices’, ‘servitude’ and ‘forced labour or services’ (in other words, ‘labour exploitation’) represent a sliding scale from an absolute want of liberty to relative want of liberty. The victim has no possibility of choosing a realistic alternative (with slavery) or – in varying degrees – has only a limited possibility. Forced labour or services form the lower limit.”

49 Den Bosch Court of Appeal used the criterion in the European Convention on Human Rights for the *lex certa* review and found: “The interpretation that the Supreme Court gave to the statutory term ‘the intention of exploiting’ in the judgment of 27 October 2009, no. S 08/03895 in that case reflects the essence of the offence and was, partly in view of the legislative history, reasonably predictable.” Den Bosch Court of Appeal 17 September 2010, LjN: BN7215 (*Chinese restaurant*). See also Korvinus 2006. For an extensive review of the relationship between the criminalisation of human trafficking and the principle of legality, see Esser 2012.

50 See Supreme Court 5 February 2002, LjN: AD5235, where reference is made to the explanatory memorandum to the bill that introduced Art. 250ter (old) DCC. Art. 250ter (old) and Art. 250a (old) DCC are precursors of the current Art. 273f DCC.

51 NRM5, pp. 12 ff. See also Beijer 2010a. Nevertheless, there have been judgments in which the judge wrongly assessed exploitation in the sex industry according to the standards of exploitation outside the sex industry and, for example, devoted findings to working conditions, living conditions, housing conditions and economic benefit. See, for example, Utrecht District Court 11 November 2011, LjN: BU4728, Amsterdam District Court 21 September 2010, 13-411071-09 (not published), Amsterdam District Court 10 September 2010, 13-527384-08; 13-527405-07; 13-527406-07 (not published) and Zutphen District Court 21 August 2012, LjN: BX5202. However, these should not be considerations in the context of forced prostitution. See also NRM7, p. 423.

Court cited below concerning the term ‘exploitation’ in the *Chinese restaurant* case are, by definition, met for human trafficking cases in the sex industry and are therefore only relevant in cases of other forms of exploitation.

*Supreme Court, 27 October 2009 (Chinese restaurant case)*⁵²

“The question of whether and, if so, when there is ‘exploitation’ within the meaning of Article 273a (old) DCC cannot be answered in general terms, but depends greatly on the circumstances of the case. In a case like this, other relevant factors include the nature and duration of the work, the restrictions imposed on the individual concerned and the economic benefit gained by the employer from the work. In weighing these and other relevant factors, the standards that apply in Dutch society should be adopted as the frame of reference.”⁵³

At the end of 2011, the Supreme Court repeated these findings when answering the question of whether and, if so, when there is exploitation. In this case, the Amsterdam Court of Appeal⁵⁴ had found that the defendant had completely dominated the life of the victim, who had the mental capacity of a 10-year-old, that he had misused his vulnerability, had caused him to perform work without paying any realistic remuneration and had punished him (also physically) if the work was not done properly, and that the working relationship had adversely affected the psychological and physical well-being of the victim, who had not felt capable of escaping from the situation. Although the defence had put forward ‘contradictions’,⁵⁵ including the assertions that the work involved everyday activities such as making coffee, that it was a friendly relationship, that the benefit enjoyed was small and that it was actually a joint household, the Supreme Court ruled that the appeal court’s finding that there was a situation of exploitation was not an incorrect view of the law and also required no further reasoning. That the jobs performed, separately and in themselves, were not ‘degrading’, that the ‘undesirable situation’ had grown out of a friendly relationship between the suspect and the victim and that the suspect had gained little or no financial benefit from the work performed by the victim “does not, after all, detract from the fact that the defendant had forced the victim to perform that work and had kept him under his thumb against the victim’s will. All of these facts are sufficient to assume intentional exploitation.”⁵⁶ A combination and accumulation of events can cause such a serious infringement of the victim’s physical and mental integrity and personal liberty as to create exploitation.⁵⁷

2.3.2 Subsection 3: in another country

Under Article 273f (1)(3) DCC, it is a criminal offence to recruit, take or abduct another person with the intention of inducing that other person to make himself or herself available for performing sexual acts with or for a third party for remuneration in another country.

52 Supreme Court 27 October 2009, *LJN*: BI7097 (advisory opinion of A-G Knigge).

53 “This finding should also be based on the standard that applies in the country where the offence was committed.” See Alink & Wiarda 2010, p. 256. See also the annotation to Supreme Court 27 October 2009, *NJ*: 2010/598 (*Chinese restaurant case*) by Y. Buruma, who did not consider the standards that apply in Dutch society to be the correct frame of reference for human trafficking.

54 Amsterdam Court of Appeal 14 January 2010, 21-002724-08 (not published).

55 Supreme Court 20 December 2011, *LJN*: BR0448.

56 Supreme Court 20 December 2011, *LJN*: BR0448 (advisory opinion of A-G Silvis).

57 Supreme Court 5 July 2011, *LJN*: BQ6691 (Mental health care worker).

Any person ... who recruits, takes with him or abducts a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country;

This provision implements the Geneva Convention of 1933 for the suppression of traffic in women of full age.⁵⁸ Article 1 of that convention provides that

*Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent [emphasis added, BNRM] a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.*⁵⁹

This subsection is discussed in detail in §4.5.

2.3.3 Subsection 4: use of a situation of exploitation

Article 273f (1)(4) DCC makes it a criminal offence for a person to force or induce another person, using the means of coercion referred to in subsection 1, to make himself or herself available to perform work or services, as well as to perform any act in the circumstances referred to in subsection 1, which the coercing individual knows or may reasonably be expected to know will result in that other person making himself or herself available.⁶⁰

Subsection 4 makes the use of a person in a situation of exploitation⁶¹ a criminal offence: that is what constitutes the exploitation.⁶² This refers to the situation where a person has made himself or herself available for work or services. Like subsection 1, subsection 4 does not require that the work or services have actually been performed.⁶³ The conduct in subsection 4 usually follows from the conduct in subsection 1, which criminalises the activities that place a person in a position in which he or she might be forced or induced to make himself or herself available. The actions in subsection 1 and subsection 4 can overlap, however. If a perpetrator, using a means of coercion, accommodates a person with the intention of exploiting that person, he can at the same time – on the basis of the same means of coercion – be guilty of forcing or inducing the victim to make himself or herself available to perform work or services. In practice, offences are sometimes declared proven under subsection 1 and subsection 4 on the basis

⁵⁸ Approval of the Protocol signed in New York, on 12 November 1947, to amend the Convention for the Suppression of the Traffic in Women and Children, *Bulletin of Acts, Orders and Decrees*. 1935, 598. This convention was originally transposed in Art. 250a (1) (2) (old) DCC.

⁵⁹ On this point, see also §4.5 (Subsection 3).

⁶⁰ The interpretation of subsection 4 is discussed further in §4.6 (Subsection 4), where the forms of guilt (intent and culpability) under the second part of subsection 4 are also discussed.

⁶¹ There is some terminological confusion concerning the distinction between the terms ‘situation of exploitation’ and ‘exploitation/intention of exploiting’. The terms have different historical and legal backgrounds. This is discussed further in § 4.6.1 (Subsection 4 – The Offence). See also Esser 2012, p. 35.

⁶² Alink & Wiarda 2010, p. 224. See also Machiels 2010 (*T&CDCC*), Art. 273f DCC, Note 6, who argues that under subsection 4 the exploiters are guilty of an offence.

⁶³ Supreme Court 19 September 2006, *LJN: AX9215*.

of the same set of facts. The relationship between subsection 1 and subsection 4 is discussed further in §4.6.2.

The element of exploiting (or intention of exploiting) does not appear in subsection 4. There has been no consistency in the decisions of the lower courts on the question of whether that element should be inferred in subsection 4. The conclusion in the judgments of the higher courts now seems to be that subsection 4 does not include a requirement of the intention of exploitation for a conviction for human trafficking: it is not an element of the offence under subsection 4.⁶⁴ The Supreme Court seemed to confirm that in a judgment at the end of 2011.⁶⁵ The implications of that line of reasoning for the scope of application of subsection 4 is discussed further in §4.6.4 (Intention of exploiting is not an element of the offence under subsection 4).

2.3.4 Subsections 6, 7, 8 and 9: profiting

Subsection 6:

A person who... wilfully profits from the exploitation of another person;

Subsection 7:

A person who... wilfully profits from the removal of organs from another person, while he knows or may reasonably be expected to know that the organs of that person have been removed under the circumstances referred to under subsection 1;

Subsection 8:

A person who ... wilfully profits from the sexual acts of another person with or for a third party for remuneration or the removal of that person's organs for remuneration, when this other person has not yet reached the age of eighteen years;

Subsection 9:

A person who ... forces or induces another person by the means referred to under subsection 1 to provide him with the proceeds of that person's sexual acts with or for a third party or of the removal of that person's organs;

64 The Hague Court of Appeal 25 August 2011, LjN: BR5629. Also Arnhem Court of Appeal 10 June 2011, 21-004189-10 (not published).

65 Supreme Court 20 December 2011, LjN: BR0448. See also the advisory opinion of A-G Silvis: "For a criminal offence under [subsection 4], in contrast to the acts in Art. 273f(1)(1) (recruiting, transporting, taking, accommodating or sheltering), no finding of an intention to exploit is required."

Subsection 6 requires (conditional) intent to profit. For subsection 6 and subsection 7, the person who profits must know, or reasonably be expected to know,⁶⁶ that there is exploitation or the forced removal of organs. Subsection 7 can also cover a person who should reasonably suspect that coercion has been used in the removal of organs. The intention of exploiting or removing organs itself is not required.⁶⁷ In these subsections, therefore, the criterion is awareness, with that criterion having a wider scope under subsection 7 than under subsection 6. It is also relevant that subsection 8 does not contain the term ‘exploitation’ but “sexual acts with or for a third party for remuneration”. This subsection relates to minors and therefore neither force nor exploitation is required to make it a criminal offence. The crime is profiting from the sexual acts of a minor with or for a third party for remuneration or the removal of organs from a minor for remuneration, regardless of how the minor arrived in that situation.⁶⁸

*Alkmaar District Court, 15 April 2010*⁶⁹

The indictment in this case included a human trafficking offence within the meaning of Article 273f, opening lines and section 1, subsection 8 DCC: wilfully profiting from the sexual acts of another person with or for a third party for remuneration, when that other person has not yet reached the age of eighteen years. The victim was nine or ten years old and the defendant was accused of placing a picture of her performing sexual acts on a paid Internet site.

In contrast to the subsections discussed above, the use of coercion is also an element of the offence under subsection 9. In this subsection, there is a more direct relationship between the offender and the victim. Subsection 9 only relates to the surrender of proceeds from sexual acts or the forced removal of a person’s organs. The offender under subsection 9 can be, but does not necessarily have to be, the same person as the person who forced the performance of sexual acts or the removal of organs.

2.3.5 Subsections 2, 5 and 8: underage victims

That a victim has not yet reached the age of 18 is an objective fact; neither intent nor guilt is required with regard to it.⁷⁰ The legislature’s intention here was to reflect the fact that the will, and hence the

66 Subsection 6 refers back to Art 250a (1)(4) (old) DCC. According to the explanatory memorandum, at the time this provision was intended to punish the background offenders: those who “wilfully profit from the sexual act of another person, while he knows or may reasonably be expected to know that the other person is engaging in prostitution involuntarily”, *Parliamentary Documents II* 1996/97, 25 437, no. 3, p. 9. The current human trafficking article makes it an offence to profit from any form of exploitation; otherwise the scope of the article has not changed. See *Parliamentary Documents II*, 2003/04, 29 291 no. 3. See also Alink & Wiarda, 2010, p. 228: “By ‘exploitation’ is meant the forms of exploitation referred to in the second section. *It follows from the requirement of intent that the offender must in any case be aware of the relevant circumstances which give rise to the exploitation* (italics, BNRM). Conditional intent (*dolus eventualis*) is sufficient. It is not necessary to choose a particular form of exploitation. It is sufficient for the essential features of one of the forms of exploitation to be present”.

67 NRM7, p. 462. Cf. A. Beijer 2010a, p. 986.

68 Van Maurik/Van der Meij 2012 (T&C DCC), Art. 273f DCC, Note 9(i).

69 Alkmaar District Court 15 April 2010, 14-018037-03; 14-018035-03; 14-018036-03 (not published).

70 Van Maurik/Van der Meij 2012 (T&C DCC), Art. 273f DCC, Notes 6 and 9(i).

consent, of a minor has no significance.⁷¹ It is irrelevant whether the suspect knew that the victim was a minor; the defendant cannot invoke the defence of excusable error.⁷² The use of coercion is not an element of the offence in these provisions with respect to minors.

71 *Parliamentary Documents II* 1996/97, 25 437 no. 3, p. 9, concerning Art. 250a (old) DCC.

72 Supreme Court 17 May 2011, LjN: BP6122.

3 Some figures (2010)

This case-law survey covers human trafficking in both the sex industry and in other sectors ('other forms of exploitation'). In 2010, in addition to cases involving exploitation in the food industry and in agriculture and horticulture, other forms of human trafficking for which suspects were tried and convicted included forcing victims to smuggle drugs and to take out telephone subscriptions.¹

This section contains some of the figures that emerged from the analysis of the judgments rendered in first instance in 2010. There were 138 judgments in all, of which 111 involved human trafficking in the sex industry and 29 involved other forms of exploitation. Two judgments related to both sexual and other forms of exploitation.

There was a total of 60 human trafficking investigations relating to sexual exploitation, involving at least one suspect (and not more than five). In all, there were 109 unique suspects,² of whom 108 were natural persons. Of the 147 unique, identified victims³ whose names appeared in the indictments, the courts found that 93 (63%) had been proven to be victims. As regards other forms of exploitation, there were 29 judgments resulting from 13 criminal investigations⁴, which involved at least one suspect (with a maximum of four), with a total of 29 suspects. Of the 70 unique, identified victims in these cases, 39 (56%) were proven to have been victims. In some cases, the charges were declared proven for a shorter period than was charged; in others, the court found that not all of the acts or means of coercion that were charged had been proven against all of the suspects. More information and more detailed statistics about suspects, convictions and victims can be found in Chapter 5 (Suspects and perpetrators) and Chapter 7 (Victims). The other chapters also contain quantitative data on a range of subjects, from means of coercion to compensation.

1 See Appendix 3, Table A1.9.

2 The number of unique suspects does not match the number of judgments because some judgments involved the same defendants.

3 Some victims appear in more than one judgment.

4 Since the expansion of the criminalisation of human trafficking in 2005, on the basis of the number of judgments at least 34 investigations of exploitation outside the sex industry had been conducted up to July 2012. There will be a further discussion of developments in sectors where there is a risk of other forms of exploitation in NRM 9.

Duration of the human trafficking offence

Human trafficking often starts with the recruitment of a victim and then proceeds to actual exploitation. As is apparent from the definition, the period of recruitment is an element of the offence of human trafficking and is therefore included in the calculation of the period for which the offence continued. The study shows that the average duration of the longest human trafficking offence declared proven in a judgment – which is not always the same as the duration of the possible exploitation – was roughly a year in both the sex industry and in other sectors.⁵ In Chapter 6 (Sentencing), the effect of this factor on the ultimate sentence is shown.

Human trafficking committed abroad

Human trafficking is an offence that is often committed in part abroad. According to the convictions for sexual exploitation (N: 69), almost half of the offences (46%) were committed both in the Netherlands and another country.⁶ The ratio was different among the convictions for other forms of exploitation (N: 14): in 10 cases (86%) the offence was committed solely in the Netherlands, but only twice (14%) in the Netherlands and another country.⁷

Victims recruited abroad

While it would be easy to conclude from these figures that the international dimension is more relevant in cases of sexual exploitation than in cases of other forms of exploitation, this can be explained in part by the large number of indictments in sexual exploitation cases based on Article 273f (1)(3) DCC, where recruitment in another country is an element of the offence. This means that, almost by definition, this offence has a ‘transnational aspect’.⁸ At the same time, 54 of the 93 individuals (58%) who were proven to be victims of sexual exploitation were recruited abroad. That also applies for 85% of those who were proven to be victims (33 of the 39) of other forms of exploitation.⁹ In other words, in terms of victims, the international dimension seems to be greater in cases of other forms of exploitation than in cases of sexual exploitation. There are two explanations for this apparent discrepancy between the locations of the proven human trafficking and of the recruitment of victims. The first is the fact that decisions about the locus of the proven human trafficking are made at the judgment level, while the place of recruitment of victims is studied at the level of the victim, and there is often more than one victim in a judgment. The second explanation lies in the fact that the place of the proven human trafficking is based exclusively on the finding of fact in relation to the definition of the offences charged, while for the place of recruitment of victims, the entire judgment is studied. For example, in the case of 11 Indonesian victims both people smuggling and human trafficking were declared proven.¹⁰ The victims were helped to find work and accommodation in order to enter the Netherlands, but both

5 Sexual exploitation: 366.0 days (SD: 419.3), max. 1,979 days; other forms of exploitation: 365.6 days (SD: 421.4), max. 1,108 days. See Table 15.

6 These other countries are Belgium, Benin, Bulgaria, Congo, Germany, Greece, Hungary, “Hong Kong” (China), Libya, Macedonia, Malaysia, Nigeria, Poland, Romania, Slovakia, Thailand, Togo and the Czech Republic.

7 Bulgaria and Surinam.

8 See §4.5 (Subsection 3).

9 See Chapter 7 (Victims).

10 The Hague District Court 3 May 2010, LJN: BM3374.

the accommodation and the work constituted the situation of exploitation, which was precisely why these victims had been recruited. Nevertheless, the place where the *offence* was committed was the Netherlands. The same applies for a group of 10 victims from India.¹¹ The reverse is also entirely possible (the human trafficking could be proven to have occurred in both the Netherlands and another country rather than only in the Netherlands, and the place where the victim was recruited could be the Netherlands rather than another country), as in the case in which a victim recruited in the Netherlands was forced to smuggle drugs from Surinam.¹²

Human trafficking and other offences

Suspects are often charged with and convicted of other offences in addition to human trafficking. In 2010, that occurred more often in cases outside the sex industry – other forms of exploitation – than in cases relating to sexual exploitation.¹³ In the cases of other forms of exploitation, offences against property, violations of the Opium Act and offences related to people smuggling were charged relatively more often in addition to human trafficking.¹⁴ People smuggling can play a role in both sexual and other forms of exploitation and sometimes forms part of a set of facts that lead to the offence of human trafficking - in a certain sense constituting an overture to human trafficking. Sometimes people who are smuggled to the Netherlands are then vulnerable to exploitation because of their illegal status. In the indictments for sexual exploitation cases, violent crimes, offences against public morals and offences against the Arms and Ammunition Act were charged relatively more often in addition to human trafficking, but the two latter offences were never charged in relation to other forms of exploitation.¹⁵ This is perhaps indicative of the differences in the types of criminality involved in the different forms of human trafficking.

Participation in a criminal organisation

It is noteworthy that charges under Article 140 DCC – participation in a criminal organisation – were not brought in a single human trafficking case in 2010, whereas in 2007, 11 suspects (10%) were charged under this provision.¹⁶ Several major human trafficking cases in which suspects were charged with violations of this article – among other things – were dealt with in other years.¹⁷ The absence of prosecutions on the grounds of Article 140 DCC does not, in any case, seem to rhyme with the fact that the majority

11 The Hague District Court 12 May 2010, *LJN*: BM4240.

12 The Hague District Court 18 March 2010, 09-754181-09 (not published).

13 Sexual exploitation: in 69 (62%) of the 111 judgments, offences other than human trafficking were also charged, and in 30 (43%) of the 69 judgments in which at least human trafficking was declared proven, offences other than human trafficking were also declared proven (including human trafficking in relation to other forms of exploitation). Other forms of exploitation: in 27 (93%) of the 29 judgments, offences other than human trafficking were also charged, and in 13 (93%) of the 14 judgments in which at least human trafficking was declared proven, offences other than human trafficking were also declared proven (including human trafficking in relation to sexual exploitation).

14 People smuggling (Art. 197a DCC), providing work for people living illegally in the country (Arts. 197b and 197c DCC) and offences relating to false travel documents (Art. 231 DCC).

15 See Appendix 3, Table A1.8.

16 See NRM7 pp. 403-404. This led to seven convictions.

17 In the *Sneep* and *Koolvis* cases, for example.

of the indictments and convictions in human trafficking cases¹⁸ involved complicity (two or more suspects acting in concert), which is, in fact, an aggravating circumstance. The Minister of Security and Justice wants to double the number of prosecutions of criminal enterprises, including gangs involved in human trafficking, in the period 2011-2014. In this context, the Task Force on Trafficking in Human Beings will stimulate efforts to increase the number of prosecutions in the domain of human trafficking.¹⁹ The minister's ambition at least creates the expectation that more defendants will also be prosecuted for participation in a criminal organisation in human trafficking cases. However, since many investigations of human trafficking in 2010 also involved more than one suspect, the question is whether this will also lead to a change in the approach to human trafficking investigations. In the *Sneep* case, at least, a conviction under Article 140 DCC was a factor that led to a significantly higher sentence.²⁰

Convictions and acquittals

The number of acquittals in human trafficking cases has been consistently high, as the following table shows.²¹ The table also shows that, in 2010, the percentage of acquittals in cases of other forms of exploitation was higher than in cases involving the sex industry. One explanation for this could be the relatively recent criminalisation of the offence of human trafficking in relation to other forms of exploitation and the need for further elaboration of the definition of the offence by the courts.

18 In cases of human trafficking in the sex industry, 89 indictments (80%) included charges of co-participation in human trafficking. In slightly more than half of the convictions – 36 (52%) of a total of 69 convictions – the co-participation in human trafficking was also declared proven. In cases outside the sex industry ('other forms of exploitation'), co-participation was charged in 23 indictments (79%) and declared proven in nine (64%) of the total of 14 convictions; see also Chapter 6 (Sentencing).

19 Task Force on Trafficking in Human Beings 2011, chapter 10.

20 See, for example, Utrecht District Court, sitting in Almelo, 11 July 2008, *LJN*: BD6957. See also NRM7, p. 462.

21 See also NRM 2012a, which contains a quantitative study by the NRM of the prosecution of suspects and conviction of perpetrators in human trafficking cases between 2006 and 2010.

Table 2 Number of convictions and acquittals for human trafficking (2010)

	Sexual exploitation				Other forms of exploitation			
	Convictions for human trafficking		Acquittals for human trafficking		Convictions for human trafficking		Acquittals for human trafficking	
	N	%	N	%	N	%	N	%
Complete ²²	58	54%	25+13=38	36%	10	34%	3+12=15	52%
Partial ²³	11	10%	11	10%	4	14%	4	14%
Total	69	64%	49	46%	14	48%	19	66%

Sexual exploitation: $N=111-4^{24}=107=100\%$

Other forms of exploitation: $N=29$

In 64% of the judgments in cases of sexual exploitation in which the charges of human trafficking were assessed, the outcome was a complete or partial conviction for human trafficking. In 38 judgments (36%), there were acquittals on all the charges of human trafficking.²⁵ In 48% of the judgments relating to other forms of exploitation, the suspects were convicted on all or some of the human trafficking

22 A full conviction for human trafficking is a conviction for all human trafficking offences that a suspect was charged with. For a full conviction, all the human trafficking offences must be declared proven; the charges are often declared only partially proven: for example, with respect to a smaller number of victims than charged in the indictment, with respect to fewer subsections for the same offence or with respect to a shorter period than specified in the indictment. If the human trafficking offence is included only as an alternative charge in the indictment, it is still regarded as a complete conviction for human trafficking if it was declared proven.

23 A partial conviction for human trafficking means that a defendant has been convicted of at least one charge of human trafficking and at the same time has been acquitted on at least one charge. This category does not include acquittals on parts of charges

24 In three judgments, the indictment was declared entirely null and void, and in one judgment, all charges relating to human trafficking were dismissed. See §4.2 (The indictment) and Appendix 3, Table A1.4.

25 In 25 judgments, the defendants were acquitted of all charges – including any other offences that were charged in addition to human trafficking. In 13 cases, there was an acquittal on all the human trafficking charges, but a conviction for offences other than human trafficking.

charges. There were acquittals on all human trafficking offences charged in 15 judgments (52%).²⁶ In 2011, the ratio of convictions (65%) to acquittals (35%) for human trafficking was not very different.²⁷

26 Three judgments involved acquittals on all charges – including any other offences that may have been charged in addition to human trafficking. There were 12 cases with acquittals on all charges of human trafficking but a conviction for offences other than human trafficking.

27 In 2011, according to PPS data, the courts rendered 129 judgments in first instance in human trafficking cases (both sexual and other forms of exploitation – the PPS data make no distinction between them). In 13 of these cases, there was no conviction or acquittal for human trafficking because the case was dismissed or the cases were joined at the hearing. This produces a final figure of 116 cases (129-13): 75 cases in which convictions for at least human trafficking were handed down (65%) and 41 judgments (35%) with acquittals on all human trafficking charges. NRM9 (not yet published) will include the results of a quantitative study into the prosecution and trial of human trafficking. NB: for a comparison of the PPS data and the figures that emerged from this analysis of the case law, see Appendix 3, Table A1.1.

4 Prosecution and trial

4.1 Introduction

Courts sometimes take different approaches to various legal issues. For example, one of the findings from the previous study by the BNRM into the case law on human trafficking in the sex industry based on cases in 2007 and subsequent years, was that the context of violence, force, deception and the possibility for victims to escape from their situation was not assessed consistently.¹

This study again reviews the case law on human trafficking in the sex industry, but also exploitation in other sectors ('other forms of exploitation'), on the basis of Article 273f DCC. It includes an analysis of the formulation of charges in the indictment, as well as the findings made in the judgments and their legal consequences. This chapter covers a number of issues related to the application of that article, including the meaning of 'exploitation' and the role of coercion and free will.² Without having read the underlying case file, it is impossible to make any evaluation of the weight of the evidence, so that aspect falls beyond the scope of this study, but the legal considerations underlying a conviction or acquittal are analysed. As this chapter will show, there are a number of persistent pitfalls.

The first subject covered in this chapter is the indictment (§4.2). The issue of jurisdiction follows in §4.3. The chapter then considers a number of issues relating to evidence, for example in relation to the role of coercion and free will (§4.4), Article 273f (1)(4) DCC and the concept of 'exploitation' (§4.6) and criminal attempt (§4.7). Article 273f (1)(3) DCC (further referred to as 'subsection 3') is something of an exception because exploitation and means of coercion are not elements of the definition of the offence under this subsection. This offence, which only applies in cases of human trafficking in the sex industry, is discussed in detail in §4.5.

1 These and other results of the previous study are presented in NRM7, Chapter 11 (Case law on exploitation in the sex industry). Chapter 12.6 of NRM7 contains an overview of the case law on other forms of exploitation at that time. The full report is available at www.dutchrapporteur.nl.

2 This study contains not only a qualitative analysis, but also quantitative data. The figures in the tables cover all 138 judgments at first instance in human trafficking cases in 2010. With just a few exceptions, there is also a qualitative analysis of the case law up to 1 August 2012. The research methodology is described in Appendix 2.

4.2 The indictment

Human trafficking, particularly when it is accompanied by coercion, is not so much an offence consisting of a single or a few specific acts, but rather a complex process that often also involves manipulation and psychological abuse of power. Human trafficking is often difficult to describe in specific terms and, accordingly, it is not always easy to formulate an indictment.³ This is due in part to the complexity of Article 273f DCC,⁴ in which the subsections of the first section embrace a relatively large number of separate criminal acts, which partly overlap but which also differ significantly from each other in important respects. In most human trafficking cases, different subsections of Article 273f DCC apply to the same set of facts. Furthermore, there is often more than one victim, which can lead to charges being formulated in different ways in the indictment. There is also some overlap between means of coercion and acts, which can lead to confusion. The judge is not bound by the public prosecutor's qualification of the body of facts presented,⁵ but it is, nevertheless, important to make as clear a distinction as possible between means of coercion and acts.⁶ In this study, therefore, the method of formulating an indictment is also covered.

When charges are brought for human trafficking, it has to be remembered that an offence under Article 273f DCC is quickly a completed offence. It is not always easy to draw the line between criminal attempt and a completed offence. A number of examples of this are given in §4.7 (Criminal attempt), together with illustrations of how the decision to bring charges under a particular subsection can make the difference between a conviction for attempt or for a completed offence (§4.7.1). The acts specified in Article 273f (1)(1) DCC, in particular, can also give forms of participation a wider significance. For example, the legislature has explicitly made certain acts, such as accommodating and transporting, separate human trafficking offences.⁷

In cases of sexual exploitation, sexual or physical violence against a victim is sometimes charged only as a means of coercion with regard to the human trafficking offence and at other times as a separate offence.⁸ The case law in 2010 shows that in 13 judgments at first instance (11%), rape (Article 242 DCC) had

3 See NRM7, pp. 422 ff. A working group of public prosecutors responsible for human trafficking cases is currently preparing models for indictments in human trafficking cases.

4 The length and complexity of some indictments could also be due to the fact that the statutory definition of the offence had changed during the period that a particular offence was committed. See, for example, Amsterdam Court of Appeal, 30 September 2011, *LJN*: BT6850 (*Judo*). The first offence charged commenced on 1 July 1998; the latest date on which an offence charged ended was 26 November 2008. During that period, the human trafficking provision in the Dutch Criminal Code was amended several times. The numbering of the different subsections was also amended several times, see Chapter 2 (Article 273f DCC).

5 The Hague District Court 14 December 2007, *LJN*: BC1761. See also NRM7, p. 422.

6 The Hague District Court 27 March 2012, *LJN*: BW1957. The indictment in this case was based on subsection 5, but nevertheless encompassed the charge that the suspect had brought or held the complainant in a situation of coercion and/or exploitation. The district court found that there was insufficient evidence of coercion and acquitted on the charge of human trafficking; see also § 4.4 (Coercion and free will).

7 NRM7, pp. 440 ff.

8 NRM7, pp. 422 ff.

been charged as a separate offence in addition to human trafficking, in some instances on the basis of the same set of facts.⁹ Acts that were described in detail under means of coercion and which also formed a crime in themselves were not always separately charged¹⁰ and it is not clear what criteria were applied in those cases.

4.2.1 Article 261 of the Dutch Code of Criminal Procedure and nullity of the indictment on substantive grounds

The judge is bound by the indictment,¹¹ which must be clear and comprehensible, must not contain internal inconsistencies and must be properly formulated. It must also be clear enough to allow the defendant to put forward a defence. An indictment consists of a formal part that sets out the elements of the crime, followed by a description of the underlying facts.¹² If an indictment does not comply with these requirements it will be declared null and void. As Table A1.4 in Appendix 3 shows, in three cases in 2010 the indictment was declared entirely null and void; in two cases, the charges pertaining to just one of the human trafficking offences were declared null and void; and in 10 cases, parts of the charges in the indictment were declared null and void. All of these cases concerned exploitation in the sex industry.

While the phrase ‘and one or more other women’ appearing after a number of victims referred to by name was repeatedly found to be insufficiently clear,¹³ on other occasions it did not cause any problems.¹⁴ Notably, a similar expression never led to the complete or partial nullification of an indictment in any case involving other forms of exploitation in 2010. In 10 of the 29 cases of other forms of exploitation (more than a third), the indictment was criticised for referring, in addition to the names of specific

⁹ In three judgments (3%), rape was charged both as a means of coercion in relation to human trafficking and as a separate offence. All three judgments were rendered by the Amsterdam District Court.

¹⁰ Seven judgments involved rape as a means of coercion, but it was not charged as a separate offence, in contrast with, for example, Arnhem District Court 4 April 2012, *LJN*: BW3216. The PPS had charged rape as well as human trafficking, including force as a means of coercion to have sex with the suspect. Both offences were declared proven. See also Arnhem District Court 12 April 2011, 05-703531-10; 05-702059-10 (not published), in which assault and threats were charged not only as means of coercion but also charged and declared proven as separate offences (under Art. 300 DCC and Art. 285 DCC, respectively). See also Zwolle-Lelystad District Court 27 March 2012, *LJN*: BX2627 and The Hague District Court 30 March 2012, *LJN*: BW1791.

¹¹ See Arts. 348 and 350 DCC.

¹² Amsterdam District Court 1 October 2010, 13-400354-09 (not published), in which the court rejected a defence that the indictment was null and void because the list of acts according to the definition of the offence were only further described in the follow-up to the indictment..

¹³ See, for example, Zwolle-Lelystad District Court 10 December 2010, *LJN*: BO9639; BO9656 and Amsterdam District Court 24 December 2010, 13-529072-09 (not published).

¹⁴ See, for example, Amsterdam District Court 9 December 2010, 13-650384-10; 13-656153-10; 13-656153-10 (not published).

persons, to other persons being exploited, sometimes with the phrase ‘others, including’ followed by a series of names¹⁵ and sometimes the phrase ‘one or more others’.¹⁶

In one case, the indictment was declared partially null and void because of a lack of internal consistency. This was a case where both the Netherlands and Antwerp, or in any case Belgium, were referred to as the place where the offence – which was taking a person to another country, i.e. Belgium, to enter prostitution there (Article 273f (1)(3) DCC) – was committed.¹⁷ The phrase ‘Antwerp, or in any case Belgium’ was declared null and void. The question is whether this is internally inconsistent. The element ‘another country’ refers to the country where the woman was put to work, which must be another country for the woman in question, which does not necessarily exclude the possibility that the acts occurred in more than one country, including the country of destination (by taking the victim over the border from one country to another, for example). In a similar case, the Supreme Court¹⁸ upheld a judgment of The Hague Court of Appeal,¹⁹ ruling that the place where the offence was committed was Goes and Belgium, in Antwerp, and that Belgium was also the other country. The following is an example of a case in which the specification of the place led to a different outcome.²⁰

Amsterdam District Court, 9 December 2010²¹

In three cases, the charge was that, among other things, “in or around the period from 14 February 2010 up to and including 9 March 2010 in Amsterdam and/or Utrecht and/or Alkmaar, in any case in the Netherlands, together and in concert with another person or other persons, [the suspect²²] recruited or took with him [victims 1, 2 and 3] and one or more other persons with the intention of inducing those other persons to make themselves available for performing sexual acts with or for a third party for remuneration in the Netherlands”. Given the formulation and the names of the victims, it appears that the intention was to bring charges under subsection 3. The district court acquitted. The description in the indictment does not in fact produce a criminal offence, since the element ‘in another country’ is lacking.

Factual meaning of elements of the offence

A number of the elements of the offence have a factual meaning. ‘Prostitution’ and ‘sexual acts’, for example, require no further description. In response to a complaint that an indictment did not include a description of what the sexual acts had comprised, the Supreme Court ruled: “in the charge pertaining to this article, the words ‘sexual acts’ have a sufficiently factual meaning that the charge complies with

15 The Hague District Court 3 May 2010, *LJN*: BM3374. In this case, the conviction only applied to the persons named.

16 The Hague District Court 12 May 2010, *LJN*: BM4240 and Roermond District Court 26 October 2010, *LJN*: BO4180; BO3022.

17 Den Bosch District Court 17 February 2010, 01-839065-09 (not published).

18 Supreme Court 2 February 2010, *LJN*: BK6328.

19 The Hague Court of Appeal 16 June 2008, 09-758541-06 (not published).

20 See also §4.5.2 (The Netherlands and other countries).

21 Amsterdam District Court 9 December 2010, 13-650384-10; 13-656153-10; 13-656175-10 (not published); the court agreed with the defence and the PPS that the charge had not been proven.

22 In this report, the term ‘suspect’ is also used to refer to persons who have been indicted and have stood trial. In other jurisdictions, members of the latter group are regularly referred to as ‘accused’.

Article 261 of the Code of Criminal Procedure even without further elaboration.²³ The following case shows that the decision might be different with other offences.

*Alkmaar District Court, 15 April 2010*²⁴

The indictment in this case included charges for two offences under Article 240b DCC (child pornography offences) and a human trafficking offence. The human trafficking offence related to Article 273f (1)(8) DCC: wilfully profiting from the sexual acts of another person with or for a third party for remuneration, when this other person has not yet reached the age of 18 years. The victim was nine or ten years old and the suspect was charged specifically with posting images of sexual acts on a paid Internet site. In reviewing the indictment, the court made no distinction between the definitions of the two offences and declared the indictment null and void for all charges. With its decision the court followed a judgment of the Amsterdam Court of Appeal,²⁵ which had found that the terms ‘image of a sexual act’ or ‘sexual act’ do not in themselves have a sufficiently factual meaning in the context of Article 240b DCC. The context of Article 273f DCC is different, however, and the term ‘sexual act’ has sufficiently factual meaning for charges brought that provision, something the district court had failed to appreciate.²⁶

A number of means of coercion also have a sufficiently factual meaning, including deception, abuse of a vulnerable position²⁷ and misuse of authority arising from the actual state of affairs.²⁸ These terms therefore require no further elaboration. The acts listed in Article 273f (1)(1) DCC have also be interpreted in accordance with common usage, but must also have the substantive effect intended by the international instruments on which the provision is based. Those acts are intended to be understood in a neutral and factual sense.²⁹ All of the acts described in subsection 3 also have a factual meaning.³⁰ Ac-

23 Supreme Court 19 September 2006, *LJN*: AX9215.

24 Alkmaar District Court 15 April 2010, 14-018037-03; 14-018035-03; 14-018036-03 (not published).

25 Amsterdam Court of Appeal 18 September 2009, *LJN*: BJ8833.

26 The provision also encompasses cases of sexual acts without physical involvement or physical contact with another person (see *Parliamentary Documents II 2000/01*, 27 745, no 3, p. 7 and 12).

27 Arnhem Court of Appeal 3 September 2007, 21/001088-07 (not published): “The court has found with regard to charge 1 that the deception has not been further specified in the indictment and with regard to charge 2 that the deception and the abuse of a vulnerable position have not been further specified, but does not believe the interests of the defendant – who has not made an issue of it – have been harmed. It has not been shown, either explicitly or implicitly, that the defendant and his counsel did not understand what was meant by those terms in this case.” The Supreme Court upheld the judgment of the court of appeal: “In this finding the Court of Appeal expressed the view that [...] the terms ‘deception’ and ‘abuse of a vulnerable position’ also have a precise meaning. This finding is correct, so the complaints fail”. Supreme Court 8 September 2009, *LJN*: BJ3537. See also the advisory opinion for this judgment, in which A-G Vellinga concluded: “The discussion of whether there was deception should therefore centre on the question of whether deception has been proven and not the question of whether deception was properly described in the indictment.” See also §4.4 (Coercion and free will).

28 Misuse of authority arising from the actual state of affairs can usually be ascertained from the actual circumstances; see also Van Maurik/Van der Meij 2012 (*T&C Sr*), Art. 273f DCC, Note 9(c).

29 Van Maurik/Van der Meij 2012 (*T&C Sr*), Art. 273f DCC, Note 9(b). See also Chapter 2 (Article 273f DCC).

30 Amsterdam Court of Appeal 17 March 2010, *LJN*: BL7890. See also § 4.5 (Subsection 3).

cordingly, the relevant question is whether the case file contains enough evidence to prove these elements and not whether the indictment complies with Article 261 of the Code of Criminal Procedure.³¹

4.2.2 Mutual relationship between subsections³²

Frequently, offences under different subsections of Article 273f DCC are combined into a single charge in the indictment, so no choice has to be made.³³ The various subsections are usually cited in such a way that all the elements of the offences under the relevant subsections are presented in succession, followed by the facts that relate to the various subsections to one extent or another.³⁴ The list of charges sometimes also includes the offence referred to in subsection 3. This quite often seems to cause confusion, prompting the judge to also consider the facts presented as evidence of the offence under subsection 3, which can wrongly lead to an acquittal as far as elements of coercion are concerned.³⁵ The same applies for subsections 2 and 5. Conversely, subsections that might apply in light of the facts as presented are not always included in the indictment.³⁶

4.2.3 Number of victims

There are often multiple victims in human trafficking cases, including minors, adults and underage victims who reach adulthood during the period of exploitation. This also has implications for the way in which the indictment is formulated. Sometimes, the exploitation of each victim is charged as a separate offence, and sometimes some or all of the victims³⁷ are included in a single charge. Especially if the acts and the means of coercion, or the requirement of coercion, vary from one victim to another, combining several victims and means of coercion in the indictment needlessly complicates the formulation of the indictment. In cases involving sexual exploitation, if an underage victim reaches the age of majority during the period of exploitation, offences under subsection 2 and subsection 5 are generally charged separately from offences under subsection 1 and subsection 4.³⁸ For other forms of exploitation, subsection 4 (in other words, the requirement of means of coercion) applies equally to underage and adult victims, although the difference between subsection 1 and subsection 2 remains relevant for other forms of exploitation.

31 Supreme Court 8 September 2009, *LJN*: BJ3537 (advisory opinion of A-G Vellinga).

32 See Chapter 2 (Article 273f DCC) and NRM7, pp. 422 ff.

33 See Appendix 3, Table A1.5. Cf. Utrecht District Court 13 December 2010, 16-711450-09; 16-600429-10 (not published): “The court understands the indictment as relating principally to subsections 1 and 6, and (implicitly) alternatively to subsections 4 and 9, so that if, briefly, subsections 1 and 6 can be legally and convincingly proved, the court will no longer assess the charges relating to subsections 4 and 9.” This decision is not in accordance with established case law.

34 Rotterdam District Court 9 December 2010, 10-750131-08; 10-750089-08 (not published); The Hague Court of Appeal 26 July 2012, 22-00635-11 (not published). See also §4.5 (Subsection 3).

35 See §4.5 (Subsection 3).

36 On this point see §2.3 (The definitions of offences in Article 273f DCC) and §4.7.1 (Attempt or a completed offence?).

37 In cases of other forms of exploitation, all of the victims are generally named in a single indictment for human trafficking. See, for example, Den Bosch Court of Appeal 6 July 2012, *LJN*: BX0599 and Arnhem Court of Appeal 29 June 2011, *LJN*: BQ9861.

38 If that distinction is made, it can have consequences for the judicial findings of fact. The Hague District Court 27 April 2012, *LJN*: BW4630; BW4647; BW4642; BW4616. See §4.4 (Coercion and free will).

*The Hague District Court, 17 February 2010*³⁹

In these cases, the public prosecutor had included the offences against five victims, two of whom were minors, in a single charge of human trafficking, based on subsection 1 and subsection 2, and perhaps implicitly subsection 4. The offences charged were those covered by subsection 1 and subsection 2; the circumstances suggested subsection 4. Although the district court initially seemed to make a distinction between the adult and underage victims and also found that the use of means of coercion was not required for victims 1 and 2 (both minors), the court concluded with the following finding: “This means that it has also not been shown that there was a violation of any fundamental right of [minor victim 1] and [adult victim]. In the court’s opinion, there was no abuse of a dependent position of [minor victim 1] and [adult victim] by the defendant and/or co-defendants by reason of which [minor victim 1] and [adult victim], given their limited mental capacity, which affected their personal perception of their relationship with the defendant and/or co-defendants, did not reasonably have any choice but to agree to and carry out the requests of the defendants.” The court acquitted on all charges with respect to all the victims.

The district court seems to have read subsection 4 into the indictment. Since the case involved other forms of exploitation, subsection 4 also applies for the underage victim, including the means of coercion.⁴⁰ It seems to follow from the reasoning of the district court that subsection 2 no longer has any separate significance. It is important to keep the terms ‘situation of exploitation’ and ‘exploitation’ separate. Just as the intention of exploiting should not be read into the definition of the offence in subsection 4, actual exploitation is not an element of the offence under subsection 1 or subsection 2.⁴¹

It is up to the PPS to make that distinction clear in the indictment, both with regard to minors and adult victims and with respect to the subsections, since the indictment forms the basis of the criminal proceedings.

4.3 Jurisdiction

Human trafficking is often a transnational offence. Looking only at exploitation in the sex industry, the case law shows that 54% of convictions for human trafficking in 2010 were for offences committed solely in the Netherlands, while 46% involved human trafficking in both the Netherlands and another country.⁴² In cases of other forms of exploitation, the majority of offences leading to convictions were committed only in the Netherlands (86%), and a minority in both the Netherlands and abroad (14%).⁴³

Human trafficking often involves a series of different acts, starting with the recruitment of a victim abroad, possibly accompanied by violence or another form of coercion, and ending in a situation of

39 The Hague District Court 17 February 2010, *IJN*: BL4279; BL4298; 09-754012-09; 09-754074-09 (not published).

40 This was the first case in which a minor was found to be a victim of other forms of exploitation and therefore also the first case to address the relationship between subsection 2 and subsection 4, one of which does and the other does not require coercion.

41 See §4.6 (Subsection 4).

42 Many of the cases involve recruitment of victims in other countries, see §7.4 (Victims recruited abroad).

43 See also Chapter 3 (Some figures (2010)).

exploitation. Despite the potential for complexity, the question of jurisdiction does not often cause a problem; in any case, prosecutions are rarely dismissed for lack of jurisdiction. In view of the nature of the offence and the importance of international cooperation, extra-territorial jurisdiction over human trafficking offences has been extended in recent years – see the discussion below of the Warsaw Convention, which led to the insertion of new provisions in articles 5, 5a and 5b DCC. And the pending implementation of the provisions of the EU Directive on Human Trafficking on this point means that the expansion of jurisdiction has not yet ended.⁴⁴ This section describes the most recent developments in the area of jurisdiction, as well as discussing, on the basis of examples, some issues that could arise in relation to the question of what should be deemed to fall under the scope of the same set of facts.

4.3.1 Basic principles

The basic principle of the Dutch rules on jurisdiction is the principle of territoriality: Dutch criminal law applies to anyone who commits a criminal offence *in the Netherlands*.⁴⁵ Established case law provides that acts that have taken place outside the Netherlands can also be prosecuted in the Netherlands on the grounds of Article 2 DCC if those acts constitute part of a criminal offence that is committed both in the Netherlands and abroad.⁴⁶ The Supreme Court reaffirmed this principle in a human trafficking case in 2010.⁴⁷ Jurisdiction then extends to the entire set of facts – quite apart from the question of whether the acts perpetrated in the Netherlands can in themselves be regarded as separate offences. This might include a situation where a victim is transported to the Netherlands from another country in order to work in prostitution here, as well as the situation where the victim is required to work as a prostitute not only in the Netherlands but also in neighbouring countries like Belgium or Germany.⁴⁸ To assume jurisdiction, therefore, the acts for which a person is charged must be part of one and the same set of facts. Whether they actually are is sometimes disputed.

Sneep

The question of jurisdiction was repeatedly raised in the *Sneep* case, an important case that has given rise to many judgments at first instance and on appeal. One of the defences put forward

44 See Parliamentary Documents II 2011/12, 33 309. no.2.

45 Art. 2 DCC. Jurisdiction is regulated in Arts. 2-8 DCC.

46 If places in the Netherlands and outside the Netherlands could be the place where the offence was committed, the offence can be prosecuted in the Netherlands on the grounds of Art. 2 DCC, even with respect to acts that constitute part of the offence which took place outside the Netherlands, regardless of whether the offence is a criminal offence in the other country. Cf. Supreme Court 27 October 1998, *LJN*: ZD1413, NJ: 1999, 221 and Van Elst 2012 (*T&C Sr*), Art. 2 DCC, Note 3 (c).

47 Supreme Court 2 February 2010, *LJN*: BK6328, in which jurisdiction was accepted in a human trafficking case in which the some of the acts charged took place in the Netherlands and some in Belgium.

48 See also, for example, Den Bosch District Court 19 February 2010, *LJN*: BL5303; BL5310: “The court is of the opinion that, in part because of the tapped telephone calls that were made on and around 20 April 2008 between the defendant and co-defendant X concerning X’s acts in the Czech Republic and what occurred in the Netherlands before X’s departure, the offence charged under 1 was committed in both the Netherlands and in the Czech Republic. According to the indictment, the defendant took part in the criminal offence in the Netherlands. This means that the defendant’s acts fall under Dutch criminal law. The requirement of double incrimination does not arise.” See also NRM7, pp. 420 ff. See also Leeuwarden Court of Appeal 10 February 2011, *LJN*: BP4396.

was that, although the specific case involved the same victim and the same suspect, and there were various sets of facts relating to human trafficking, the human trafficking had already been completed in one country before it commenced in the other and, thus, there could be no question of a continuing offence. In other words, the defence challenged the court's jurisdiction with respect to the offences committed in the other country. The PPS invoked the judgment of the Supreme Court of February 2010.⁴⁹ Arnhem Court of Appeal⁵⁰ found, however, that the case was different from the case on which the Supreme Court had ruled and held that – in general – the sequence of the human trafficking offences charged was relevant for the question of jurisdiction. After all, according to the Court of Appeal: “the phrasing of the description of time in the indictment – anterior – cannot bring within the scope of Dutch jurisdiction offences that, pursuant to Article 2 DCC, have already been completed and have ended outside Dutch jurisdiction.” This point had not been addressed in the Supreme Court's judgment, which apparently prompted the Court of Appeal to make this additional finding. The issue did not create any jurisdictional problems in that particular *Sneep* case, because in the appeal court's view the offences had not been completed and had not ended in Belgium. The appeal court therefore rejected the defence.

The same point also arises in another of the *Sneep* cases, in which the suspect did not have Dutch nationality or a permanent place of residence in the Netherlands. The victim did have Dutch nationality, however. Almelo District Court dismissed some of the charges brought by the PPS, in so far as they related to offences committed in Belgium, due to a lack of jurisdiction.⁵¹ The court found that there had been no continuous period during which the victim had worked for the suspect: there had been an interval of 18 months between the two periods she had worked in prostitution. The court found: “The alleged work as a prostitute for the suspect in Belgium had therefore ended at the time and any human trafficking by the suspect had been completed. The offences that the suspect is alleged to have committed in the Netherlands therefore took place 18 months after those in Belgium. The Netherlands has no jurisdiction with respect to those offences on the basis of Article 2 DCC.”

At first glance, this raises the question of how short or long the maximum interval between different periods of work – by the same individual for the same suspect – must be in order for them to be regarded as part of one and the same set of facts. Human trafficking often takes place in an environment of violence, threats and coercion. What should be assessed in deciding whether there was human trafficking is not just whether a person has actually been forced to work in prostitution,⁵² but rather the overall context, and the means of coercion must be examined in relation to each other.⁵³ In the above case, the fact that the prostitution in Belgium had ended does not exclude the possibility that the situation of coercion by the same suspect had continued in the meantime.

49 Supreme Court 2 February 2010, *LJN*: BK6328.

50 Arnhem Court of Appeal 20 December 2010, *LJN*: BO8406.

51 Utrecht District Court, sitting in Almelo, 18 February 2011, *LJN*: BP5092.

52 Haarlem District Court 21 July 2011, *LJN*: BR2862.

53 Supreme Court 8 September 2009, *LJN*: BJ3537 (advisory opinion of A-G Vellinga). See also Den Bosch Court of Appeal 5 September 2007, *LJN*: BB4386; Arnhem Court of Appeal 19 October 2010, *LJN*: BO2994. See also §4.4 (Coercion and free will).

*Leeuwarden District Court, 26 July 2012*⁵⁴

In this case, two suspects were accused of first exploiting the victim in Romania, and then bringing her to the Netherlands on 1 April 2009 and exploiting her in prostitution in Leeuwarden until 25 October 2009. In the meantime, the victim had returned to Romania where the coercion had allegedly continued. The court accepted jurisdiction for the entire period from 1 April 2009, but dismissed charges brought by the public prosecutor for the period from July 2008 to 1 April 2009 in Romania. The court did not consider what happened in Romania to be so inseparably linked to what had happened after the suspect's arrival in the Netherlands that those events fell under Dutch jurisdiction. The court found that the use of serious violence, threats and manipulation had been proven. The victim stated – according to the evidence presented – that she had worked for the suspects from July 2008, that they had confiscated all the money she had earned and had assaulted her. The situation bears every semblance of exploitation and, in view of the findings of fact, could also have been found to form part of the same set of facts.

Another aspect where the assumption that acts belong to the same set of facts arises pertains to acts that are charged not only as a means of coercion in a human trafficking offence, but also as separate offences. This point was discussed in NRM7. The judgment discussed there⁵⁵ was upheld on appeal.⁵⁶

*Amsterdam District Court, 9 March 2010*⁵⁷

In this case, the suspect was convicted of offences under Article 273f (1)(1), (3), (4) and (6) DCC, committed against three victims in the period from October 2006 up to and including 25 June 2009 in the Netherlands, Germany, Austria and Switzerland. With respect to victim A, the proven means of coercion was that the defendant had beaten her severely on the head and legs with his fist and/or bare hand. The defendant was separately charged with assaulting the same victim in various places in the Netherlands, Germany and Switzerland by striking her (with force) on and/or against her head and/or her legs. The court ruled *ex officio* that it had no jurisdiction and declared itself incompetent to hear the charges with respect to the assaults committed in Germany and Switzerland. It convicted the suspect for the assault in the Netherlands. In terms of time, place and form, all of these assaults corresponded with those declared proven in the human trafficking case. The court found that the suspect had transported the victim to various places in Europe to work in prostitution against her will and that the assaults took place after she had said she wanted to leave. Under these circumstances, the question is whether the court could also have seen these as a single set of facts.

4.3.2 Extraterritorial jurisdiction

In addition to jurisdiction on the grounds of the principle of territoriality, in some other specific cases, Dutch courts may also have jurisdiction over human trafficking offences committed abroad pursuant to Articles 5, 5a and 5b DCC. Furthermore, since 1 April 2010,⁵⁸ extraterritorial jurisdiction has also been expanded in several respects with the implementation of the Council of Europe Convention on Action

54 Leeuwarden District Court 26 June 2012, 17-925612-09 (not published).

55 Utrecht District Court, sitting in Almelo, 11 July 2008, *LJN*: BD6969; NRM7, p. 422.

56 Arnhem Court of Appeal December 2010, *LJN*: BO8406.

57 Amsterdam District Court 9 March 2010, 13-529038-09 (not published).

58 *Bulletin of Acts, Orders and Decrees*. 2010, 139.

against Trafficking in Human Beings, signed in Warsaw on 16 May 2005.⁵⁹ Given the nature of the offence of human trafficking, it was decided to adopt the maximum scope of protection afforded by the convention.⁶⁰

If a *Dutch national* commits human trafficking outside the Netherlands, first and foremost the Dutch courts have jurisdiction by virtue of the general provision of Article 5 (2) DCC if the offence is also a crime in the country where it is committed (the so-called requirement of double incrimination). Article 5 also contains two additional rules, specifically tailored to human trafficking. By virtue of Article 5 (1)(3) DCC, Dutch law also applies if the human trafficking is committed against a person under the age of 18, without any requirement of double incrimination. Since 1 April 2010, a new Article 5 (1)(5) DCC has also made Dutch law applicable if a Dutch person is guilty of human trafficking outside the Netherlands or is guilty of committing offences relating to travel documents to be used for human trafficking, and if these offences are committed outside the jurisdiction of any state. Obviously, the requirement of double incrimination does not apply in this situation since it could never be met.

The rules regarding *an alien with fixed domicile or residence in the Netherlands* who has committed human trafficking outside the Netherlands are as follows. Dutch courts have jurisdiction on the grounds of Article 5a (1) DCC if human trafficking is committed against a person under the age of 18. Since 1 April 2010, jurisdiction can also be based on Article 5a (2) DCC if human trafficking is committed against a person who has reached the age of 18, as well as for offences relating to travel documents for the purpose of human trafficking, provided there is dual incrimination.⁶¹ The new Article 5a (3) DCC provides that the requirement of dual incrimination does not apply when the offences are committed outside the jurisdiction of any state. Finally, since 1 April 2010, the Dutch courts have had jurisdiction over human trafficking and criminal offences relating to

59 *Bulletin of Treaties* 2006, 99; entered into force on 1 February 2008; for the Netherlands on 1 August 2008, *Bulletin of Treaties* 2010, 160, p. 6.

60 Art. 31 (1)(a) to (c) of the Convention require a State Party to establish jurisdiction when the offence is committed in its own territory or on board a ship flying the flag of that country or an aircraft registered under the laws of that country (Arts. 2 and 3 DCC). Art. 31 (1)(d) obliges a State Party to establish jurisdiction over any offence committed outside that country by one of its nationals or a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any state. Art. 31 (1) (e) obliges a State Party to establish jurisdiction over offences committed against its own nationals. By virtue of Art. 45 of the Convention, the Netherlands was permitted to make a reservation with respect to part of the provision; however, the Netherlands had indicated that it would not avail of that option.

61 Cf. Leeuwarden Court of Appeal, which dismissed the charges in so far as the offences were not committed at least partly in the Netherlands and did not involve human trafficking with respect to persons who had not yet reached the age of 18: Leeuwarden Court of Appeal 12 March 2012, LJN: BV8583 (*Koolvis*). The offences occurred before the entry into force of Article 5a (2) DCC.

travel documents for the purpose of human trafficking if those offences are committed *against a Dutch national*. This is laid down in the new Article 5b DCC.⁶²

Under Article 5b (2) DCC, Dutch criminal law is also applicable to anyone who is guilty of an offence – in addition to sexual offences – under Article 273f DCC if that offence is committed against a Dutch national or an alien with fixed domicile or residence in the Netherlands *who has not yet reached the age of 18*. This second part of the provision implements the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 2007).⁶³

The adoption of the EU Directive on Human Trafficking will lead to a further expansion of extraterritorial jurisdiction with respect to human trafficking, since Article 10 (1) of the Directive requires the Netherlands to establish unqualified jurisdiction in its legislation: the requirement of dual incrimination will no longer apply with regard to human trafficking committed by a national outside the Netherlands against victims over the age of 18, as is still the case under the existing Article 5 (1)(2) at the time of writing this report. In addition, member states are encouraged – not obliged – to establish jurisdiction over human trafficking offences committed in another country by aliens who are habitually resident in that member state.⁶⁴ The bill to implement these provisions was recently submitted to parliament. Once again, the reasoning is that extensive applicability of Dutch criminal law to human trafficking will provide greater protection for victims.⁶⁵ The EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography might also lead to the expansion of extraterritorial jurisdiction over related offences.⁶⁶

4.4 Coercion and free will

Coercion is effected by the use of means, including all of the means listed in Article 273f (1)(1) DCC.⁶⁷ It is coercion if the means used lead to a person finding himself or herself in a situation of exploitation⁶⁸ or being prevented from escaping from a situation of exploitation.⁶⁹ The means do not have to be used against the victim personally. Means such as the threat or use of physical violence can be used against a third person in order to induce another person to submit to the will of the offender. Given the intention of the international instruments on which these provisions are based, terms such as coercion, fraud and

62 Because the offences dated from before the entry into force of this provision, the Almelo District Court dismissed some of the charges for lack of jurisdiction. See the judgment cited above from the Utrecht District Court, sitting in Almelo, 18 February 2011, L/N: BP5092 (*Sneep*).

63 *Bulletin of Treaties*, 2008, 58, entered into force on 1 July 2010; *Bulletin of Treaties* 2010, 156. Art. 5b DCC was introduced by Act of 26 November 2009, *Bulletin of Acts, Orders and Decrees* 525, in conjunction with the Act of 26 November 2009, *Bulletin of Acts, Orders and Decrees* 544, entered into force in 1 April 2010.

64 See Art. 10 (2) in conjunction with (3) of the EU Directive on Human Trafficking.

65 *Parliamentary Documents II* 2011/12, 33 309, nos.2 and 3.

66 Art. 17 of the Directive of the European Parliament and of the Council of 13 December 2011, OJ L335 1.

67 See NRM7, pp.409 ff.

68 See § 4.6 (Subsection 4).

69 Van Maurik/Van der Meij 2012 (*T&CSr*), Art. 273f DCC, Note 9(d).

extortion must be interpreted broadly, and not strictly according to the definitions of offences such as the use of coercion within the meaning of Article 284 DCC or extortion in the sense of Article 317 DCC.⁷⁰

Means of coercion are not an element of the offence under all of the subsections of Article 273f DCC.⁷¹ Means of coercion are only explicitly referred to in subsections 1, 4 and 9 of Article 273f (1) DCC. When the acts involve underage victims,⁷² the offence of human trafficking can be committed without coercion or manipulation.⁷³ Coercion is also not required with respect to the recruitment, taking or abduction of a person with the intention of inducing that person to make himself/herself available to perform sexual acts with or for a third party for remuneration in another country, as referred to in Article 273f (1) (3) DCC.⁷⁴ And naturally, the fact that means of coercion are not an element of the offence does not mean that they have not been used. Although it is not an element of the offences in these cases, coercion still sometimes plays a role in the assessment of these types of human trafficking offences. For example, the coercion used is sometimes described in the indictment and sometimes the court erroneously assesses the existence of those means of coercion in deciding whether there is proof of human trafficking.⁷⁵

4.4.1 Children

The terms of Article 273f (1) (2), (5) and (8) DCC relate to the protection of children, also from themselves. The legislature's intention was to express the fact that the will of a minor, and hence his or her consent, is immaterial.⁷⁶ It is irrelevant whether the suspect knew that the victim was a minor; this element of the offence is an objective fact. The defence of excusable mistake of fact cannot be invoked.⁷⁷ The EU

70 Van Maurik/Van der Meij 2012 (*T&C Sr*), Art. 273f DCC, Note 9(c).

71 NRM7, pp. 427 and 432.

72 Except with respect to Art. 273f (1) (9) DCC and other forms of exploitation in the case of subsection 4.

73 The provisions of subsections 2, 5 and 8 of Art. 273f (1) DCC do not include the means of coercion specified under (1). Subsections 5 and 8 in fact relate only to prostitution or the making available of organs for remuneration.

74 On this point, see §4.5 (Subsection 3).

75 The Hague District Court 27 March 2012, *LJN*: BW1957; the court found insufficient evidence of coercion and also found that this suspect had denied forcing the complainant into prostitution. The victim was 14 years of age and had run away from a custodial institution; the suspect was in his early twenties and the charge involved subsection 5, in other words, not 'forcing' but 'inducing'. A different decision is that of Rotterdam District Court 21 April 2010, *LJN*: 10-765105-06 (not published). This case also involved a 14-year-old girl who had run away from home. In this case, the court found: "The suspect was aware of the abuse. He had practically created the circumstances in which [the victim] found herself. The intention of exploiting her is almost a given: the circumstances were created in order to put [the victim] to work as a prostitute and then to profit personally from it." The suspect was convicted under subsections 2, 5 and 6 and, implicitly, under subsection 9.

76 *Parliamentary Documents II* 1990/91, 21 027, no. 5, p. 4, on the amendment of Arts. 250bis and 250ter (old) DCC.

77 Supreme Court 17 May 2011, *LJN*: BP6122.

Directive on Human Trafficking also gives considerable prominence to the protection of minors and other vulnerable persons against human trafficking.⁷⁸

The protection of minors is not only an important theme in legislation, but also at policy level.⁷⁹ Nevertheless, the figures for the number of registered underage victims show that there is still a long way to go in that regard.⁸⁰ The following case provides an illustration of how the protection of an underage girl can sometimes prove inadequate. It also demonstrates the relationship between subsections 1 and 4 on the one hand, and subsections 2 and 5 on the other, as well as the significance of means of coercion in the definition of the offence.

*The Hague District Court, 27 April 2012*⁸¹

This case involved one underage girl, who was particularly vulnerable, and four suspects, one a minor and three adults. Three days before her 18th birthday, victim X was expelled from her sheltered residential accommodation. She had nowhere to go and sought contact with a boy she knew from a juvenile institution. This boy, suspect B, told her to come to The Hague. She had no money and told suspect B that she wanted to be a prostitute. Suspect B knew people who could help her in that and, on 2 October (victim X turned 18 on 5 October), suspect B brought her to suspects A and C, who would be able to arrange accommodation for her with suspect D. Suspect A highlighted the victim's vulnerability by informing the examining magistrate that the girl was not entirely right in the head. Suspect C (a woman) would accompany victim X when she went to suspect D to find accommodation. Suspects A and C took photos of victim X with her upper body exposed, made an advertisement and placed it on three sex sites on the Internet. Suspect C admitted this. Two clients replied and suspect D brought victim X by car to the first client in Scheveningen, from whom she received € 50 in cash. Suspects A, C and D then brought her to a second client in Dordrecht and waited for her. She earned € 60 there. She had to surrender all of the money she earned to suspect C. The original intention was that the money would be divided three ways: one-third for victim X, one-third for suspects A and C and one-third for suspect D for the accommodation. The victim ultimately received nothing. These facts are taken from the findings on the evidence in *LJN: BW4616*.

Suspect C was not prosecuted for complicity in human trafficking or for producing and distributing child pornography,⁸² even though she admitted to making the photos and placing them on the Internet together with suspect A. The judgments also show that she travelled to Dordrecht and that the agreement was that she would receive at least a share of one-third of the proceeds from prostitution and that victim X had to surrender the money earned to her.

78 Recital 8 of the Preamble to the EU Directive on Human Trafficking provides that the child's best interests must be a primary consideration in the application of the directive. Article 2 (5) provides that human trafficking involving a child is a punishable offence even if no means of coercion are used. Articles 13 to 16 contain specific provisions relating to minors, with respect to preventing secondary victimization, for example. For a discussion of this point, see Chapter 7 (Victims).

79 See Minister of Security and Justice 2011.

80 See Chapter 7 (Victims).

81 The Hague District Court 27 April 2012, *LJN: BW4630; BW4647; BW4642; BW4616*.

82 Art. 240b DCC. She was prosecuted under Article 282 (1) DCC (deprivation of liberty), and was acquitted.

Suspect B was charged with complicity in offences under Article 273f (1)(1), (2), (4), (6) and (9) DCC, but not under subsection 5, perhaps because the initial contact with clients occurred after 5 October.⁸³ This ignores the fact that, as shown by her consent to the placing of advertisements on the Internet, victim X had already been induced to make herself available for prostitution on 2 October. In the indictment, the PPS did not make any distinction between the period before and after the victim's 18th birthday. Nor was complicity charged as an alternative offence.

Suspects A and D were also charged with complicity in offences under Article 273f, opening lines and (1)(1), (2), (4), (6) and (9) DCC. None of the charges brought against suspects A, B and D described the victim's vulnerable position in detail, although her vulnerability, and its obvious nature, are clearly apparent from the judgments. It is unclear why no charges were brought under subsection 5 in view of the period during which the offences were committed. Suspect A was also not charged with complicity under Article 240b DCC (child pornography offences).

Suspect A was the only suspect to be convicted under Article 273f (1)(1) and (9) DCC, with only abuse of a vulnerable position being declared proven as a form of coercion. Apparently, the term was found to have a factual meaning. The offence was found to have been committed from 4 to 11 October. Why the suspects were acquitted on the charges under subsection 2 is therefore unclear, since victim X was still a minor on 4 October.

The district court assigned considerable weight to victim X's consent but, as discussed above, that consent was immaterial.⁸⁴ Although the court found that suspect B had established the contact with suspects A and C, it did not consider him an accessory. With regard to suspect D, the court observed that it had not been established that he had forced or induced victim X to surrender the proceeds from prostitution to him. In view of the conviction of suspect A, this decision is difficult to understand. The court did find that there was evidence of accommodating the victim and transporting her to clients, but nevertheless acquitted on charges under subsections 1 and 2. The court also found that no intention to profit had been proven. The indictment referred to 'intention to exploit' (subsections 1 and 2) and 'profiting' (subsection 6). It is not clear which part of the indictment the court was referring to when it used the phrase "intention to profit". It is equally unclear what the court meant with the additional phrase that the proceeds "were in fact very limited". The amount of the proceeds can have no bearing whatsoever on the evidence of human trafficking. Even the total absence of proceeds would not stand in the way of a conviction on the grounds of Article 273f (1)(1), (2), (4) and (5) DCC.

83 The date of the first contact with clients is not clear from the judgments.

84 Article 2 (4) of the Directive provides that the consent of a victim of human trafficking to the exploitation, whether intended or actual, is irrelevant if any means of coercion is used. See also Chapter 2 (Article 273f DCC).

4.4.2 Violence and manipulation

First and foremost, human trafficking is a violent crime of intent,⁸⁵ which means that even if no physical violence is used, the dimension of violence must be deemed to be present.⁸⁶ Nevertheless, for the quantitative part of this study, a distinction is made between violent and manipulative means of coercion. *Violent* means of coercion are defined as those means that directly affect or threaten a victim's physical integrity. Examples would be sexual violence, non-sexual physical violence (including forcing the victim to get a tattoo, to have an abortion, to ingest narcotics or to have unsafe sex), the threat of sexual or other violence, and physical confinement.

However, human traffickers also use means that are not directly violent in nature, but which could ultimately have the same effect on the victim as the use or threat of violence. While these means, referred to in this report as *manipulative* means of coercion, might appear more subtle, they can nevertheless create a situation in which a victim feels imprisoned and therefore has no free choice. These forms of what often constitutes psychological violence leave no physical traces and therefore appear, at first glance, more difficult to prove. In 2010, this category included various means or combinations thereof:

- verbally insulting, humiliating or disparaging a victim;
- exerting psychological pressure on a victim, for example by referring to (fictitious) debts, threatening to inform others of their work in prostitution, threatening to call the Child Protection Agency, threatening to sell the victim to another person, creating a situation of control and isolation or creating a situation of dependence (for money or for shelter, by confiscating the victim's passport, or by administering drugs, for instance);
- deception or abuse of a loving relationship or friendship;
- abusing a victim's weak economic, psychological and/or social position (for example, lack of money, illegal residence in the country, mental retardation, illness, a language barrier, the fact that he or she has run away from a custodial institution, drug addiction);
- deception about the nature of the work to be performed⁸⁷;
- deception about the working conditions;
- deception about who will receive any proceeds.

The term 'violence'

Apart from physical violence, including sexual violence, other forms of coercion listed in the relevant provision of the Criminal Code – including abuse of a vulnerable position and misuse of authority arising from the actual state of affairs – can themselves constitute forms of violence, namely psychological violence. In its policy rules in 2010, the Violent Offences Compensation Fund gave the following general definition of violence: "*The violence can consist of physical and/or psychological violence. Exerting great psychological pressure on the applicant can also constitute a violent crime. The aspect of violence in these offences might lie in the creation of a particular situation and the misuse*

85 See also Art. 17 of the EU Directive on Human Trafficking (2011/36/EU).

86 Sometimes, the fact that no violence was used is regarded as a consideration in favour of the suspect in sentencing. This ignores the inherently violent character of human trafficking. This point is discussed further in Chapter 6 (Sentencing).

87 The terms 'deception', 'abuse of a vulnerable position' and 'misuse of authority arising from the existing state of affairs' are discussed in more detail later in this chapter on the basis of a number of judgments.

*of circumstances. A significant age difference, a position of authority or a position of dependency are examples of circumstances that could indicate violence.”*⁸⁸ In the Compensation Fund’s most recent policy rules (2012), this policy line is repeated in practically the same terms.⁸⁹

The Compensation Fund recently revised its policy in relation to human trafficking, with the result that human trafficking is now regarded – without exception – as a violent crime of intent, in accordance with Article 17 of the EU Directive on Human Trafficking.⁹⁰

Given the possible consequences for victims, no straightforward ranking can be made between violent and manipulative means of coercion. Nor can it be automatically assumed that the physical injury would be worse for victims of exploitation in the sex industry than for victims of other forms of exploitation. Psychological violence or manipulation can be just as serious and/or cause just as much lasting harm for a victim as physical force. An example of this can be found in a judgment of the Rotterdam District Court,⁹¹ a case that involved a 14-year-old girl who was induced to enter prostitution in the period from 1 March to 20 June 2006. No physical violence was used; however, when the girl was heard as a witness by the examining magistrate 18 months later, she suffered from decompensation and was psychologically unable to testify.⁹²

In cases of other forms of exploitation, victims have generally been worn out by the conditions under which they have had to work. In a case against the owner of a mushroom farm⁹³, an expert consulted by the Social Information and Investigation Service (SIOD)⁹⁴ said “the workload was extreme and unacceptable”. The reasons he gave were the method of remuneration of the victims⁹⁵ and the fact that they were chronically and systematically exposed to very long working weeks, were required to work for long series of days and the work was physically and mentally very onerous. From an occupational-health perspective, the expert concluded that the work load formed a threat to their health, stressing that it could have harmful effects on their health in both the short and the longer term.

There are specific acts by human traffickers that could have an impact that the victim experiences as physically violent, quite apart from whether the means of coercion themselves can be described as violent or manipulative. Examples would be forcing or inducing a person to have an abortion or get a tat-

88 Policy Rules of the Violent Offences Compensation Fund 2010, p. 5.

89 Policy Rules of the Violent Offences Compensation Fund 2012, p. 4.

90 See below, §8.6 (Violent Offences Compensation Fund).

91 Rotterdam District Court 21 April 2010, 10-765105-06 (not published).

92 Because the proceedings had consequently exceeded a reasonable period (by seven months), the sentence imposed on the suspect (who was 55 years of age at the time of the offence) was reduced by six months.

93 Roermond District Court 26 October 2010, *LJN*: BO3022.

94 The expert, Professor Kompier, was consulted while the SIOD was carrying out its investigation. Kompier is a labour and organisational psychologist attached to Radboud University in Nijmegen.

95 At a certain moment, the workers were no longer paid by the hour but for each kilogram of mushrooms they picked (so-called piece wages). Employers then sometimes make unreasonable demands as regards the number of kilograms that have to be picked in a day and, consequently, it is illusory that they can earn a minimum wage.

too. These acts and circumstances are assessed differently in the case law.⁹⁶ For example, in a case before Zwolle-Lelystad District Court, forcing or inducing a victim to have an abortion – at too late a stage, according to Dutch standards – was not included as a means of coercion in the indictment.⁹⁷ Nevertheless, the court attached great weight to the abortion in the sentencing. In another case before Amsterdam District Court, inducing a woman to have an abortion was charged and found proven by the court. In the grounds for sentencing, the court found that the acquittal on the use of force, violence and threats of violence were grounds for departing from the sentence demanded and imposing a lighter sentence.⁹⁸ By contrast with the case in Zwolle-Lelystad, it was not clear from the grounds for sentencing that the forced abortion had been considered in the sentencing.⁹⁹ In view of the possible physical and psychological consequences, forcing a woman to have an abortion should always lead to a higher sentence.¹⁰⁰ Sometimes, women who are coerced into prostitution are also forced or induced to get a tattoo and this also constitutes a direct violation of physical integrity. On the subject of forced abortion as an aggravating circumstance and inducing a person to get a tattoo, see §6.3.1.3 (Serious physical injury).

4.4.3 Data on means of coercion used

Because the definition of the offence in Article 273f (1)(1) DCC makes no distinction between the sectors in which the exploitation takes place, the means of coercion have the same significance with respect to sexual and to other forms of exploitation. Their interpretation, therefore, does not depend on whether the case involves sexual or another form of exploitation, as recently emphasised by UNODC.¹⁰¹ Nevertheless, in practice a distinction can be seen in the way in which these means of coercion are treated. The differences can be explained by the nature of the form of exploitation. For example, sexual exploitation relatively frequently involves deception or abuse of a loving relationship. In cases of other forms of exploitation, the vulnerable position of employees is relatively frequently due to the fact that they are living illegally in the country.¹⁰² In the following sections, some statistics relating to the use of coercion in cases of sexual and other forms of exploitation are discussed.

Sexual exploitation

The study of 111 cases of sexual exploitation in 2010 showed that a conviction followed relatively more often when coercion was not an element of the offence – in the case of underage victims and subsection

96 See also Chapter 6 (Sentencing).

97 Zwolle-Lelystad District Court 10 December 2010, *LJN*: BO9639.

98 Amsterdam District Court 26 November 2010, 13-708035-10 (not published).

99 See also Amsterdam District Court 12 October 2010, 13-520119-09 (not published). The proven forced abortion also played no apparent role in the grounds for sentencing in this case.

100 See §6.4 (Bill to implement the EU Directive on Human Trafficking).

101 UNODC (2012), 'Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime', UNODC: Vienna, considerations 4.1 and 4.2, published at http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf. The 'guidance note' is the outcome of a meeting at which BNRM was also represented, UNODC Expert Group Meeting, Vienna, 28-29 June 2012.

102 As discussed below, to prove the means of coercion 'abuse of a vulnerable position' it is sufficient to show the existence of such a situation and that the suspect was aware of it.

3 – than when it was.¹⁰³ In the cases where coercion was an element of the offence,¹⁰⁴ manipulative means of coercion were almost always included in the indictment (99%). The same applies for convictions (96%).

Table 3 Means of coercion used (2010, sexual exploitation)

	Indictment N=83		Conviction N=45	
	N	%	N	%
Use of (threat of) violent coercion	62	75%	27	60%
– including rape	11	13%	1	2%
Use of manipulative means of coercion	82	99%	43	96%
– including deception or abuse of a loving relationship	28	34%	18	40%
– including deception about the nature of work	18	22%	7	16%
– including (fictional) debt owed to offender	24	29%	12	27%

Violent means of coercion were charged in three-quarters of the indictments and were found proven in 60% of the convictions – almost always in combination with manipulative means of coercion, since the latter appeared in almost every indictment and conviction in cases where coercion constituted an element of the offence.¹⁰⁵

Other forms of exploitation

Coercion was always an element of the offence in the cases relating to other forms of exploitation in 2010.¹⁰⁶ As the table below shows, manipulative coercion was charged in every indictment (100%) and declared proven in every conviction (100%). Violent means of coercion were charged in slightly more than half of the indictments (54%). In four cases (29%) in which there were convictions, violent coercion was declared proven. In other words, this occurs more frequently in cases of sexual exploitation.

¹⁰³ See Appendix 3, Table A1.7.

¹⁰⁴ See Appendix 3, Table A1.7.

¹⁰⁵ Violent means of coercion were charged in 62 indictments (75%), 61 times in combination with manipulative means of coercion. Violent means of coercion were declared proven in 27 convictions (60%), 25 times in combination with manipulative means of coercion.

¹⁰⁶ Art. 273f (1)(3) is irrelevant for other forms of exploitation and none of the 29 judgments in 2010 involved *only* underage victims.

Table 4 Means of coercion used (2010, other forms of exploitation)

	Indictment N=29		Conviction N=14	
	N	%	N	%
Use of (threat of) violent coercion	15	54%	4	29%
– including sexual violence/sexual exploitation	3	11%	1	7%
Use of manipulative coercion	29	100%	14	100%
– including abuse of a vulnerable position as a result of illegal residence	9	32%	7	50%
– including abuse of a vulnerable position as a result of mental disability	5	18%	1	7%
– including abuse of a vulnerable position as a result of cultural factors	3	11%	-	-

*The Hague District Court, 18 March 2010*¹⁰⁷

In a case in which a suspect was prosecuted for forcing another person to smuggle drugs, the court declared proven as a means of coercion that the suspect had induced one of the victims to enter prostitution. This is noteworthy because the suspect was acquitted in a separate case in which he had stood trial for that offence.¹⁰⁸

4.4.4 Means of coercion in relation to each other

It is clear from the case law that was studied that human traffickers normally use a combination of different means of coercion to induce their victims to enter or remain in prostitution or otherwise to exploit them, since, in practice, these means of coercion do not usually occur in isolation. Human trafficking in the sex industry often takes place in a climate of violence, intimidation, manipulation and coercion.¹⁰⁹ In his advisory opinion for Supreme Court 17 January 2012,¹¹⁰ A-G Machielse expressed this as follows: “The list of means by which the victim is forced or induced in Article 273f DCC must be interpreted broadly. Human trafficking will often be characterised by a variety of acts, ranging from the pretence of affection and giving compliments, on the one hand, to the use of physical violence, on the other. Naturally, the greater the pressure applied, the more clearly the restriction of the victim’s freedom is manifested. The use of lies and deception to induce the victim to enter prostitution may not, in itself, be sufficiently coercive for the offence of human trafficking. But deception rarely occurs alone. It is often part of a combination of tactics that are used by the suspects to keep the victim under their thumb.” The Supreme Court upheld a judgment of Den Bosch Court of Appeal.¹¹¹

107 The Hague District Court 18 March 2010, *LJN*: BL8022.

108 The Hague District Court 26 June 2009, 09-757365-09 (not published).

109 Whereas the previous study showed that the various acts were each assessed separately by the court to decide whether they were sufficient to constitute coercion (NRM7, p.418), this study shows that the acts are more often considered in relation to each other and interpreted as mutually reinforcing.

110 Supreme Court 17 January 2012, *LJN*: BU4004.

111 Den Bosch Court of Appeal 25 October 2010, 20-000969-10 (not published).

Arnhem Court of Appeal¹¹² used the term ‘broken spirit’ to describe the emotional state of a victim who was unable to offer any resistance to the persistent coercion and pressure exerted on her by the suspect.

*Arnhem Court of Appeal, 19 October 2010*¹¹³

“By forming a relationship with [X] and making use of the aforementioned acts and assaults during that relationship and by exploiting the situation where [X] had assumed the care of her daughter [name of daughter] and felt a great sense of responsibility for her, the court finds that the suspect had broken the spirit of [X] to such an extent that he had caused her to be in a situation of dependence. Particularly in view of the fact that violence was systematically used against [X], the court finds that [X] was no longer able to freely decide whether to enter or continue in prostitution. The mechanism of coercion, violence and acts used against her, which accumulated during the entire period covered by the indictment, meant that [X] did not dare to resist the suspect and that she eventually acceded to the suspect’s insistent demands to work and to continue working in prostitution. [X] was therefore forced to work in prostitution.”

*The Hague District Court, 3 May 2010*¹¹⁴

The case that has become known as the *Kroepoek* case provides a good example of a combination of means of coercion that cause persons to remain in a situation of exploitation. In this case, the suspects used ingenious constructions. For example, they consciously required the victims to work short hours so that they would earn too little to be able to escape from the situation. The victims were all living illegally in the Netherlands and were living in social isolation, making the possibility of escaping from their situation even more illusory.

In deciding whether there was human trafficking through the use of specific means of coercion, it is therefore important to consider the detailed facts as a whole. This now seems to be established jurisprudence.

4.4.5 Deception, abuse of a vulnerable position and misuse of authority arising from the actual state of affairs

As already mentioned, Article 273f DCC lists a number of specific means of coercion that originate in part from international legislation.¹¹⁵ The elements ‘misuse of authority arising from the actual state of affairs’ and ‘abuse of a vulnerable position’ are objectified.¹¹⁶ These elements have a factual meaning.

112 Arnhem Court of Appeal 19 October 2010, *LJN*: BO2994.

113 Arnhem Court of Appeal 19 October 2010, *LJN*: BO2994.

114 The Hague District Court 3 May 2010, *LJN*: BM3374.

115 See NRM7, pp. 413 ff.

116 Almelo District Court 30 March 2012, *LJN*: BW0448 differs in this sense. The court found that the suspect had approached the named persons to work as prostitutes, brought them into contact with client through his escort service, made his home available for prostitution and kept their earnings. The court found that no means of coercion were used. The means of coercion specified in the indictment mainly encompassed abuse of a vulnerable position consisting of the fact that the persons had no residence permit, were living illegally in the country, were engaged in an asylum procedure and did not know the language or the customs. These all seem to be verifiable circumstances since the persons were named. The court did not give any further reasons for its finding that no means of coercion were used

Naturally, the existence of facts and circumstances giving rise to the misuse or deception must be proved, but these terms are sufficient for the indictment to comply with Article 261 of the Code of Criminal Procedure even without a detailed description. Abuse of a vulnerable position and misuse of authority arising from the actual state of affairs are sometimes confused.¹¹⁷ Their meanings overlap to a considerable extent¹¹⁸, although there does not have to be an unequal relationship to prove abuse of a vulnerable position.¹¹⁹ The term ‘misuse of authority arising from the actual state of affairs’ has a wider scope than the term ‘abuse of power’ in the EU Directive on Human Trafficking.

Abuse of a vulnerable position

The origin of the element ‘abuse of a vulnerable position’ lies in the UN Palermo Protocol.¹²⁰ It was added to ensure that complex forms of coercion – subtle coercion – would not fall outside the scope of the definition of human trafficking,¹²¹ but there been little attention to the elaboration of the criterion of abuse at international level. The *Travaux Préparatoires* to the Protocol state that this element of the offence refers to the situation “in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.¹²² The new EU Directive on Human Trafficking contains a separate section with a similar definition: “A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved”.¹²³ The definition is broad and potentially encompasses a wide range of acts, as discussed above. In the bill to implement the directive it is also proposed including the definition of abuse of a vulnerable position in a separate section of Article 273f DCC (contrary to the advice of the NRM).¹²⁴ The definition would then also encompass “a situation in which a person has no real or acceptable alternative but to submit to the abuse”.¹²⁵

117 According to Beijer 2010a, the means ‘misuse of authority arising from the actual state of affairs’ is often also charged because it is easier to objectify and every aspect of the relationship between the suspect and the alleged victim can be taken into account. However, in the indictments in 2010 it is apparent that they do not include a choice for a particular charge or a specific means of coercion but rather all of the means of coercion according to the legal provision are included in the indictment, followed by a presentation of the facts, see §4.2.2 (Subsections in relation to each other).

118 Alink & Wiarda 2010, p. 217.

119 Machiels 2010 (NLR), Art. 273f DCC, note. 3.1.

120 Article 3(a) of the Palermo Protocol.

121 UNODC 2012, p. 22.

122 UNODC 2006.

123 Art. 2 (2) EU Directive on Human Trafficking (2011/36/EU).

124 Letter from the National Rapporteur on Trafficking in Human Beings to the Minister of Security and Justice concerning the implementation of EU Directive 2011/36/EU on preventing and combating trafficking in human beings, 13 October 2011, appendix to *Parliamentary Documents II* 2011/12, 33 309, no. 3.

125 *Parliamentary Documents II* 2011/12, 33 309, no. 2. Such an explanation should preferably be included in the explanatory memorandum, since the article also contains no definitions of other means of coercion. Furthermore, the term ‘vulnerable position’ has already been fleshed out in quite some detail in the case law in the Netherlands and therefore there is no uncertainty about its interpretation by the courts.

Because misuse of a vulnerable position has never been fleshed out at international level, the meaning given to this element of the offence in the case law has been influenced mainly by the national legislative history concerning the element ‘misuse of authority arising from the actual state of affairs’.

For an act to constitute ‘abuse of a vulnerable position’ and ‘misuse of authority arising from the actual state of affairs’, two factors have to be proved: the existence of such a situation and awareness of that situation on the part of the suspect. The legislature already commented on the first factor in the explanatory memorandum to Article 250ter (old) DCC,¹²⁶ in which the criterion of the ‘articulate prostitute’ in the Netherlands was linked to the ‘misuse of authority arising from the actual state of affairs’, which is assumed to exist if the prostitute is in a situation in which the conditions are not the same as those experienced by an articulate prostitute in Netherlands. Examples mentioned in the explanatory memorandum are persons from other countries, drug addicts and very young people. In the memorandum of reply, those examples are supplemented with persons who have debts because they had to pay for the journey to the Netherlands themselves or persons who do not have a passport, whose visa has expired or who do not have financial resources of their own.¹²⁷ It is now established case law that a person’s illegal residence in the country is in itself sufficient evidence that he or she is in a vulnerable position.¹²⁸

Although the explanatory memorandum – in 1988 – did not mention ‘abuse of a vulnerable position’, the text is also relevant for the definition of this element of the offence, since the meaning of the term overlaps with that of the element ‘misuse of authority arising from the actual state of affairs’.

*Amsterdam Court of Appeal, 30 September 2011*¹²⁹

In this case, the Court of Appeal gave a clear interpretation of the terms ‘authority arising from the actual state of affairs’ and ‘deception’: “The fact that [M.C.] was so in love with the suspect that she was willing to allow him to manage the money she earned for their joint future, and the fact that there was a significant difference of 14 years between their ages and that, at least initially, she was alone in the Netherlands, without friends and family, creates a situation of authority arising from the actual state of affairs for the suspect over [M.C.], which he misused by getting her to surrender her money to him. In that context, the court assumes that the suspect was aware of this state of affairs, since he had a relationship with her and it is totally implausible that he could have failed to notice this state of affairs. The court also finds that the suspect misled [M.C.] by representing to her that he had a relationship only with her and wanted to build a joint future with her, while at that time he had at least one other serious relationship (with [A. van D.]). It can be concluded from that, and from the fact that the suspect repeatedly formed other relationships while in a relationship, that he did not genuinely have that intention. This is confirmed in the suspect’s statement to the examining magistrate that he had an on-off relationship with [M.C.] when he was already with [A. van D.] and the description of that relationship as a ‘casual relationship’.”

126 *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 8.

127 *Parliamentary Documents II* 1990/91, 21 027, no. 5, p. 3.

128 See, for example, Supreme Court 5 February 2002, *LJN*: AD5235. The Supreme Court reiterated the criterion in Supreme Court 27 October 2009, *LJN*: BI7097; BI7099 (*Chinese restaurant case*).

129 Amsterdam Court of Appeal 30 September 2011, *LJN*: BT6850 (*Judo*).

Zwolle-Lelystad District Court, 27 March 2012¹³⁰

As regards the term ‘vulnerable position’, the court found, in accordance with the explanatory memorandum to the article, that a drug addict is not usually in a situation in which it is possible to adopt an independent attitude, similar to the attitude of an articulate prostitute in the Netherlands. In this case, the victim’s alcohol addiction had contributed to the vulnerable position she was in. “The circumstances that [victim] was married to the suspect and that they had children together also contributed to curtailing the possibility for [victim] to make her own decisions and/or free choices entirely independently of the suspect and co-suspect.”

Domestic violence

The government’s attention to domestic violence has increased substantially in recent years.¹³¹ The term ‘domestic violence’ refers to the relationship between offender and victim, and there is usually an imbalance of power in the relationship. The victim is in a situation of being dependent on the offender. Domestic violence involves physical, sexual and psychological forms of violence.¹³² Whereas it used to be rare for victims of domestic violence to report a crime or for offenders to be prosecuted, domestic violence is nowadays treated as a priority by the PPS.¹³³ This approach has also led to many convictions for domestic violence. Domestic violence is rarely confined to a single blow, but is far more often a systematic problem. If there is also human trafficking within the sphere of domestic violence, it seems logical to make the link between the domestic violence and the existence of means of coercion within the meaning of Article 273f DCC. In a case before Amsterdam District Court,¹³⁴ the suspect was accused of exploiting his partner in prostitution over a period of more than four years. The picture to emerge from the case file was that of an unequal relationship. The suspect was 12 years older than the victim and had met her when she was 19. The victim was already working as a prostitute at that time. The court also noted the fact that the suspect had been convicted by the police magistrate in Amsterdam (the decision was still open to appeal) for domestic violence against the same victim. The acts underlying the conviction for domestic violence were also charged as a means of coercion in the prosecution for human trafficking. The court found that those acts had been proven. The court also found that the suspect had not earned any income of his own in the period covered by the indictment and that he had got the victim to surrender part of her income, a sum of € 200,000, to him. Nevertheless, the court saw no causal relationship between the victim’s continuing to work in prostitution and the means of coercion. Although the court established the relationship between the inequality and domestic violence, it ruled that it had not been shown that the suspect abused the victim’s vulnerable position. The court mentioned the victim’s vulnerability, but apparently regarded the fact that she worked in prostitution before she met the suspect as grounds for treating her as an ‘articulate Dutch prostitute’, and acquitted the suspect of

130 Zwolle-Lelystad District Court 27 March 2012, LJN: BX2627; BX2628.

131 For an example, see the web page *Huiselijk geweld* [Domestic violence] at Rijksoverheid.nl: <http://www.rijksoverheid.nl/onderwerpen/huiselijk-geweld> (accessed on 13 September 2012).

132 See also the web page *Wat huiselijk geweld is* [What domestic violence is] at Rijksoverheid.nl: <http://www.rijksoverheid.nl/onderwerpen/huiselijk-geweld/wat-huiselijk-geweld-is> (accessed on 13 September 2012).

133 See PPS, *Huiselijk geweld en kindermishandeling* [Domestic violence and child abuse]: <http://www.om.nl/onderwerpen/huiselijk-geweld/> (accessed on 13 September 2012).

134 Amsterdam District Court 1 November 2011, 13-693005-11 (not published). See also the aforementioned judgment of Alkmaar District Court 21 March 2012, LJN: BV9569.

human trafficking.¹³⁵ It is difficult, however, to imagine that domestic violence would not curtail the possibility for the person concerned to make her own decisions and/or free choices entirely independently of the suspect, as the average prostitute in the Netherlands could do.¹³⁶ The PPS appealed against this judgment.¹³⁷

4.4.6 Initiative and awareness

As discussed above, two factors have to be proven to show misuse of a position of authority. The second factor relates to the offender's awareness of the state of affairs, in the sense that he must have been aware of the relevant actual circumstances of the person concerned which give rise or must be assumed to give rise to the position of authority. Conditional intent (*dolus eventualis*) with respect to the misuse is sufficient. The Supreme Court ruled in the *Chinese restaurant* case that there is no stricter requirement of intent. The same applies for abuse of a vulnerable position. In other words, the vulnerable position does not have to have been intentionally abused. It is enough for the offender to have been aware of it. There is no separate requirement that the offender took the initiative.

*Den Bosch Court of Appeal, 30 January 2008*¹³⁸

The appeal that preceded the Supreme Court judgment in the *Chinese restaurant* case concerned several Chinese victims who had voluntarily applied to the owner of a Chinese restaurant for work, sometimes even begging for work. With regard to misuse of authority arising from the actual state of affairs and abuse of a vulnerable position, the court of appeal found: "The court agrees with the court of first instance that such, in view of the above and the text of Article 273f of the Criminal Code, assumes a certain initiative and positive action by the offender(s), purposely misusing the weaker or vulnerable position of victims." Given the fact that the Chinese in this case had taken the initiative to ask for the work themselves, the court found that "it cannot be said that the suspect and/or others took the initiative, nor that they took positive action with respect to the aforementioned Chinese, for example by persuading them to come and work in the restaurant."¹³⁹ The Supreme Court rejected this reasoning on the grounds of the legislative history of Article 273f DCC and its own judgment of 5 February 2002, *LJN: AD5235*, in which it had ruled that there did not have to be intentional abuse; *dolus eventualis* with respect to the circumstances was sufficient.

*The Hague District Court, 17 February 2010*¹⁴⁰

This case involved five victims, two of whom were minors. Following a psychological examination, it was established that one of the adults functioned at a very low level of intelligence. Consequently, the court found that the existence of a vulnerable position has been proven. However,

135 In addition to a number of means of coercion, the court found that at least the acts of accommodating and transporting had been proved, but ruled that there was no intention to profit financially, and also acquitted on charges under subsection 1.

136 See also §4.4.4 (Means of coercion in relation to each other).

137 Verbal information from the portfolio holder, PPS Amsterdam Office, 15 May 2012.

138 Den Bosch Court of Appeal 30 January 2008, *LJN: BC2999; BC3000*. For a discussion of this case, see also *NRM8*, p. 85.

139 Den Bosch Court of Appeal 30 January 2008, *LJN: BC2999; BC3000*.

140 The Hague District Court 17 February 2010, *LJN: BL4279; BL4298*.

abuse of that vulnerable position could not be declared proven since “[...] in the opinion of the court, neither in the case file nor during the examination at the hearing has it been adequately shown that the suspect or any of her fellow suspects knew that the victim functioned at just above retarded level – and therefore knew of [B]’s vulnerable position.”

The line taken by the Supreme Court towards abuse seems to have been followed in the vast majority of the cases examined. Nevertheless, in one case the court still found that the text of Article 273f DCC “assumes a certain initiative and positive action, whereby conscious misuse is made of the weaker or vulnerable position of the victim”.¹⁴¹

Subtle means of coercion remain particularly difficult for the courts. For example, Arnhem District Court¹⁴² did not regard the acts charged, “involving the suspect representing to the complainants that they could earn a lot of money by making themselves available to third parties as prostitutes in the suspect’s boy’s club and/or the suspect providing shelter for the complainants in the boy’s club”, as deception and acquitted for this offence. The court did, however, refer to the fact that there was no chance of earning a lot of money because, for example, the suspect had to be paid a lot for food and lodging, etcetera. Falsely representing to a person that he or she can earn a lot of money could very easily be construed as deception, however.

*Haarlem District Court, 8 December 2010*¹⁴³

In a case of other forms of exploitation, the suspect had deceived three victims into performing a service (i.e. taking out telephone subscriptions). The deception consisted of the fact that the suspect had asked the victims to perform promotional work by taking out telephone subscriptions, with which they could earn money and receive a free mobile telephone. The victims were also told that their personal details would be removed immediately from the system and that the aim of the action was to increase the number of clients and/or the sales figures for the telecom shop. The suspects also informed the victims that the staff of the shop were fully aware of the arrangement.

141 In this judgment, Den Bosch District Court followed its own precedent and the case law of Den Bosch Court of Appeal, which had in fact since been superseded by the judgment of the Supreme Court of 27 October 2009, Den Bosch District Court 17 February 2010, 01-839064-09; 01-839065-09 (not published). Cf. Rotterdam District Court 17 December 2010, 10-750199-06 (not published), in which the court found that the means ‘misuse of authority arising from the actual state of affairs’ and ‘abuse of a vulnerable position’ are in practice used interchangeably, and that with these means “the suspect misuses the weak, vulnerable position of the victim (the situation of exploitation).”

142 Arnhem District Court 13 February 2012, *LJN*: BV8315.

143 Haarlem District Court 8 December 2010, *LJN*: BO8985. This case is discussed in Chapter 8 (Compensation) and §4.6 (Subsection 4).

4.4.7 Consent and free will

Even if there is consent to the intended or actual exploitation, that consent is irrelevant for the criminal nature of the exploitation if a means of coercion is used.¹⁴⁴ This is consistent with existing international law.¹⁴⁵ Consent is also irrelevant with respect to those subsections of Article 273f DCC for which no means of coercion are required.¹⁴⁶ The question of whether any means of coercion have been used has to be answered first. The question of whether the victim had any reasonable alternative only arises when the existence of that (objectified) situation of coercion has been established.¹⁴⁷ The existence or otherwise of free choice must be seen in light of the use of coercion. A victim will often have the idea that he or she made the choice particularly in the event of deception and misuse of authority or of a vulnerable position.

4.4.8 The influence of Dutch prostitution policy on the case law on sexual exploitation

In the previous study of case law, it was noted that Dutch prostitution policy seemed to play a role in the decisions in cases involving exploitation in prostitution, particularly with regard to aspects such as free choice, consent and causality.¹⁴⁸ Prostitution is a legal occupation in the Netherlands. The fact that the victim was already working as a prostitute prior to the situation of exploitation should, in any case, not

144 See, for example, Haarlem District Court 21 July 2011, *LJN*: BR2945: “In so far as counsel wished to argue that victim X ‘consented’ to working in prostitution, for example by cooperating with the placement of an escort advertisement on the Internet and by not running away or asking for help, the court notes that this ‘voluntariness’ is irrelevant because of the means used. After all, because of the means declared proven victim X was not free, or was far less free, to escape from the exploitation by the suspect and his co-perpetrator.”

145 On the grounds of these provisions “the consent of the victim of human trafficking to the intended or actual exploitation is irrelevant if any of the means referred to in subsection 1 is used”, Article 2 (4) of the EU Directive on Human Trafficking (2011/36/EU). See also Article 3 subsection b of the Palermo Protocol and Chapter 2 (Article 273f DCC). These provisions have not led to explicit legislation; according to the explanatory memorandum, that was not regarded as necessary (*Parliamentary Documents II* 2003/04, 29 291, no. 3, p.19). Nevertheless, it has been advocated that when the right opportunity presents itself, the legislature should provide a further elaboration of these provisions (Alink & Wiarda 2010, p. 256 (recommendation 16)).

146 Means of coercion are not an element of the offence of human trafficking when it involves underage victims or of the offence under subsection 3. See also Rotterdam District Court 22 February 2010, 10-750044-09; 10-750130-09; 10-750142-09; 10-750169-09; 10-750105-09 (not published), in which, in two judgments relating to a human trafficking investigation, the court attached no relevance to the consent of the underage victim in a situation that, at least according to the findings of fact, bore a close similarity to the situations in the aforementioned judgments of The Hague District Court 27 April 2012, *LJN*: BW4630; BW4647; BW4642; BW4616.

147 NRM7, p. 417.

148 NRM7, p. 419.

be an obstacle to conviction.¹⁴⁹ A comparison with human trafficking involving other forms of exploitation quickly shows, for example, that a court will not be quick to find, either in its findings of fact or in the grounds for sentencing, that the fact that a victim had picked asparagus before was a factor to be considered in a case of exploitation in the agricultural sector

The absence of free choice could arise later, even in the case of a person who was already working in prostitution or who intended to. Nevertheless, in the case law in the lower courts, the fact that alleged victims were already working in prostitution features quite regularly in the courts' considerations.¹⁵⁰ The division of income is also sometimes regarded as an indicator of the presence or absence of exploitation. For example, Amsterdam District Court found that a 50:50 division between the (alleged) victim and a massage parlour was not so unreasonable or disproportionate that it could conclude that there was abuse of a vulnerable position.¹⁵¹ In other cases, a similar division of earnings led to different conclusions.¹⁵²

It is irrelevant that other factors, unknown to the suspect, might have contributed to the dependency.¹⁵³ This was the point of departure in the *Judo* case: "Furthermore, restriction of the victim's freedom of choice is already sufficient to assume the coerced character of the prostitution. It is not necessary for coercion or pressure to have been exerted to such an extent that there was no other alternative for the person concerned. Finally, the court may also conclude from the circumstances that there was deception or misuse of authority arising from the actual state of affairs."¹⁵⁴ Nevertheless, this remains a difficult

149 Arnhem Court of Appeal 3 September 2007, 21-001088-07 (not published), confirmed in Supreme Court 8 September 2009, LJN: BJ3537: "Even if it is true that [victim 3] had previously worked in prostitution, that is no obstacle to a conviction, since the fact that a person has worked in prostitution does not mean that this person will in future want to work in prostitution, always and under any conditions. Such a person can also subsequently be induced (by deception, etc.) to start working (again) in prostitution."

150 Amsterdam District Court 9 March 2010, 13-529038-09 (not published), in which the court found that "after all, they were already working in prostitution". Utrecht District Court 14 July 2010, LJN: BN5110: "It should, however, be noted that the suspect did not introduce B. H. and T. to prostitution. Both women already worked in prostitution even before they met the suspect." It is unclear why the court made this remark. See also Amsterdam District Court 1 November 2011, 13-693005-11 (not published) and Amsterdam Court of Appeal 26 October 2011, LJN: BU4222, in which the court of appeal, in the grounds for sentencing, found that the victims worked in prostitution and had to surrender half of their income. "This in no way justifies the offences that have been declared proven, but colours the background against which the sentencing should take place." On sentencing, see §6.3.

151 Amsterdam District Court 9 September 2010, 13-529076-09; 13-529076-09 (not published).

152 See, for example, Amsterdam Court of Appeal 26 October 2011, LJN: BU4222: "That the suspect also intended to exploit the complainants is, in any case, apparent from the fact that the complainants had to surrender half of their earnings from prostitution to the suspects and/or their fellow suspects, while there was no proportionate effort in return."

153 Supreme Court 5 February 2002, LJN: AD5235

154 Amsterdam Court of Appeal 30 September 2011, LJN: BT6850 (*Judo*); Amsterdam Court of Appeal 18 January 2012, LJN: BV1281.

point, as emerged from a judgment of Alkmaar District Court,¹⁵⁵ in which the court acquitted the suspect of offences that included the sexual exploitation of his 19-year-old stepdaughter: “Although it is factually correct that there was a daughter-stepfather relationship, it has not been shown that this fact was a factor in forcing or inducing [the victim] to work in prostitution.” In this case, the suspect was convicted of various offences against public morals with respect to his 11-year-old daughter and 19-year-old stepdaughter, as well as human trafficking involving exploitation of his 11-year-old daughter in the sex industry. The fact that consent or free choice is sometimes stressed in cases involving underage victims reinforces the impression that even for them judges regard the choice to work in prostitution as normal.¹⁵⁶

4.5 Subsection 3

Article 273f (1)(3) DCC concerns recruiting, taking or abducting a person with the intention of inducing that person to make himself or herself available for, in brief, prostitution, in another country. The background to this subsection was discussed at length in NRM7,¹⁵⁷ where the problems that arise in the case law with regard to this subsection were also explained.¹⁵⁸ Nevertheless, there is every reason to devote special attention to the judgments relating to subsection 3 again here, in the first place, because the number of cases in which charges are brought under subsection 3 is increasing. This applied to almost half of the sexual exploitation cases in 2010,¹⁵⁹ compared with a third of cases in 2007. The number of cases brought under subsection 3 will probably increase further. The PPS has started a pilot project to intensify efforts to investigate and prosecute cases under subsection 3 with a view to erecting barriers to human traffickers who bring foreign women from other countries to work as prostitutes in the Netherlands. During the pilot project, a number of investigations were conducted in response to specific warnings generated by the Mobile Security Monitoring (*Mobiel Toezicht Veiligheid – MTV*) programme. After a number of successful prosecutions,¹⁶⁰ the use of evidence gathered during MTV operations was challenged. As the following text box shows, evidence collected in this way is now appears to be admissible.

155 Alkmaar District Court 21 March 2012, *LJN*: BV9569. See also Supreme Court 10 October 2006, *LJN*: AY6940, NJ2006, 624, annotated by Buruma. Buruma discusses functional authority that has arisen from the passage of time. This could apply in both of the cases referred to. In the same sense, the case discussed above, Amsterdam District Court 1 November 2011, 13-693005-11 (not published).

156 See also Leeuwarden Court of Appeal 8 February 2011, *LJN*: BP3606. This case concerned a 15-year-old girl who was allegedly induced to make herself available for prostitution and kept in prostitution by a man who was roughly five years older. The court found: “There is in fact still a lot of uncertainty about the role played by the suspect in the process that caused [victim] to end up in prostitution. The suspect undoubtedly had influence, but since it is not yet possible to establish how great it was, no criminal charges can be brought against him.” The court of appeal set aside the judgment of Groningen District Court 19 June 2008, 18-670528-07 (not published) and acquitted the defendant.

157 NRM7, p. 428.

158 NRM7, p. 429.

159 See Appendix 3, Table A1.5.

160 See, for example, Arnhem District Court 16 February 2011, 05-703333-10; 05-70332-10; 05-703192-10; 05-703191-10 (not published).

Mobile Security Monitoring

The Royal Netherlands Marechaussee (a military organisation with policing powers) carries out mobile security patrols along the borders with Belgium and Germany in order to combat illegal immigration and cross-border crime, such as people smuggling, drug smuggling and human trafficking. In May 2010, Den Bosch Court of Appeal ruled that evidence gathered during these patrols could not be used and consequently acquitted a suspect of people smuggling.¹⁶¹ In June 2012, the Administrative Law Division of the Council of State submitted a request for a preliminary ruling¹⁶² to the European Court of Justice about the relationship between the MTV checks and the prohibition of carrying out border checks as laid down in Article 20 of Regulation 562/2006 (the so-called ‘Schengen Borders Code’). Article 21 of the Regulation provides that the prohibition in Article 20 does not affect the exercise of police powers, provided that the checks carried out in exercising those powers do not have ‘an effect equivalent to border checks’. The court of appeal ruled on various grounds that the MTV checks did not have such ‘an equivalent effect’.¹⁶³ The key finding was that conducting border checks was not the purpose of the MTV patrols; according to the court of appeal, the relevant powers were being used to combat illegal immigration.¹⁶⁴

It is also important to review subsection 3 again because there are still a number of persistent misconceptions concerning the interpretation of this subsection. Of the 51 indictments based on subsection 3, 19 led to acquittals. In 34 judgments, offences under subsection 3 were declared proven.¹⁶⁵ A significant number of those acquittals were the result of an incorrect interpretation of the subsection.

Foreign men and women are employed in the Dutch sex industry, with or without their consent. Provided they do so on their own initiative and entirely voluntarily, Dutch prostitution policy is designed to give them the option of doing so.¹⁶⁶ However, if they are not voluntarily employed in the Dutch sex industry, the situation can quickly give rise to a criminal offence within the meaning of Article 273f (1)(3) DCC, which was inserted precisely to protect these foreign nationals.¹⁶⁷ This provision also reflects the

161 Den Bosch Court of Appeal 11 May 2012, *LJN*: BW5488. This ruling has been appealed to the Supreme Court.

162 Council of State, Administrative Law Division 4 June 2012, *LJN*: BW7489, in response to the appeal against The Hague District Court, sitting in Maastricht, 16 April 2012, 12-10657 (not published). This case involved immigration law.

163 European Court of Justice (Second Chamber) 19 July 2012, C-278/12/ PPU (*Adil v. Minister for Immigration and Asylum*).

164 This ruling has since been upheld in Council of State, Administrative Law Division, 3 August 2012, *LJN*: BX3933. See also Supreme Court 26 June 2012, *LJN*: BW9199 and BV1642.

165 In 2010, principal charges were brought under subsection 3 in 51 cases. The number of alternative charges for offences under subsection 3 is not covered in this study. Two of the 34 convictions were for the alternative charge.

166 Provided, of course, there are no obstacles on the grounds of the Aliens Act.

167 Geneva Convention of 1933 for the Suppression of the Traffic in Women of Full Age, *Bulletin of Treaties*, 1935, 598. The Convention was originally implemented in Article 250a (1) (2) (old) DCC. The protection extends to Dutch women who are recruited to work abroad. The protection of Art. 273f (1) (3) actually goes further than is required by the Convention, since men are also protected under subsection 3. In this context, see Utrecht District Court 11 November 2011, *LJN*: BU4728.

Netherlands' respect for the criminal law regimes of other countries with regard to prostitution.¹⁶⁸ Leeuwarden Court of Appeal formulated a different view in a judgment in May of this year.

*Leeuwarden Court of Appeal, 29 May 2012*¹⁶⁹

This case concerned three women from Latvia who were already working as prostitutes in that country. Charges were brought under several sections of Article 273f (1) DCC in which exploitation and means of coercion form elements of the offence, and under Article 273f (1)(3) DCC, for which those elements are irrelevant. The court of appeal found that it had been proven that X had told the women that they could earn more in prostitution in the Netherlands, whereupon the women decided to go to the Netherlands, where they met the suspect. The suspect helped to arrange rooms and papers for them. X had told the women that they would have to pay the suspect the money, including the cost of the journey. The court noted that “when a woman from another country, where she was working in prostitution and where the economic situation is worse than in the Netherlands, then comes to the Netherlands to work in prostitution here, while she does not speak the Dutch language and is unfamiliar with customs and working practices and also does not know her way around in the country, not every direction or interference with her work in this country can be regarded as exploitation. In the given circumstances, without the intervention of others the work in the Netherlands would in fact not even have started. That other persons who provided this intervention also gained financially from it does not differ from regular working relationships.”¹⁷⁰

The Court of Appeal acquitted on charges under the subsections of Article 273f (1) DCC in which means of coercion – in contrast to subsection 3 – do constitute an element of the offence. Nevertheless, this finding unnecessarily presents a view of what constitutes a criminal offence under subsection 3 and interprets a situation covered by subsection 3 as creating a normal working situation. That is precisely what the legislature intended to prevent and criminalise, partly in order to protect – mainly – women from other countries who are vulnerable to exploitation because they do not speak the language or know the customs. The court of appeal also failed to recognise that working in the prostitution sector is not seen as a normal labour relationship in other countries.

168 Alink & Wiarda 2010, p. 227.

169 Leeuwarden Court of Appeal 29 May 2012, 24-0032380-09 (not published).

170 See also Arnhem District Court 21 December 2011, LJN: BU8837. The court found that a literal application of Article 273f (1)(3) DCC could prevent certain categories of persons from earning their income legally. It could also hamper the free movement of services (in this case, sexual services) under EU law, since it would restrict the right of persons from other countries in the European Union to provide sexual services that are in themselves lawful in the Dutch legal system. The court still went on to impute the requirement of coercion or the absence of freedom of choice in the definition of the offence and acquitted the suspect. This was different in Den Bosch District Court 19 February 2010, LJN: BL5303; BL5308; BL5310; BL5400, which, confronted with a similar defence, explained why it is not for the court to deprive a criminal provision of its actual effect, contrary to the legislature's explicit explanation, by attaching additional requirements to it; neither the explanatory memorandum nor the case law of the Supreme Court gives any pretext for interpreting subsection 3 other than literally. Cf. Van Maurik/Van der Meij 2012 (T&C Sr), Art. 273f, Note 9(f).

4.5.1 Recruiting, taking with and inducing

In 2000, the Supreme Court¹⁷¹ gave a clear interpretation of the term ‘recruiting’ in the sense that it means ‘any act that results in a person being recruited in order to induce that person to enter prostitution in another country, without the necessity of showing that the method of recruitment curtailed freedom of choice’. The term ‘recruiting’ must be read in the context of the provision. This means that a person who was already working in prostitution can still be recruited to work as a prostitute in another country.¹⁷²

The Supreme Court¹⁷³ has also interpreted ‘taking with’ broadly: paying for a ticket and collecting a person from Schiphol Airport is sufficient. There does not have to be an element of involuntariness with respect to the term ‘taking with’ either.¹⁷⁴ Nor can an element of involuntariness be inferred in the term ‘inducing’.¹⁷⁵ The Den Bosch District Court partially applied this established case law.

*Den Bosch District Court, 24 May 2012*¹⁷⁶

This case involved eight women who arrived at Eindhoven Airport from Hungary at different times and who were sheltered in the home of the suspect. Advertisements were placed for these women and they were repeatedly visited by men. While the suspect had not taken the initiative, he had contact with persons from Hungary and had subsequently actively negotiated on making his house available and what money he would earn from the arrangement, in the knowledge that the purpose was for women from Hungary to perform work as prostitutes in the Netherlands. The court found that ‘recruitment’ within the meaning of subsection 3 had been proven, but acquitted the suspects on the element ‘taking with them’ because, according to the court, simply collecting the victims from Eindhoven Airport could not fall under the term. It is not clear from the judgment whether the suspect was also actively involved in the purchase of the tickets, for example. The court convicted the suspect of human trafficking, committed repeatedly in the Netherlands and

171 Supreme Court 18 April 2000, *LJN*: ZD1788, NJ 2000, 443.

172 Amsterdam District Court 9 March 2010, 13-5290038-09 (not published). The court acquitted the suspect on the charge of ‘recruiting’ because the victim already worked in prostitution. The court here failed to recognise the context of the act that was charged. It is irrelevant whether a victim is already working in prostitution: Den Bosch Court of Appeal 25 October 2010, included in Supreme Court 17 January 2012, *LJN*: BU4004.

173 Supreme Court 20 December 2005, *LJN*: AU3425.

174 Supreme Court 22 November 2011, *LJN*: BT7070 (advisory opinion of A-G Hofstee).

175 The Hague Court of Appeal 30 June 2010, *LJN*: BO2794; Amsterdam Court of Appeal 17 March 2010, *LJN*: BL7890: The suspect knew that the victim wanted to work in prostitution, but that does not prevent a conviction for the element ‘inducing’.

176 Den Bosch District Court 24 May 2012, *LJN*: BW6451.

Hungary. Given the facts declared proven, it is not clear why he was acquitted of complicity and why Hungary was still identified as the place of commission of the offence.¹⁷⁷

The terms ‘recruiting’, ‘taking with’, ‘abducting’ and ‘inducing’ have a factual meaning and were generally not further fleshed out in the indictments that were studied. Nor is that necessary.¹⁷⁸ However, the offence under subsection 3 is often included amidst many other acts covered by Article 273f DCC, and the presentation of the facts relating to offences under subsection 1, subsection 4 and/or subsection 9, for example, is positioned in such a way that without a careful reading it can seem as though the means of coercion charged could also play a role in the assessment of the charges under subsection 3. But that is not the case. Two judgments of Rotterdam District Court illustrate differences in the formulation of charges under subsection 3.

*Rotterdam District Court, 9 December 2010*¹⁷⁹

In this case, two suspects were charged with recruiting women in the Czech Republic to work as prostitutes in the Netherlands (subsection 3) and then forcing or inducing them to surrender the proceeds (subsection 9). In case A,¹⁸⁰ these facts were charged as a single offence; in case B,¹⁸¹ the acts were charged as two separate offences. The same women were named in both cases, with the exception of one woman who was named in case A but did not appear in the other case. In both cases, the charges referred to ‘and one or more other women’. The court apparently assumed that the acts described in case A, which mainly detailed the means of coercion, related to the offences under both subsection 3 and subsection 9. The court had no problem with the clarity of the indictment on this point, but acquitted on the charges for both acts. With regard to the acquittal on the charges under subsection 3, the court found that the recruitment of women in the Czech Republic was described in the first count as “inducing to come to the Netherlands under false pretences, for example, to participate in one or more photo sessions or an erotic film” and had to consider whether that had been proved. The court found that false pretences had not been used and acquitted the suspects. However, false pretences fall within the scope of the means of coercion, deception, referred to in subsection 1 and therefore do not constitute an element of the offence described in subsection 3 of Article 273f (1) DCC. In case B, the court declared *ex officio* that the indictment was null and void in so far as it related to the offence under subsection 3 because the indictment did not contain any further description of recruiting, taking with and abducting. In contrast to case A, because of the way the charges were formulated, the court could not read any

177 See Leeuwarden Court of Appeal 29 May 2012, 24-0032380-09 (not published). The court found with respect to almost identical circumstances that there was no offence under subsection 3. Women from Latvia were recruited by X and in the Netherlands met the suspect, who helped them to arrange rooms and papers. The women had been instructed to surrender money to the suspect, including the money for the trip. The court did not see any close cooperation between X and the suspect because the suspect did not know when the women would arrive or when she would be expected to act.

178 See Amsterdam Court of Appeal 17 March 2010, LJN: BL7890. The court sanctioned this method of formulating charges.

179 Rotterdam District Court 9 December 2010, 10-750089-08; 10-750131-08 (not published). See also §4.2 (The indictment).

180 Rotterdam District Court 9 December 2010, 10-750089-08 (not published).

181 Rotterdam District Court 9 December 2010, 10-750131-08 (not published).

further description into the charges under subsection 9. Unnecessarily, the court found that “in so far as it can be assumed that the terms ‘recruiting’, ‘taking with’ and ‘abducting’ taken from Article 273f DCC have a sufficiently factual meaning, without a further description of the acts concerned, it is not clear to the court, against the background of the ‘voluminous’ criminal file in this case, which of the alleged acts the PPS wished to submit to the court for assessment.”

The acts that were submitted to the court were recruiting, taking with and abducting, and these terms have a factual meaning and therefore do not need any further description. In that context, the size of the case file is irrelevant. The court of appeal set aside the judgment in case B¹⁸² and found the indictment to be valid. The charges had meanwhile been confined to the three women identified by name. The court of appeal then acquitted on the charges. The court accepted the following facts: the women were approached in the Czech Republic by L. or her associate to work as prostitutes in the Netherlands. The terms were already discussed in the Czech Republic. The suspect and his co-suspects collected the women from Schiphol and arranged for them to work in prostitution in the Netherlands. The reasons given for the acquittal were the absence of an intention to induce them to enter prostitution in the Netherlands because, according to the court, the women had already formed the intention to work in prostitution in the Czech Republic. With this decision, the court failed to appreciate that it is irrelevant whether the women knew that they would work in prostitution and/or agreed to it, and apparently attached no weight to the role of L. or her associate and the manifest cooperation between L. and the suspects, as evidenced by the fact that the suspects were able to collect the women from Schiphol. In this decision, the court gives a different interpretation of subsection 3 than the Supreme Court¹⁸³ and also reverses a view it had itself expressed earlier.¹⁸⁴

The decision on what falls under ‘taking with’ led to different outcomes in the judgments that were analysed. For example, Groningen District Court¹⁸⁵ agreed with the PPS that “accompanying a person who will land in the Netherlands from another country is sufficient to constitute ‘taking with’. Any person who accompanies that other person on parts of a journey, during which the border with the Netherlands is crossed from another country, is guilty of ‘taking with’.” Both of the men who were in the car (the driver and the passenger) were convicted under subsection 3. In another case, however, Arnhem District Court,¹⁸⁶ found that the presence of the suspect in the car at the time it was stopped did not provide sufficient substantiation for the statement of the person who had reported the offence.

4.5.2 The Netherlands and other countries

Inherent to the criminal offences under Article 273f (1)(3) DCC is that they must, in brief, involve the recruitment of a person in one country to work as a prostitute in another country. This might be recruiting a person in another country to work in the Netherlands, but it also relates to situations where a person is recruited in the Netherlands to work abroad. The purpose of this subsection is to protect women from being put to work in prostitution in a foreign country. The term ‘another’ therefore refers

182 The Hague Court of Appeal 26 July 2012, 22-00635-11 (not published). The PPS has appealed to the Supreme Court.

183 Supreme Court 18 April 2000, LJN: ZD1788.

184 The Hague Court of Appeal 30 June 2010, LJN: BO2794.

185 Groningen District Court 14 October 2010, LJN: BO0437.

186 Arnhem District Court 9 December 2010, 05-702760-10 (not published).

to another country in relation to the victim. Acts therefore often extend to a number of different countries, apart from the Netherlands. In the majority of the cases, the victims were actually recruited abroad, brought to the Netherlands and put to work in the Netherlands. Accordingly, the other country concerned is usually also named as the place of the offence, in addition to the Netherlands.¹⁸⁷ Quite regularly, however, suspects are acquitted on charges relating to offences committed outside the Netherlands, while, at the same time, being convicted for offences under Article 237f (1)(3) DCC committed by recruiting a person in the Netherlands to work in prostitution in the Netherlands.¹⁸⁸ This makes the finding of fact on the element ‘in another country’ not entirely comprehensible, even if it is clear that the women concerned are from another country and the evidence shows that they were transported from the other country to the Netherlands.¹⁸⁹

4.5.3 Means of coercion are not an element of the offence

It is established case law that coercion exerted by the suspect or the absence of consent on the part of the victim are not elements of the offence and should not be imputed to the definition.¹⁹⁰ The terms are also not used in the text of the provision. The Leeuwarden Court of Appeal¹⁹¹ reaffirmed this in its judgment, which led to the judgment of the Supreme Court of 22 November 2011. The fact that a person was already working in prostitution is also irrelevant.¹⁹²

*Den Bosch Court of Appeal, 25 October 2010*¹⁹³

“Counsel’s argument that the case referred to in Article 273f (1)(3) DCC cannot arise because [victim 1] was already working in prostitution when she was transported to Antwerp and was therefore not induced to enter prostitution, is rejected by the court. The simple fact of (repeatedly) bringing another person from the Netherlands to Belgium to work as a prostitute involves taking that other person with the intention of inducing that other person to make herself available for prostitution in another country. In that context, it is irrelevant whether the woman concerned, at the time when she was taken in the aforementioned manner, is or was already working in the sex industry.”

187 But not always, and this sometimes leads to problems. See § 4.2.1 (Article 261 Code of Criminal Procedure and nullity of indictment on substantive grounds).

188 Groningen District Court 14 October 2010, *LJN*: BO0437; BO0435. In these cases, the border crossing is shown by the evidence.

189 To the contrary: Den Bosch District Court 17 February 2010, *LJN*: BL4298; BL4279; 09-754012-09; 09-754074-09 (not published), in which, for precisely these reasons, the court declared the indictment null and void for internal inconsistency. See also §4.2 (The indictment).

190 Supreme Court 6 July 1999, *LJN*: AB9475, NJ 1999; Supreme Court 18 April 2000, *LJN*: ZD1788, NJ 2000, 443. See also Supreme Court 22 November 2011, *LJN*: BT7070 (advisory opinion of A-G Hofstee); Alink & Wiarda 2010, pp. 193 and 194.

191 Leeuwarden Court of Appeal 24 November 2009, 24-000661-09 (not published).

192 Den Bosch Court of Appeal 25 October 2010, included in Supreme Court 17 January 2012, *LJN*: BU4004, in which the Supreme Court did cite this passage but did not substantively review it.

193 Den Bosch Court of Appeal 25 October 2010, included in Supreme Court 17 January 2012, *LJN*: BU4004.

Nevertheless, a requirement of coercion or deception is still regularly read into this subsection, which it does not contain.¹⁹⁴

*Amsterdam District Court, 2 December 2010*¹⁹⁵

“With respect to victim 2, the court notes that it cannot automatically be concluded from her complaint that she came to the Netherlands from Romania with the suspect to work in prostitution here under false pretences or otherwise involuntarily.”

In some judgments, the often lengthy indictment is reproduced in brief, with the emphasis being placed on the other subsections of Article 273f (1) DCC: for example, in two judgments of the Alkmaar District Court,¹⁹⁶ in which, under the heading ‘indictment’, the court’s judgment starts by paraphrasing that the suspect was charged with complicity in human trafficking in the sense that he was charged, in brief, with exploiting two women in prostitution, without any reference to the charge for the offence under subsection 3, where coercion and exploitation are not elements of the offence. It is therefore not surprising that the court then acquitted on all charges with the finding: “... no more can be concluded from this evidence than that [victim 1] was working as a prostitute on the Achterdam in Alkmaar. This evidence contains no specific information about the alleged exploitation of [victim 1] by the suspect and/or by [co-suspect]” and ignored the question of whether the case nevertheless involved conduct that constituted a criminal offence under subsection 3.

Amsterdam District Court¹⁹⁷ also paraphrased the indictment. The court found that although both suspects had declared that they had been involved in the victim’s journey from Bulgaria to the Netherlands, and one of the suspects had provided accommodation, there had been no coercion, violence or threat of violence and/or abuse of a vulnerable position, and acquitted on the charges under all the subsections, including subsection 3.

In eight¹⁹⁸ of the 19 cases in which suspects were acquitted on charges under subsection 3 in 2010, the absence of coercion or a situation of exploitation was incorrectly given as the reason for the acquittal. The recent judgments of the courts of appeal in Leeuwarden¹⁹⁹ and The Hague²⁰⁰ described earlier are also at odds with the case law of the Supreme Court.

194 Groningen District Court 14 October 2010, LjN: BO0437. The court found that the object of subsection 3 is to protect against forced prostitution, but the possible use of coercion in recruiting or taking the victim does not have to be proved, since it is not an element of the offence. It is not entirely clear what the court meant by this. Zutphen District Court 24 January 2011, LjN: BV2125; here the court seems to overlook the fact that among the charges under the other subsections of Art. 273f DCC, charges were also brought under subsection 3.

195 Amsterdam District Court 2 December 2010, 13-693013-10 (not published).

196 Alkmaar District Court 7 October 2010, LjN: BO2101; BO2105.

197 Amsterdam District Court 4 February 2010, 13-447383-08; 13-524224-08 (not published).

198 District Court Rotterdam 9 December 2010, 10-750089-08; 10-750090-08; 10-750091-08 (not published). District Court Amsterdam 2 December 2010, 13-693013-10 (not published).

199 Leeuwarden Court of Appeal 29 May 2012, 24-0032380-09 (not published).

200 The Hague Court of Appeal 26 July 2012, 22-00635-11 (not published).

4.5.4 Sentences

In 2010, the PPS drew up the Instructions on Human Trafficking for cases involving sexual exploitation.²⁰¹ The instruction on the sentence to be demanded for offences under Article 273f (1)(3) DCC with a single adult victim and without aggravating circumstances²⁰² is a prison sentence of six months.²⁰³ Table 10 shows that in the four cases²⁰⁴ in 2010 in which a sentence was demanded only for an offence under subsection 3, an unconditional prison sentence of a maximum of six months was demanded, sometimes in combination with a partially suspended sentence or a community service sentence. In the eight cases in which there was a conviction for only an offence under subsection 3 and a prison sentence followed, in six cases there was a sentence of up to six months, in one case a sentence of between six and 12 months and in one case a sentence of between one and two years, also sometimes in combination with a partially suspended sentence or a community service sentence.²⁰⁵

*Groningen District Court, 14 October 2010*²⁰⁶

In one case, the suspect was convicted but no punishment was imposed. The court found that although human trafficking is, in principle, a very serious offence, the intention of the legislature was to combat exploitation and that in this case there was no exploitation. So, whereas in the judgments discussed earlier, this was – incorrectly – a reason for acquittal, in this judgment it constituted a ground for applying Article 9a DCC [a guilty verdict without punishment].

In a number of other cases, the nature of the offence under subsection 3 also led the courts to mitigate the sentence, even if the sentence demanded was exclusively related to subsection 3. Den Bosch District Court²⁰⁷ described subsection 3 as ‘one of the least serious forms of human trafficking’, stating that this was grounds for departing from the sentence demanded. Not that the court had found less to be proven or had taken other circumstances into account, but purely on the grounds of its interpretation of the subsection. When sentencing for a simple assault, the court will not quickly give the suspect the benefit of the fact that there was no *serious* injury, since that is not an element of the offence and is therefore irrelevant. It is therefore incomprehensible why factors such as the fact that no coercion was used, there was no violence, the woman was already working in prostitution or there was no situation of exploitation should weigh in the suspect’s favour in sentencing for offences under subsection 3. These circum-

201 *Parliamentary Documents II 2009/10*, 28 638, nr. 47, p.12. The Instructions on Human Trafficking in the sense of sexual exploitation were published on 25 August 2010, Government Gazette. 2010, no. 13154, and entered into force on 1 September 2010.

202 If there are aggravating circumstances, they will probably mainly involve the commission of the offence in an organised context. As soon as there are underage victims or means of coercion are used, other subsections will also apply.

203 The policy rules in these Instructions apply from the date of their entry into force and offences committed before 1 July 2009 still fall under the former maximum sentence on the grounds of Article 1 of the Code of Criminal Procedure. It is therefore too early to evaluate the judgments analysed here in relation to the Instructions, see §6.1 (Instructions and orientation points).

204 In all other cases where charges were brought under subsection 3, this formed an element of multiple offences (including human trafficking).

205 See Table 13.

206 Groningen District Court 14 October 2010, LJN: BO0439.

207 Den Bosch District Court 19 February 2010, LJN: BL5303; BL5310; BL5400; BL5308; BL5311.

stances are not elements of the offence under subsection 3, do not affect the circumstances under which the offence was committed and should also not be considered in the grounds for sentencing. After all, if those circumstances do arise, at least one of the other subsections is very likely to apply.

As with the other subsections, there is diversity in sentencing and in the grounds for sentencing for offences under subsection 3. As with the other subsections, it is unrealistic to attempt a comparison of the sentences imposed without knowledge of the entire case file and of what was said at the hearings. Nevertheless, there are substantial differences in a number of the points of departure that have been adopted, which is an issue that could be addressed in the drafting of orientation points by the judiciary, in relation to the Instructions on Human Trafficking drawn up by the PPS or otherwise. For example, Assen District Court²⁰⁸ sentenced a suspect to an unconditional prison sentence of 15 months for recruiting and taking two women from Poland to work in prostitution in the Netherlands between 2000 and 2002, while Groningen District Court²⁰⁹ did not impose any sentence at all in a case in which a young woman, probably from Hungary, who was working on the street in Germany was taken by the suspect to work as a prostitute in Groningen in February 2010. Assen District Court found that a severe infringement of the physical and psychological integrity of the victims and of their personal liberty had been proven, while Groningen District Court considered punishment inappropriate under this subsection of Article 273f DCC in that case. In neither case was there any question of complicity in human trafficking and no other special circumstances were mentioned, which is in fact unlikely in an austere criminal provision like this.

4.6 Subsection 4

4.6.1 The offence

Article 273f DCC is intended to make every form of human trafficking a criminal offence.²¹⁰ Article 273f (1)(4) DCC covers one of those forms – or modalities. The subsection embraces two types of act:

1. forcing or inducing another person by the means referred to under Article 273f (1)(1) DCC to make himself/herself available to perform work or services;
2. in the circumstances referred to in subsection 1, taking any action that the offender knows or might reasonably be expected to know will result in that other person making him- or herself available to perform work or services.

Subsection 4 incorporates the means of coercion listed in subsection 1. Coercion must therefore be interpreted broadly to embrace not only violence or the threat of violence, but also deception, misuse of authority arising from the actual state of affairs and abuse of a vulnerable position.²¹¹

208 Assen District Court 6 April 2010, 19-810221-06 (not published).

209 Groningen District Court 14 October 2010, *LJN*: BO0437; BO0439; BO0435.

210 Alink & Wiarda 2010, p. 178.

211 On this point, see Chapter 2 (Article 273f DCC) and §4.4 (Coercion and free will).

Subsection 4 makes it a criminal offence to take advantage of a person in a situation of exploitation.²¹² If means of coercion are used, it is *de facto* a situation of exploitation.²¹³ The subsection therefore relates to making use of a person who is in a position of coercion (the situation of exploitation). The exploitation lies in making *use* of that person. In the literature, therefore, it is assumed that under subsection 4 it is the exploitation²¹⁴ or the exploiters themselves that are punishable,²¹⁵ while subsection 1 relates to the activities designed to create the exploitation.²¹⁶

*Terminological confusion: situation of exploitation and exploitation*²¹⁷

When studying human trafficking cases, it is useful to make a clear distinction between two terms: ‘situation of exploitation’ and ‘exploitation’.²¹⁸ The legislature has traditionally used the term ‘**situation of exploitation**’ to refer to a prostitute who finds herself in a situation that is not the same as the circumstances an articulate prostitute in the Netherlands ought to experience.²¹⁹ The term is therefore linked to the element ‘misuse of authority arising from the actual state of affairs’.²²⁰ Examples given by the legislature include persons who have incurred debt to make the

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- 212 As is clear from the explanatory memorandum to the precursor of subsection 4, art. 250ter DCC: *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 4.
- 213 For an explanation of this, see the text box ‘Terminological confusion: situation of exploitation and exploitation’ below.
- 214 Alink & Wiarda 2010, p. 224. See also Lestrade 2011.
- 215 Cf. Machielse 2010 (NLR), Art. 273f DCC, Note 6.
- 216 The interpretation of the legislature that human trafficking is (aimed at) exploiting also has to be understood in this context. *Parliamentary Documents II* 2003/04, 29 291, no. 3, p. 2. The relationship between the acts that constitute criminal offences under subsection 4 and subsection 1 is discussed below.
- 217 On this point, see also Esser 2012, p. 34.
- 218 The terms are often used interchangeably. An example of this can be found in The Hague District Court 17 February 2010, LJN: BL4279; BL 4298; 09/754074-09; 09/754012-09 (not published). The public prosecutor formulated the indictment in this case in such a way that subsection 1 and subsection 4 more or less overlapped. The court found that the suspects had recruited the victims to perform a service by deceiving them and/or by misusing their vulnerable position. However, the court also considered whether there was a situation of exploitation, which is not necessary for a conviction under subsection 1. The court then found that there was no such situation and concluded that there was “accordingly” no intention of exploiting. Consequently, the court made no decision on the question of whether there was an offence under subsection 1. It seems that, although the court declared that the act of recruiting and the means of coercion in subsection 1 had been proved, it did not consider these acts in the context of the charges under subsection 1, but only as part of the charges under subsection 4, which were ultimately not proven. ‘Situation of exploitation’ is used here in the sense of a situation in which the victim was exploited. See also The Hague District Court 18 March 2010, LJN: BL8022.
- 219 *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 3. See also: *Parliamentary Documents II* 1990/91, 21 027, no. 5, p. 3.
- 220 The precursors to subsection 4, Art. 250ter (old) DCC and later Art. 250a (old) DCC, still referred to ‘misuse of authority arising from actual relationships’. The terms overlap. According to Alink & Wiarda 2010, p. 215, footnote 124, the scope of this means of coercion has been ‘slightly’ expanded with the change in the text.

journey to the Netherlands,²²¹ drug addicts and persons from a developing country.²²² The term ‘situation of exploitation’ therefore relates to the description of the actual (vulnerable) situation in which a person finds himself or herself. Although the legislature links the term ‘situation of exploitation’ to the misuse of authority arising from the actual state of affairs, it can also be used to describe the circumstances that arise when other means of coercion are used. This is the situation where a person is in a position in which he or she is susceptible, or vulnerable, to exploitation.²²³ The situation where an offender uses violent means of coercion can also be described as a situation of exploitation. The use of that situation constitutes exploitation under subsection 4.

Under subsection 1, the term ‘**exploitation**’ also plays a role in combination with the element ‘intention of exploiting’. Subsection 2 contains a non-exhaustive list of forms of ‘exploitation’ in this sense. The term was further defined by the Supreme Court in the *Chinese restaurant case*.²²⁴ Although the criterion that was introduced in that case only plays a role in cases of other forms of exploitation, it is deemed to have been met in cases of sexual exploitation, although the case law in this area is not always consistent.²²⁵

In contrast to subsection 1, the text of which has been taken verbatim from international law instruments, the definition of the offence in subsection 4 comes from the Dutch legislature.²²⁶ The precursor of subsection 4 – Article 250a (old) DCC – only related to exploitation in the sex industry. With the expansion of the concept of human trafficking following the entry into force of Article 273a (old) DCC, subsection 4 also came to encompass other forms of exploitation.²²⁷

4.6.2 Relationship between subsection 4 and subsection 1

The acts that are made criminal offences in subsection 1 usually occur prior to the acts in subsection 4. Subsection 1 is related to activities carried out with a view to achieving the final objective of exploitation. This could already be the case if a person in a vulnerable position is recruited with the intention of exploiting this person. It is only an offence under subsection 4 if that person actually makes himself or herself available to perform work or services.

Charges are often brought under subsection 4 as well as subsection 1.²²⁸ This was the case in roughly half of the cases of sexual exploitation, although charges were also brought under other subsections in these cases. Charges are also brought under a combination of subsections in cases of other forms of exploita-

221 *Parliamentary Documents II* 1990/91, 21 027, no. 5, p. 3.

222 *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 8.

223 See Supreme Court 27 October 2009, *LJN*: BI7097; BI7099 (advisory opinion of A-G Knigge), consideration 2.5.2, in which the Supreme Court found the situation of exploitation to be the situation that created the opportunity for exploitation.

224 Supreme Court 27 October 2009, *LJN*: BI7097; BI7099 (advisory opinion of A-G Knigge).

225 On this point, see also Chapter 2 (Article 273f DCC).

226 Alink & Wiarda 2010, p. 224, refer to subsection 4 as a ‘national achievement’. Although the definition of the offence comes from the Dutch legislature, the key to this article lies originally in international law obligations.

227 *Parliamentary Documents II* 2003/04, 29 291, nr. 3, p. 12.

228 See Appendix 3, Table A1.5. See also NRM7, p. 422 and Beijer 2010a.

tion; in 79% of all cases involving other forms of exploitation, charges were brought under subsection 4 and subsection 1, sometimes in combination with charges under one or more other subsections. The combination of charges under only subsection 1 and subsection 4 occurred in 31% of the cases.²²⁹ These figures all relate to the situation where offences under subsection 1 and subsection 4 were charged together, and not as alternative charges. The charges under subsection 4 can be brought as an alternative or *in addition* to charges under subsection 1.²³⁰ In practice, the PPS sometimes finds it difficult to make a distinction between the two human trafficking modalities, as the following example shows.

*The Hague District Court, 12 May 2010*²³¹

In this case, charges were only brought under subsection 1. The suspect had accommodated and sheltered the victims, all of Indian origin or from other countries outside the Netherlands, by misuse of authority arising from the actual state of affairs and abuse of a vulnerable position. There was also the intention of exploiting, so that an offence under subsection 1 was declared proven. The evidence showed that the suspect not only provided shelter for the victims, but also caused them to perform work and mediated in finding work for them. These factors were also listed in the indictment. In light of these facts, it is remarkable that charges were not *also* brought under subsection 4.

As the example shows, the acts in subsection 1 and subsection 4 can overlap. If an offender, by using a means of coercion, accommodates a person with the intention of exploiting that person, he or she may simultaneously be guilty – on the basis of the same means of coercion – of forcing or inducing the victim to make himself or herself available to provide work or services. It is impossible to establish in advance when the acts that are criminal offences under subsection 1 and subsection 4 overlap; it depends on the specific circumstances of the case.

In drafting the indictment a clear distinction has to be made between the acts relating to subsection 1 and to subsection 4. Even if the same acts can contribute to the evidence of offences under both subsections, it is advisable to specify which acts contribute to the evidence of which element of the offence under which subsection.²³²

4.6.3 The acts in subsection 4

Subsection 4 is divided into two parts. The first part relates to forcing or inducing a person to make himself or herself available to perform labour or services *using* a means of coercion. It is not necessary for the labour or services to have already taken place.²³³ The point is that a person is actually in a situation in which he or she makes himself or herself available to perform them.²³⁴

229 These figures are based on the judgments examined for this study, in other words only judgments at first instance in 2010.

230 NRM7, p. 422.

231 The Hague District Court 12 May 2010, L/JN: BM4240.

232 In §4.2 (The indictment) there is a discussion of an indictment in which it was unclear whether in addition to charges under subsection 4, charges were also brought under subsection 1.

233 Supreme Court 19 September 2006, L/JN: AX9215.

234 Van Maurik/Van der Meij 2012 (T&C Sr), art. 273f DCC, Note 9(g).

*The Hague District Court, 11 February 2011*²³⁵

In this case, the court found at first instance that the victims were in a vulnerable position due to their status as aliens and their debts to the offender. The public prosecutor demanded acquittal for human trafficking because the working conditions under which the victims had to work were not so desperate that they could be described as a situation of exploitation.²³⁶ The court – which declared human trafficking proven – found that this did not detract from the fact that the suspect had committed a crime: “After all, for a criminal offence under Article 273f (1)(4) it is not even relevant whether the labour or services were actually performed. The only decisive factor is that the victim has been forced or induced to make himself or herself available to perform work or services.”²³⁷ According to the court, that was the case since the suspect had offered work to victims in a vulnerable position and put them to work for him.

As with subsection 1, there is no requirement under subsection 4 that the situation of exploitation has been created by the suspect personally (as in the case of the debts in the example above).²³⁸ Both subsections also relate to persons who make use of a situation of exploitation, even though they themselves have not helped to create it. The situation can arise from the circumstances in which the victim finds himself or herself without a suspect or anyone else contributing to them. In the example above, that was the case with respect to the victims’ immigrant status (their vulnerable position).

Second part of subsection 4

The second part of subsection 4 contains two levels of *mens rea*: intent and culpability. Under this part of the subsection, any person who takes any action where he or she knows (*intent*) or may reasonably be expected to know (*culpability*) that it will result in another person making himself or herself available to perform labour or services is guilty of a criminal offence.²³⁹ In other words, there must be a causal relationship between ‘any action’ and the person making him- or herself available. This concerns every conceivable act that results in a person finding him- or herself in the actual situation in which he or she makes him- or herself available.²⁴⁰

According to the definition of the offence, the actions must be taken *in* the circumstances referred to in section 1, subsection 1. This is a reference to the situation of coercion, which is effected by a means of coercion. The second part of the subsection also does not require that the situation of coercion has been personally created by the suspect. But the suspect must be aware of the circumstances giving rise to the coercion, since the legislature’s intention with subsection 4 was to make it a criminal offence to make

235 The Hague District Court 11 February 2011, *LJN*: BP4006.

236 As mentioned above, the term ‘situation of exploitation’ was used incorrectly here. Because of the debts to the offender and their alien status, the victims were already in a vulnerable position and, hence, also in a situation of exploitation.

237 The court referred to Supreme Court 19 September 2006, *LJN*: AX9215.

238 Supreme Court 27 October 2009, *LJN*: BI7097; BI 7099 (advisory opinion of A-G Knigge), consideration 2.5.2.

239 *NRM7*, p. 430-431.

240 Van Maurik/Van der Meij 2012 (T&C Sr), Art. 273f DCC, Note 9(g).

use of a situation of exploitation.²⁴¹ That requires, at least, that the suspect was aware of the desperate situation in which the other person found himself or herself.

The definition of the offence in the second part of the subsection recognises two levels of *mens rea*: intent and culpability. The *mens rea* always relates to the consequence of ‘any action’: that the victim makes himself or herself available for performing labour and/or services. Neither level of *mens rea* relates to the coercion or the means of coercion, since exerting coercion or using means of coercion already implies the offender’s intent.²⁴²

*The Hague Court of Appeal, 25 August 2011*²⁴³

In this case, charges were brought under both the first and second part of subsection 4. The court convicted on the basis of the second part; the suspect had taken an action that he knew or could reasonably have been expected to know would lead to the victim making herself available to take out telephone subscriptions. The evidence showed, however, that there was a relationship of dependency between the offender and the victim and that the victim was misled regarding the telephone subscriptions. As in Haarlem District Court 8 December 2010, LJN: BO8985, charges under the first part of subsection 4 could also very easily have been declared proven. It is also interesting to note that the court found that the suspect knew or could reasonably have been expected to know that the victim was easy to influence. However, the *mens rea* relates to the consequence – that the action results in the victim making himself or herself available to perform labour or services – and not to the victim’s vulnerable position (being easy to influence).

There are practically no cases in which charges were brought only under the second part of subsection 4.²⁴⁴ If charges are brought under subsection 4, the indictment generally includes the entire definition of the offence. The division of subsection 4 therefore receives scarcely any attention in the case law. Nor has an issue been made of the distinction between intent and culpability discussed above.

4.6.4 Intention of exploiting is not an element of the offence in subsection 4

The element ‘intention of exploiting’ in subsection 1 does not appear in the definition of the offence in subsection 4. However, since the criminalisation of other forms of exploitation, that element has been

²⁴¹ *Parliamentary Documents II* 1988/89, 21 027, no. 3, p. 4: “The application of the proposed Art. 250ter DCC will furthermore also cover those persons who, making use of a situation of exploitation, take any action that they know or may reasonably be expected to know will lead to the other person entering prostitution.”

²⁴² In the explanatory memorandum to Art. 250ter (old) DCC, the precursor to subsection 4, the Minister of Justice said of this: “I note that the culpability (must reasonably be expected to know that, as a result, the other person will enter prostitution) is only equated with intent (knows that, as a result, the other person will enter prostitution) with respect to the *mens rea* concerning the consequence of an action taken. Intent is inherent to the use of the unlawful means, the other element of the offence. I find both forms of *mens rea* equally punishable in the event that coercion or other unlawful means are used.” *Parliamentary Documents II* 1990/91, 21 027, no. 5, p. 6.

²⁴³ The Hague Court of Appeal 25 August 2011, LJN: BR5629.

²⁴⁴ In The Hague District Court 17 February 2010, LJN: BL4279; BL4298; 09-754012-09; 09-754074-09 (not published) this implicitly seems to have been the case.

imputed in subsection 4, with the argument that the rationale of Article 273f DCC implies that it should be. The courts have also found a legal argument for incorporating the intention to exploit in the definition of the offence in subsection 4 in the list of different forms of exploitation in Article 273f (2) DCC.²⁴⁵

The Supreme Court has since explained that ‘intention of exploiting’ is *not* an element of the offence under subsection 4.

*Supreme Court, 20 December 2011*²⁴⁶

The second ground of appeal in this case complained that the court of appeal had incorrectly, or at least without giving sufficient reasons, found that the suspect had acted with the ‘intention of exploiting’. The Supreme Court ruled: “The ground of appeal fails because it ignores the fact that the Court of Appeal did not declare said intention – which does not form an element of the provision to which the indictment and the conviction apply – as proven.”

The Hague Court of Appeal had previously already ruled that ‘intention of exploiting’ was not an element of offences under subsection 4.²⁴⁷ In arriving at this finding, the court employed both the grammatical interpretation method – the term ‘exploiting’ is not used in subsection 4 – and the legislative historical interpretation method. In interpreting subsection 4, the court of appeal assigned decisive significance to the legislative history of its precursor, Article 250a (old) DCC, rather than the legislative history of Article 273f DCC.²⁴⁸ Since Article 250a (old) DCC did not contain the words ‘intention of exploiting’, in the court of appeal’s opinion it was also not an element of the offence under subsection 4.

Implications of not imputing intention of exploiting in subsection 4

Not imputing the ‘intention of exploiting’ as an element of the offence under subsection 4 has consequences for the scope of application of the provision. This is illustrated by a judgment of Haarlem District Court and the judgment of The Hague Court of Appeal mentioned above.

²⁴⁵ The courts do not explain why rationale and system are grounds for reading ‘intention of exploiting’ into subsection 4. Cf. for example The Hague District Court 3 May 2010, LJN: BM3374, Dordrecht District Court 20 April 2010, LJN: BM1743, The Hague District Court 5 October 2007, LJN: BB5303, in which the court acquitted because ‘exploitation’ is imputed in subsection 4 and this element could not be declared proven: “With respect to the question of whether these actions are sufficient to convict on the grounds of Article 273f, first paragraph, subsection 4 DCC, the court finds as follows. In light of the formulation of the relevant article of the law, the legislature cannot have intended otherwise than to make this a criminal offence only if there was exploitation. Exploitation is not mentioned, but was manifestly intended to be an element of the offence defined in this provision.”

²⁴⁶ Supreme Court 20 December 2011, LJN: BR0448, considerations 4.1 ff.

²⁴⁷ The Hague Court of Appeal 25 August 2011, LJN: BR5629. In Haarlem District Court 8 December 2010, LJN: BO8985 it was explicitly stated for the first time that ‘intention of exploiting’ is not an element of the offence under subsection 4.

²⁴⁸ *Parliamentary Documents II* 2003/04, 29 291, no. 3.

*Haarlem District Court, 8 December 2010*²⁴⁹

The suspect in this case was convicted by the court of inducing three victims to perform a service (i.e. to take out telephone subscriptions) by deception. The deception involved representing to the victims that they would perform promotional work consisting of taking out telephone subscriptions. The telecom suppliers, the suspect told the victims, were all aware of the arrangement and would immediately delete their personal details and cancel the subscription. The telecom provider was doing this to increase the number of customers and/or the sales figures, according to the suspect.

*The Hague District Court, 18 March 2010*²⁵⁰ and *The Hague Court of Appeal, 25 August 2011*²⁵¹

The district court did not consider the charges proved at first instance. Although the victim in these cases was defrauded by the suspect and was pressured to take out telephone subscriptions, according to the court it could not be said that there was “such a serious violation of [X]’s fundamental rights as to constitute ‘exploitation’ within the meaning of the human trafficking article.” The court of appeal ruled otherwise. It did not read ‘intention of exploiting’ into subsection 4 and found that it had been proved that the suspect had performed an action that he knew or could reasonably have been expected to know would result in X making herself available to take out telephone subscriptions.

The question is whether the human trafficking definition was not stretched too far in these cases.²⁵² It is doubtful whether the legislature wanted to describe the above situation as ‘human trafficking’. The Haarlem District Court itself struggled with this problem in the judgment cited above.

Haarlem District Court, 8 December 2010

In its grounds for sentencing, the court found: “The court further notes that with a demand for a prison sentence of 21 months, of which seven months suspended, the public prosecutor apparently assesses the seriousness of the case differently than the court. In that context, the court finds that although the offences declared proven under 3, 4 and 5, each primarily, should each be described as ‘human trafficking’, what actually happened recalls more a form of fraud, a term that also better reflects the day-to-day use of language and public perception of the facts in this case.”

In this finding, the court made it clear that there seemed to be some disparity between the actual events and their description as human trafficking. Although in this case all of the elements of the definition of the offence were met without imputing the term ‘intention of exploiting’, it does not seem to be a situ-

249 Haarlem District Court 8 December 2010, *LJN*: BO8985.

250 The Hague District Court 18 March 2010, *LJN*: BL8022.

251 The Hague Court of Appeal 25 August 2011, *LJN*: BR5629.

252 For an elaboration of this point, see Esser 2012. The NRM already warned of the stretching of the concept of human trafficking during the adoption process for art. 273a (old) DCC: NRM3, p. 18. See also Korvinus 2006.

ation that goes to the essence of the offence of human trafficking.²⁵³ This is mainly connected with the legal right that the criminalisation of human trafficking is intended to protect: the preservation of physical and mental integrity and personal liberty.²⁵⁴ In cases of sexual exploitation, these are, by definition, violated, given the nature of the work performed under coercion.²⁵⁵ The expansion of the concept of human trafficking has, however, caused other types of work and services to fall under the criminal provision. The criminalisation of the use of a situation of exploitation in subsection 4 has consequently come to cover labour and services whose nature does *not* by definition involve a violation of physical and mental integrity and personal liberty. The result has been that acts have been brought within the scope of Article 273f DCC that the legislature might not have intended to include when human trafficking was criminalised.

Even at the time of the entry into force of Article 273a (old) DCC, which expanded the concept of human trafficking, concerns were expressed about the potentially wide scope of the application of subsection 4. In an article in *Trema*,²⁵⁶ the NRM said that, linguistically, one could already speak of human trafficking if a person was induced to perform a service through deception.²⁵⁷ The NRM felt that human trafficking only relates to excessive situations where human rights are endangered: "... socially undesirable working situations then only constitute exploitation within the meaning of the human trafficking article if they involve a violation of fundamental rights such as the human dignity, the physical integrity or the personal liberty of the individual concerned, and as such are unacceptable. Other sanctions under criminal law, labour law or administrative law should be used to combat situations that do not constitute such a violation, but which are nonetheless reprehensible."²⁵⁸ This approach means that in establishing whether there is human trafficking outside the sex industry, it first has to be determined whether the situation is excessive.²⁵⁹ If so, the human trafficking is proven and, consequently, the violation of phys-

253 Kelk 2010, p. 93 refers in this context to the *Typizität* of an offence: although all elements of an offence may be fulfilled, the result may be out of character, in light of the qualification of the offence. It does not go to the heart of the offence. A classic example can be found in Supreme Court 14 October 1940, NJ 1941, 87 annotated by Pompe (Prison food). The problem usually arises with broadly formulated offences, as in the case of 'money laundering' in Art. 420bis ff. DCC. On this point, see De Hullu 2009, p. 99. According to Kelk, the *Typizität* is a good test for restricting the scope of the definition of the offence.

254 *Parliamentary Documents II* 2003/04, 29 291, no. 3, p. 2.

255 See Chapter 2 (Article 273f DCC) and Korvinus 2006.

256 In this article, it was also argued that parts of the human trafficking articles were too imprecise, and therefore contrary to the *lex certa* principle, one of the standards of legality applied to substantive law, that requires the legislature to produce clear, sharply formulated laws. Cf. De Hullu 2009, p. 92. In Den Bosch Court of Appeal 17 September 2010, LJN: BN7215 the court found that the term 'exploitation' was not contrary to the *lex certa* principle. See also Chapter 2 (Article 273f DCC).

257 Which was the case in the cases discussed above.

258 Korvinus 2006, p. 287.

259 To the contrary: A-G Knigge in his advisory opinion in Supreme Court 27 October 2009, LJN: BI7097; BI7099, in which Knigge also left open the possibility of assuming labour exploitation, even if there was no violation of Article 4 of the European Convention on Human Rights. That opinion dates from before the Rantsev judgment.

ical and mental integrity and personal liberty is a given.²⁶⁰ This approach is in line with the legislative history of Article 273f DCC, when an extremely long working week for disproportionately low pay under poor working conditions was given as an example of exploitation.²⁶¹

In cases of other forms of exploitation, in which the use of a situation of exploitation does not by definition affect physical and mental integrity and personal liberty,²⁶² it has to be established that the situation is excessive. In NRM5, guidelines were given for determining whether such a situation exists.²⁶³ It was also argued there that the excessive situation does not have to be related to a single evident excess,²⁶⁴ but could also consist of an accumulation of less serious matters such as underpayment, unreasonable working hours or multiple dependence.²⁶⁵ In that case, the excessiveness of the situation lies in the accumulation of the abuses. Although the Supreme Court dealt primarily with the element ‘intention of exploiting’ in the *Chinese restaurant* case, the guidelines given in that judgment may also play a role in qualifying a situation as excessive. Relevant factors are then the nature and duration of the employment, the restrictions that they entail for the individuals concerned and the economic benefit that the employer enjoys.²⁶⁶ In weighing these and other relevant factors, the courts should apply generally accepted standards in Dutch society as the frame of reference.²⁶⁷

Decision

Although not reading the ‘intention of exploiting’ into the subsection sometimes seems to lead to the definition of human trafficking being stretched too far, it is a welcome development that the limits of the definition are being explored. The point at which poor working conditions or conditions under

260 The article in Trema was written in 2006, when the government did not, by definition, regard human trafficking as a violation of human rights. That has now changed, partly as a result of the Rantsev judgment: European Court of Human Rights 7 January 2010, no. 25965/04 (*Rantsev v. Cyprus and Russia*). On the human rights approach to human trafficking, see §2.2 (International principles) and NRM8, p. 33.

261 *Parliamentary Documents II 2003/04*, 29 291, no. 3, p. 18.

262 The term ‘fundamental human rights’ is also used. This term can cause confusion, see §2.2 (International principles).

263 NRM5, pp. 149 ff.

264 An example is having to rent a chair in the workplace to sleep in shifts.

265 NRM5, p. 154.

266 Supreme Court 27 October 2009, LJN: BI 7097; BI7099 (advisory opinion of A-G Knigge), consideration 2.6.1.

267 To the contrary: Buruma in his annotation to Supreme Court HR 27 October 2009, NJ 2010/598 (*Chinese restaurant* case). Buruma does not totally agree with the use of the situation in the Netherlands as the frame of reference: “I find it difficult [...] to regard people as victims of exploitation for a reason that they themselves do not consider to be a cause of exploitation [...]”. See also Lestrade 2011, who says of the use of Dutch standards as the frame of reference: “It leaves room for an excessively broad interpretation of exploitation, whereby employees who do not feel they are being coerced, and are looking for a quick way to earn a lot of money, can be described as victims of human trafficking. However undesirable certain working conditions may be, the criminalisation of human trafficking does not relate to ‘miserable work chosen voluntarily.’” In her article, Lestrade discusses various frames of reference that could be relevant in assessing whether there was pressure on or exploitation of a specific victim. She mentions as a possible alternative frame of reference the person’s cultural background.

which services are performed tip over into exploitation remains a question that can only be answered by considering all of the circumstances of a specific case. This means that there will always be something of a grey area into which cases can fall and in which it is debatable whether or not they involve human trafficking. Trials of an experimental nature could help to demarcate the limits of the concept of human trafficking.

4.7 Attempt

According to established case law, it is a criminal attempt if the actions that are declared proven can be regarded as acts that are manifestly intended to commit a completed crime. Each offence involves the performance of specific actions, and those actions have to be assessed in their specific context. This context was clearly illustrated in the judgment of the Supreme Court of 2 October 2001,²⁶⁸ confirming a judgment of the Den Bosch Court of Appeal²⁶⁹ in which the facts declared proven included writing – and sending – love letters, with the suspect informing the victim that he wanted a relationship with her and his telling the victim that he was very wealthy, which, according to the court of appeal, constituted attempted human trafficking. Love letters have moved to the Internet, with the result that deception nowadays often occurs online, with the same result in legal terms.²⁷⁰

The study of the case law in NRM7 showed that attempted human trafficking is scarcely ever prosecuted. Nevertheless, the case law of the Supreme Court provides adequate grounds for doing so. The PPS should address this, since successful prosecution of attempted human trafficking could have a preventive effect.²⁷¹ Attempt was a principal charge in six cases of sexual exploitation (5%) in 2010. That is the same number as in 2007. In cases involving other forms of exploitation, attempt was not a principal charge in a single case and no alternative charge of attempt was declared proven. Convictions were handed down for attempted human trafficking in five,²⁷² and ultimately six,²⁷³ cases at first instance. In at least two of these cases, given the acts that were finally declared proven, a charge under subsection 2 could also have led to a conviction for a completed offence.

268 Supreme Court 2 October 2001, *LJN*: AB2806. See also the advisory opinion of A-G A.J.M. Machiels.

269 Den Bosch Court of Appeal 11 February 2000, 20-002224-99 (not published).

270 See also Utrecht District Court 19 January 2012, *LJN*: BV2375. See §4.7.2 below (Grooming).

271 See NRM7, recommendation 33.

272 For example, Arnhem District Court 8 September 2010, *LJN*: BN6764: in which both the completed offence and attempt were charged as alternative offences with respect to two victims. The court declared the completed offence proven with respect to one victim and attempt proven as regards the other victim, both on charges under subsection 5.

273 Leeuwarden District Court 28 December 2010, *LJN*: BO9043, set aside by Leeuwarden Court of Appeal 22 April 2011, *LJN*: BQ2356; in this case, the suspects were acquitted of all human trafficking charges at first instance, but convicted of attempted human trafficking on appeal.

4.7.1 Attempt or completed offence?

Sometimes the choice to bring charges under one or other of the subsections of Article 273f DCC implies a decision to prosecute for a completed offence or an attempt.²⁷⁴ This applies, for example, to the indictment in a case heard by Leeuwarden District Court in 2010.

*Leeuwarden District Court, 28 December 2010*²⁷⁵

In this case ('Social internship in prostitution'), the suspect was accused of trying to induce two underage girls to make themselves available for prostitution (Article 273f (1)(5) DCC). The acts he was charged with consisted of:

- speaking to S. and P., who were on the Weaze (a prostitution district in Leeuwarden), and/or
- discussing working in prostitution and/or as a streetwalker with S. and P. and/or a girlfriend of the suspect in the Eroscentrum 't Hofje (a sex club in the Weaze district) and/or
- saying to S. and P. (in brief) that he could take photos of them and then place them on an escort site called Kincky and/or that he would receive half of the money earned and/or that S. and P. could keep the other half and/or that he could arrange clients and/or that S. and P. could work at clients' homes and/or that he would protect them but wanted to be paid for it and/or
- agreeing with S. and P. to take photos and/or taking S. and P. to a home and/or
- telling S. and P. (in brief) that he wanted to have sex with them because he wanted to know how they would be with a client and/or
- then having sex with S. and P.

The court acquitted the suspect of human trafficking because it did not regard the specific acts of the suspect as being aimed at completion of the offence.

On appeal, the acts were charged both as a completed offence and as an attempt under subsection 5. The court of appeal²⁷⁶ acquitted the defendant on the charge of a completed offence, in accordance with the demand of the Advocate General, but found attempt proven in this case, and decided, in contrast to the district court, that the above actions had been aimed at completion of the offence. These facts could also have been charged and declared proven as a completed offence within the meaning of subsection 2, since the suspect had also taken S. and P. to a house, which can be regarded as moving or sheltering, both acts falling within the scope of subsection 2. The acts declared proven by the court of appeal could also be described as recruiting.

Usually, however, offences under the different subsections of Article 273f (1) DCC are charged together.²⁷⁷ This was the case in the *Judo* case, where the PPS laid charges with respect to offences against a number of victims under subsection 1, subsection 4, subsection 6 and subsection 9.

²⁷⁴ See also §4.2 (The indictment).

²⁷⁵ Leeuwarden District Court 28 December 2010, *LJN*: BO9043.

²⁷⁶ Leeuwarden Court of Appeal 22 April 2011, *LJN*: BQ2356.

²⁷⁷ See §4.2 (The indictment).

*Amsterdam Court of Appeal, 30 September 2011 (Judo)*²⁷⁸

The suspect was principally charged with acts as referred to in subsection 1, subsection 4, subsection 6 and subsection 9 against victim A. Alternatively, he was charged with attempt to commit the offences under each of these subsections. In the view of the court of appeal, it had been sufficiently established that the acts for which the suspect was charged had induced victim A. to rent a room for prostitution, that the suspect had brought her to the place of work in Amsterdam and that she had entered the room for the purpose of performing work as a prostitute. “Because she did not open the curtains on the door of her rented room and did not sit behind the window to offer sexual services”, the court found that the offence had not been completed and acquitted the suspect on the principal charge against him in relation to this victim. The court of appeal did convict for attempt under subsections 1, 4 and 6. However, the facts that were declared proven suggest a completed offence within the meaning of Article 273f, section 1, subsection 1 and an attempt under section 1, subsection 4. The facts declared proven clearly show the act of recruitment, and the court also found that it had been proved that the victim was transported to the place of work. For a conviction under subsection 1, it is irrelevant that the victim did not open the curtains.

An offence under Article 273f DCC is quickly a completed offence. For example, under subsection 1 and subsection 4,²⁷⁹ it is not necessary for the victim to have already worked in prostitution. The decisive factor for subsection 4²⁸⁰ is that the victim has been forced or induced to make herself available to do so.²⁸¹

Nevertheless, the boundary between an attempt and a completed offence is not always easy to draw in human trafficking cases, and the line is not always drawn consistently. According to Den Bosch District Court, talking about working in prostitution and taking an underage girl to the Schipperskwartier in Antwerp to introduce her to window prostitution did not mean that commission of the offence had already commenced.²⁸² This is remarkable given the case law on this point. These established acts could also have been treated as a completed offence within the meaning of section 1, subsection 2 or subsection 3 of Article 273f DCC. Those offences were not charged, however.

*Utrecht District Court, 19 January 2012*²⁸³

In this case, the acts included talking to an underage girl about prostitution in a private house in Belgium, collecting her in a car and providing transport and accommodation. There was discussion about how much money could be earned in prostitution and lingerie was bought; there was also a search for an adult’s identity card. These acts were charged as attempt under subsection 5 and subsection 3, and alternatively as attempt under subsection 3.²⁸⁴ The court found that these

278 Amsterdam Court of Appeal 30 September 2011, LJN: BT6850.

279 Or subsection 2 or subsection 5.

280 See §4.6 (Subsection 4).

281 Supreme Court 19 September 2006, LJN: AX9215.

282 Den Bosch District Court 6 December 2011, LJN: BU6763.

283 Utrecht District Court 19 January 2012, LJN: BV2375.

284 The indictment was not presented in the judgment, but from what was presented it is possible to conclude that charges were not also brought under subsection 2.

acts constituted sufficient evidence that the suspect had intent to induce the victim to make herself available to perform sexual acts with or for a third party for remuneration. The court also convicted for attempt under subsection 3. The court found that the suspect had, among other things, transported and accommodated the victim.

In the overall context, these facts could automatically have constituted a completed offence under subsection 2. Intention and acts follow from the findings of fact and the victim was a minor. Depending on how the charges are formulated, therefore, the same set of facts can produce attempt or a completed offence, or attempt under subsection 4 *as well as* a completed offence under subsection 1. It is therefore also important to be aware of the differences in the definitions of the offences in the various subsections of Article 273f DCC, since a conviction for attempt or a completed offence has consequences for sentencing.

4.7.2 Grooming

In human trafficking cases, and particularly where lover boy methods are used, the actual exploitation is often preceded by a period known as *grooming*. Grooming is not²⁸⁵ always charged as a separate offence. Grooming was made a criminal offence in the Netherlands in 2010²⁸⁶ as a result of the Lanzarote Convention,²⁸⁷ which obliges State Parties to make it a criminal offence to approach children for sexual purposes. This relates to adults who approach underage children on Internet sites or in chat rooms and tempt them with the ultimate aim of sexually abusing the child.²⁸⁸ So-called grooming periods also arise in human trafficking cases. Methods used in preparation for exploitation include seducing and isolating the victim and, for example, raping a victim and making a film of it and threatening to post the film on the Internet. These can be circumstances that lead to exploitation in prostitution and, in that sense, could form an element of a human trafficking offence.

*Haarlem District Court, 21 July 2011*²⁸⁹

In this case, the defence argued that only the period during which the victim worked in prostitution could be declared proven as human trafficking. The district court rejected this defence “because the suspect had ‘prepared’ the victim for work in prostitution between the ages of 15 and 18, referred to by the public prosecutor as the period of ‘grooming’. The suspect’s actions and the means used by him also relate to this period to a large extent. Contrary to what counsel argues, the court therefore finds that it has also been proven that the suspect was guilty of (in brief) human trafficking throughout the period charged.”

The court therefore regarded the ‘grooming period’ as part of the human trafficking offence and correctly found that the duration of the human trafficking was longer than the period that the victim was

285 See Art. 248e DCC. There have since been a number of convictions for this.

286 Art. 248e DCC.

287 Convention on the Protection of Children against sexual exploitation and sexual abuse, Lanzarote 25 October 2007, *Bulletin of Treaties* 2008, 58.

288 Art. 23 of the Lanzarote Convention. In the Dutch criminal provision, the age of sexual majority is 16 years.

289 Haarlem District Court 21 July 2011, *LJN*: BR2862.

actually working in prostitution.²⁹⁰ Amsterdam District Court²⁹¹ also ruled on the period prior to the actual exploitation in prostitution. The victim was a minor at the time when it was established that she had been recruited, but she was just 18 when she had sexual contact with her first escort client. The defence maintained that since the victim was already an adult when she visited her first client, the suspect should be acquitted of the charges arising from the fact that she was a minor. The court rejected this defence as regards the recruitment, but accepted it with regard to the performance of sexual acts. It is not clear precisely what the court meant by this, except that in the grounds for sentencing the victim's minority was not seen as an aggravating factor for that reason. In any case, for the purposes of sentencing the district court here makes a distinction between the time of recruitment and the first sexual acts. How the phase of grooming or recruitment is assessed also has consequences for the assessment of the boundaries between a completed offence and an attempt.

290 Supreme Court 19 September 2006, *LJN: AX9215*.

291 Amsterdam District Court 1 October 2010, 13-400961-09; 13-400354-09 (not published).

5 Suspects and perpetrators

This chapter contains data about suspects¹ and perpetrators in human trafficking cases heard in first instance in 2010. The 111 judgments in human trafficking cases in the sex industry involved 108 unique natural persons.² This chapter analyses the characteristics of these 108 suspects, 68 of whom (63%) were convicted of at least human trafficking. The 29 judgments in human trafficking cases relating to other forms of exploitation involved 29 unique natural persons, whose characteristics are also described in this chapter. Fourteen (48%) of them were also ultimately convicted of at least human trafficking.

The total of 108 individuals charged with sexual exploitation and 29 persons charged with other forms of exploitation³ includes an overlap of two persons who were charged with both sexual and other forms of exploitation. For this reason, the numbers shown in the tables for sexual and other forms of exploitation do not add up.

5.1 Suspects and perpetrators by gender, age group and region of birth

The following table shows the breakdown of suspects and perpetrators by gender.

Table 5 Suspects and perpetrators by gender (2010)

	Sexual exploitation				Other forms of exploitation			
	Suspects		Perpetrators		Suspects		Perpetrators	
	N	%	N	%	N	%	N	%
Male	96	89%	62	91%	20	69%	10	71%
Female	12	11%	6	9%	9	31%	4	29%
Total	108	100%	68	100%	29	100%	14	100%

- 1 In this report, the term 'suspect' is also used to refer to those persons who have been indicted and stood trial. The latter are often referred to as 'accused' in other jurisdictions.
- 2 Den Bosch District Court 17 February 2010, 01-839065-09 (not published) and Den Bosch District Court 17 February 2010, 01-824360-09 (not published) involved the same person. The Hague District Court 7 May 2010, 09-920393-09 (not published) and The Hague District Court 7 May 2010, 09-757516-09 (not published) involved the same person. Alkmaar District Court 15 April 2010, 14-018037-03 (not published) involved a legal entity.
- 3 Arnhem District Court 17 November 2010, 05-702246-10 (not published) and Leeuwarden District Court 13 July 2010, L/JN: BN1233 both involved sexual and other forms of exploitation.

The vast majority of suspects and perpetrators of human trafficking involving sexual exploitation are men (roughly 90%). In contrast, women make up roughly a third of the suspects and perpetrators of human trafficking involving other forms of exploitation.

Table 6 shows the breakdown by age group of suspects and perpetrators.⁴

Table 6 Suspects and perpetrators by age group (2010)

	Sexual exploitation				Other forms of exploitation			
	Suspects		Perpetrators		Suspects		Perpetrators	
	N	%	N	%	N	%	N	%
Underage	5	5%	2	3%	-	-	-	-
18-25 years	35	32%	22	32%	9	31%	2	14%
26-30 years	12	11%	6	9%	4	14%	3	21%
31-40 years	33	31%	19	28%	5	17%	4	29%
41-50 years	18	17%	14	21%	8	28%	4	29%
Older than 50 years	5	5%	5	7%	3	10%	1	7%
Total	108	100%	68	100%	29	100%	14	100%

The average age of the persons charged with sexual exploitation was 31.5 years⁵ (the youngest was 13 and the oldest was 65). The average age of perpetrators was 33.2⁶ (the youngest was 17 and the oldest was 65). The average age of suspects and perpetrators of other forms of exploitation was slightly higher (34.8⁷

4 The ages of the suspects are determined on the basis of their date of birth and, chronologically, the commencement date of the first offence for which human trafficking was charged. The ages of perpetrators are determined on the basis of their date of birth and, chronologically, the first human trafficking offence for which they were convicted. It is possible for the same person to appear in a younger age category in the 'suspects' column than in the 'perpetrators' column in those cases where the conviction for human trafficking was not found to have been proven from the date that the offence was alleged to have commenced in the indictment. An example of this can be found in Zwolle-Lelystad District Court 10 December 2010, LJN: BO9639: at the time of the first human trafficking offence for which he was charged, the suspect was only 13 years old and therefore falls into the category 'minor'. The suspect was convicted of human trafficking, but only for offences committed from the age of 20. Consequently, under perpetrators, this suspect falls into the category '18-25 years'. Furthermore, the two suspects who were charged with both sexual and other forms of exploitation do not necessarily fall into the same age group in the table, because in the column 'sexual exploitation' the criterion is the commencement date of the first human trafficking offence relating to sexual exploitation that was charged and in the column 'other forms of exploitation' the criterion is the commencement date of the first offence charged in relation to other forms of exploitation.

5 SD: 10.7.

6 SD: 11.5.

7 SD: 12.7.

and 36.8⁸ years, respectively, with a range from 18 to 62 years). The largest group of suspects of both sexual and other forms of exploitation (roughly a third) fell into the category 18-25 years. Only 14% of the persons convicted of other forms of exploitation were younger than 25, compared with 35% of persons convicted of sexual exploitation. On average, male suspects of sexual exploitation were slightly younger than female suspects in 2010.⁹ *The opposite applied for other forms of exploitation.*¹⁰

Table 7 shows the breakdown of the suspects and perpetrators by region of birth.

Table 7 Suspects and perpetrators by region of birth (2010)

	Sexual exploitation				Other forms of exploitation			
	Suspects		Perpetrators		Suspects		Perpetrators	
	N	%	N	%	N	%	N	%
Netherlands	40	37%	20	29%	12	41%	2	14%
Eastern Europe¹¹	31	29%	22	32%	3	10%	1	7%
Asia¹²	9	8%	7	10%	7	24%	5	36%
Other¹³	28	26%	19	28%	7	24%	6	43%
Total	108	100%	68	100%	29	100%	14	100%

8 SD: 11.8.

9 The average age of the male suspects was 31.4 years (N: 96, SD: 11.0) and the average age of the female suspects was 32.3 years (N: 12, SD: 9.6). However, the disparity is not significant: $t: -0.25$, $df: 106$, $p: 0.81$. Thirty-eight percent of the male suspects and 33% of the female suspects were not older than 25 years ($X^2: 0.08$, $df: 1$, $p: 0.78$ – this finding also does not seem significant).

10 The average age of the male suspects was 37.5 years (N: 20, SD: 12.8) and the average age of the female suspects was 28.9 years (N: 9, SD: 10.7). This disparity is significant: $U: 47.50$, $p: 0.04$. Twenty-five percent of the male suspects and 44% of the female suspects were not older than 25 years ($X^2: 1.10$, $df: 1$, $p: 0.40$ – this finding does not seem significant).

11 **Sexual exploitation: suspects:** nine (8%) were born in Hungary, nine (8%) in Bulgaria, four (4%) in Romania, four (4%) in Poland, three (3%) in the former Yugoslavia and two in Albania (2%); **perpetrators:** six (9%) were born in Hungary, five (7%) in Bulgaria, four (6%) in Poland, three (4%) in Romania, three (4%) in the former Yugoslavia (4%) and one (1%) in Albania. **Other forms of exploitation: suspects:** two were born in Romania (7%) and one (4%) in Poland; **perpetrators:** one (7%) was born in Poland.

12 **Sexual exploitation: suspects:** four (4%) were born in Iraq, two (2%) in Thailand, one (1%) in Iran, one (1%) in China and one (1%) in Indonesia; **perpetrators:** three (4%) were born in Iraq, two (3%) in Thailand, one (1%) in Iran and one (1%) in China. **Other forms of exploitation: suspects:** four (14%) were born in India, two (7%) in Indonesia and one (4%) in the Philippines; **perpetrators:** three (21%) were born in India and two (14%) in Indonesia.

13 **Sexual exploitation: suspects:** eight (7%) were born in Turkey, six (6%) in Morocco, three (3%) in the former Netherlands Antilles, two (2%) in Ghana, two (2%) in Surinam, two (2%) in Germany, one (1%) in Benin, one (1%) in Belgium, one (1%) in Ethiopia, one (1%) in Portugal and one (1%) in Australia; **perpetrators:** four (6%) were born in Morocco, three (4%) in Turkey, three (4%) in the former Netherlands Antilles, two (3%) in Ghana, two (3%) in Germany, one (1%) in Surinam, one (1%) in Benin, one (1%) in Belgium (1%), one (1%) in Ethiopia and one (1%) in Portugal. **Other forms of exploitation: suspects:** three (11%) were born in Morocco, three (11%) in Surinam and one (4%) in Turkey; **perpetrators:** three (21%) were born in Surinam, two (14%) in Morocco and one (7%) in Turkey.

Sexual exploitation

The Netherlands was the country of birth of 37% of the suspects and 29% of the perpetrators of sexual exploitation. Further analysis showed that 50% (20) of the suspects born in the Netherlands were ultimately convicted of human trafficking, compared with 71% (48) of the suspects who were born in a country other than the Netherlands.¹⁴ Accordingly, suspects born in the Netherlands were convicted of human trafficking relatively less frequently than suspects born in other countries.¹⁵ The principal countries of birth of suspects and perpetrators from Eastern Europe were Hungary, Bulgaria, Romania and Poland. Other common countries of birth were Turkey, Morocco, Iraq and the Netherlands Antilles. There was little difference in the average age of the suspects who were born in the Netherlands (31.2)¹⁶ and those who were born in other countries (31.7).¹⁷ The 12 female suspects were born in the following countries: the Netherlands (3), Bulgaria (2), Thailand (2), Hungary (1), Romania (1), Poland (1), Australia (1) and Indonesia (1). The three Dutch female suspects were aged 40, 32 and 22.

The distribution of the suspects and perpetrators in terms of gender (male and female), age (minor and adult) and country of birth (the Netherlands and other countries) was roughly the same as in the findings in NRM7. In relative terms, there were slightly fewer women, slightly more minors and slightly more suspects from the Netherlands in 2010, but the differences are very small.

Other forms of exploitation

In cases of other forms of exploitation, 41% of the suspects and 14% of those convicted were born in the Netherlands. Further analysis shows that only 17% (2) of the 12 suspects born in the Netherlands were ultimately convicted of human trafficking, in contrast to the 71% (12 of 17) of the suspects who were born in countries other than the Netherlands.¹⁹ In other words, suspects born in the Netherlands are also convicted relatively less often of other forms of exploitation than suspects born in other countries.²⁰ The most common countries of birth apart from the Netherlands were India, Morocco and Surinam. There was little difference between the average age of the suspects born in the Netherlands (34.6)²¹ and those

14 This difference is significant: X^2 : 4.58, df: 1, p: 0.03.

15 However, the correlation is weak (Cramer's V: 0.21, p: 0.03), which shows that factors other than the suspect's country of birth are more decisive in determining whether a person is ultimately convicted of human trafficking involving sexual exploitation.

16 N: 40, SD: 11.7.

17 N: 68, SD: 10.2.

18 This minimal difference is not significant: t: -0.22, df: 106, p: 0.82. Forty percent of the suspects born in the Netherlands and 35% of the suspects born in other countries are not older than 25 years (X^2 : 0.24, df: 1, p: 0.63 – this finding also does not appear significant).

19 This difference is highly significant: X^2 : 8.19, df: 1, p: 0.00.

20 The correlation is very strong (Cramer's V: 0.53, p: 0.01), which shows that – although other factors play a role – the suspect's country of birth determines to a large extent whether he or she will ultimately be convicted of human trafficking in relation to other forms of exploitation.

21 N: 12, SD: 16.3.

born in another country (35.0).^{22 23} Five of the nine female suspects were born in the Netherlands, with one each from Poland, Surinam, Indonesia and the Philippines. The five female suspects born in the Netherlands were aged 18, 20 and 46.

The Hague District Court, 17 February 2010²⁴

In this case, a man and three women were charged with forcing another person to smuggle drugs. The male suspect was 26 at the time of the offence; one woman was 20 and two were 18. The suspects were acquitted of human trafficking but convicted of inciting drug smuggling on the grounds of more or less the same set of facts. The man had clearly taken the lead and was considerably older than the women. The victims were five young girls, some of whom were minors.

Haarlem District Court, 8 December 2010²⁵

This case concerned, among other things, the use of deception by three girls to induce others to take out telephone subscriptions. Another suspect (whose case was not among those analysed) was a man who recruited the girls. The telephones and contracts were surrendered mainly to this other suspect.

Without studying the case file, it is impossible to say whether this case illustrates the 'lover girl' problem. However, several aspects of the situation in these cases resemble classic lover boy methods.

5.2 Preventive custody

Table 8 shows what proportion of the suspects and perpetrators were in custody at the time of the trial.²⁶

22 N: 17, SD: 9.9.

23 This minimal difference is not significant: U: 91.00, p: 0.65. Fifty percent of the suspects born in the Netherlands and 18% of the suspects born in other countries were not older than 25 years (X^2 : 3.44, df: 1, p: 0.11 – this finding is also not significant).

24 The Hague District Court 17 February 2010, L/N: BL4279; BL4298; 09-754012-09; 09-754074-09 (not published).

25 Haarlem District Court 8 December 2010, L/N: BO8985.

26 NRM 2012a contains figures relating to the application of pre-trial detention at any given time, which are different to the figures for pre-trial detention at the time of trial in those cases where pre-trial detention has been suspended and/or discontinued. In 2010, 92% of the suspects (of both sexual and other forms of exploitation) were held in pre-trial detention at some point.

Table 8 Suspects and perpetrators in custody at the time of the trial (2010)

	Sexual exploitation				Other forms of exploitation			
	Suspects		Perpetrators		Suspects		Perpetrators	
	N	%	N	%	N	%	N	%
In custody	45	42%	34	50%	10	34%	6	43%
Not in custody	63	58%	34	50%	19	66%	8	57%
Total	108	100%	68	100%	29	100%	14	100%

Forty-two per cent of all suspects of sexual exploitation were in custody at the time of their trial; 2% of them were in custody for other reasons. This represents a remarkable decline compared with the figure of 70% in 2007²⁷. Furthermore, 16 of the 63 suspects who were not in custody at the time of trial in 2010 had no known place of residence or domicile in the Netherlands. Half (34) of the persons who were convicted of at least human trafficking were not in custody at the time of trial; nine of them had no known place of residence or domicile in the Netherlands. In cases of other forms of exploitation, 34% of the suspects were in custody at the time of trial, 7% (2) of them for other reasons. Two of the 19 suspects who were not in detention at the time of trial had no known domicile or residence in the country. More than half (57%) of the persons who were convicted of at least human trafficking were not in custody at the time of their trial, and one of them had no known domicile of residence in the country.

6 Sentencing

6.1 Instructions and orientation points

The previous study of case law¹ revealed substantial variation in the sentences demanded and the sentences imposed in human trafficking cases. That report included the recommendation that general orientation points should be developed to promote consistent sentencing in human trafficking cases.² Orientation points are not binding, but are intended to lay the groundwork³ for providing the judiciary with a point of departure for determining sentences in individual criminal cases. The LOVS has since explored the possibility of formulating orientation points with a view to fostering consistency in sentencing in human trafficking cases,⁴ but as yet no orientation points have been adopted. The need for them remains, however. Sometimes, judges in human trafficking cases seek guidance in the orientation points for other offences.

*Arnhem Court of Appeal, sitting in Leeuwarden, 23 February 2011*⁵

“For the offence of human trafficking, the courts have no specific orientation points for the purpose of determining the sentence. However, since in this case the underage victim was repeatedly forced to perform sexual acts for the suspect’s financial gain, and having regard to the fact that the orientation point for the sentence for a single rape is 24 months’ imprisonment, in the court’s view a heavier sentence should be imposed than the term of 24 months’ imprisonment, with six months suspended.” The court of appeal imposed an unconditional prison sentence of 32 months, with the deduction of four months because the case had not been brought within a reasonable period.

1 NRM7, pp. 399-476.

2 NRM7, recommendation 40.

3 Beaujean 2012, pp. 15-22.

4 Letter from the Minister of Justice of 21 January 2010, *Parliamentary Documents II* 2009/10, 28 638, no. 47, p. 11.

5 Arnhem Court of Appeal, sitting in Leeuwarden, 23 February 2011, *LJN*: BP5527. See also Leeuwarden Court of Appeal 4 May 2011, *LJN*: BQ3549, in which the court, adopting the same reasoning, also imposed a higher sentence than was demanded.

In the absence of orientation points, courts sometimes also refer to sentences that have been imposed previously by courts in the same district in more or less similar cases⁶ or to judgments published in the database at *rechtspraak.nl*.⁷

Leeuwarden District Court, 14 December 2011⁸ and 16 November 2011⁹

Leeuwarden Court of Appeal also said it would follow what the court itself usually imposed for the same type of offence and, in a judgment of 14 December 2011, imposed a prison sentence of 11 months for exploitation of a vulnerable foreign woman over a period of two years. A month earlier, the same court had imposed a 23-month prison sentence for the exploitation, also in prostitution, of a Bulgarian woman for a period of nearly 13 months. In both cases, the suspects were not repeat offenders in the Netherlands, the women were vulnerable and the proven coercion involved manipulation. In the former case, the court of appeal's sentence was higher than the sentence demanded by the PPS and in the latter case it was significantly lower. In what way the court followed the precedent in the earlier case is unclear.

Sometimes, the court makes a general reference to sentencing in 'similar' cases.¹⁰ This reference remains quite vague because it is impossible to discover from the judgments how the courts assessed this similarity. Furthermore, many judgments are not published on *rechtspraak.nl*, so it is not easy to make a genuine comparison.¹¹ Illustrative of the search for guidelines for determining sentences are the findings of Utrecht District Court, sitting in Almelo, in the *Sneep II* cases,¹² where the court adopted its own frame of reference for determining the sentences.¹³

Sneep II

The court found, first and foremost, that the LOVS had not adopted any orientation points and that sentences imposed by other courts in human trafficking cases varied from several months to several years in prison, often for more offences than human trafficking alone, making it difficult

6 See, for example, Den Bosch Court of Appeal, 13 May 2011, *LJN*: BQ5633, in which the court only followed the sentences imposed by the court itself in similar cases.

7 Beaujean 2012, pp. 15-22.

8 Leeuwarden Court of Appeal 14 December 2011, 24-002336-09 (not published).

9 Leeuwarden Court of Appeal 16 November 2011, 24-001184-10 (not published).

10 See, for example, Utrecht District Court 6 April 2012, *LJN*: BW2312: "The court takes into account what is imposed in similar cases"; Almelo District Court 30 March 2012, *LJN*: BW0448: "No orientation points have been adopted for human trafficking. With regard to that offence, the court will take account of similar cases."

11 For example, from 1 January 2010 to 11 September 2012, only four judgments in human trafficking cases were published by Amsterdam District Court (*www.rechtspraak.nl*, accessed on 11 September 2012, search terms: 'human trafficking', 'criminal law', 'Amsterdam District Court from 1 January 2010'). Two of the judgments concerned a European Arrest Warrant. In 2010 alone, however, Amsterdam District Court rendered 22 judgments. Of the 138 judgments rendered in first instance in human trafficking cases in 2010, 53 were published on *rechtspraak.nl* (accessed on 19 September 2012).

12 See Utrecht District Court, sitting in Almelo, 18 February 2011, *LJN*: BP6711; BP6953.

13 See NRM7, p. 462, with respect to *Sneep I*.

to identify a consistent line.¹⁴ The court then followed the standard it had laid down in *Sneep I*,¹⁵ explaining that it was applying that standard partly because, from the perspective of equality before the law, the suspects in *Sneep II* should not be punished more severely than the suspects in *Sneep I* and because the recent increase in the maximum sentences did not apply to this case. Accordingly, the court decided that the basic sentence for the convictions for human trafficking was an unconditional prison sentence of 10 months for each victim, to be increased if violence, serious violence or rape had been used or if the offence was committed in concert with others or if it occurred over a longer period than in other cases.

PPS Instructions on Human Trafficking

In 2010, the PPS adopted the Instructions on Human Trafficking concerning the sentences to be demanded for human trafficking in the sense of sexual exploitation.¹⁶ The instructions are based on the period for which the offence was committed per victim, and in principle, the public prosecutor demands an unconditional prison sentence. The sentence demanded can range from 12 to 24 months if the offence was committed over a period from one day to six months; for offences continuing for six to 12 months, the sentence demanded can range from 24 to 36 months; and for an offence committed for a period of more than 12 months, the sentence demanded should be between 36 and 48 months. The sentence demanded is increased by 50% in at least following instances: if the victim was younger than 16 years, if the offence was committed in concert with others or in the context of organised crime, or if it is a repeat offence. Other circumstances that can lead to an increase in the sentence demanded – in addition to the aggravating circumstances already prescribed in Article 273f (3)(4) and (5) DCC – include forcing a victim to work without using a condom, the degree of violence used by the suspect, the exceptional vulnerability of a victim (which would also cover victims with a mental handicap), if the victims are 16 or 17 years old and if unusual sexual services are demanded (if a victim is forced to perform sexual services with a group of people, anal sex or bestiality). The instructions provide that the sentence to be demanded for offences under Article 273f (1)(3) DCC involving a single victim and without aggravating circumstances is six months' imprisonment (see also §4.5.4 (Subsection 3, Sentencing)).

A similar set of instructions for cases involving other forms of human trafficking entered into force on 1 May 2012.¹⁷ These instructions cover human trafficking in the sense of 'servitude or labour exploitation'.¹⁸ (Exploitation by forcing a person to beg or to commit a crime are not covered). In principle, an unconditional prison sentence should also be demanded for servitude or labour exploitation. According to the instructions, in view of the suspect's intention to profit, there might be cases where it would be appropriate to demand a prison sentence and a fine. With respect to servitude, the instructions

¹⁴ The court also referred to the NRM's reports.

¹⁵ Utrecht District Court, sitting in Almelo, 11 July 2008, LjN: BD6957; BD6960; BD6965; BD6969; BD6972; BD6974.

¹⁶ *Parliamentary Documents II* 2009/10, 28 638, no. 47, p.12. The Instructions on Human Trafficking in the sense of sexual exploitation were published on 25 August 2010 (*Government Gazette*. 2010, 13 154) and took effect on 1 September 2010.

¹⁷ Instructions on Human Trafficking in the sense of servitude and labour exploitation, *Government Gazette*. 2012, 8227.

¹⁸ For the definitions of the terms 'servitude' and 'labour exploitation' and the related term 'slavery', the instructions refer to and follow Alink & Wiarda 2010.

provide that the sentences to be demanded should be based on the period for which the offence was committed and are the same as for sexual exploitation with the exception that there is no upper limit for offences committed for a period of more than 12 months, for which the sentence demanded can be higher than 36 months. With respect to labour exploitation, the sentence demanded will depend on both the duration of the offence and the number of victims; as regards the latter, a distinction is made between human trafficking involving one to 10 victims, 10 to 25 victims, 25 to 50 victims and more than 50 victims. The minimum sentence to be demanded for human trafficking with more than 50 victims for a period of longer than a year is 48 months. Higher sentences can be demanded if there are aggravating circumstances, such as human trafficking committed in concert or leading to a person's death. Other examples of aggravating circumstances are risky working or living conditions, the use of violence, victims being required to work a disproportionately high number of hours or days, restriction of their freedom of movement,¹⁹ the exceptional vulnerability of the victims (minors, illegal immigrants, persons with reduced mental capacity), recidivism and the use of means of coercion. According to the instructions, these are the most common aggravating circumstances.

Because these sets of instructions only recently took effect, their impact has not been evaluated in this study. Nevertheless, while the Instructions on Human Trafficking in the sense of sexual exploitation²⁰ do sometimes seem to offer guidance for the courts, they are sometimes also explicitly ignored.

*Zwolle-Lelystad District Court, 10 December 2010*²¹

The periods of exploitation for which the suspects were charged and convicted were roughly five years, all before 1 January 2008, with respect to a single victim in each case. The district court followed the Instructions on Human Trafficking and found that they prescribed a prison sentence of 36–48 months for an offence committed for a period of more than 12 months. The court also took into account the fact that the victim was forced to have an abortion and general recidivism. The judgment does not say what sentence the public prosecutor demanded but the court sentenced both defendants to five years in prison.

*Amsterdam Court of Appeal, 26 October 2011*²²

The period of exploitation was from November/December 2008 to November 2009 and involved five victims. The prosecutor demanded a prison sentence of five years. In departing from that demand, the court of appeal reasoned, first and foremost, that it would not be guided by the Instructions on Human Trafficking in the sense of sexual exploitation of 1 September 2010 in view of the fact that the offences declared proven had occurred before the instructions were adopted. Furthermore, according to the court, they were internal instructions for the PPS, which were not binding on the court. The court imposed a prison sentence of 30 months.

19 On this point, see also §2.3.1 (Subsection 1: acts, coercion and (intention of) exploiting).
20 *Government Gazette*. 2010, 13 154.
21 Zwolle-Lelystad District Court 10 December 2010, *LJN*: BO9639; BO7662.
22 Amsterdam Court of Appeal 26 October 2011, *LJN*: BU4222.

Orientation points - the judiciary

One of the reasons the judiciary had not formulated orientation points was the relatively small number of human trafficking cases.²³ The Legal Uniformity Committee of the LOVS is once again investigating the possibility of formulating orientation points, partly in view of the number of judgments rendered. In light of the normal procedure, if orientation points are formulated, they will be published around the spring of 2013.²⁴

Compared with many other offences for which there are orientation points, the number of human trafficking cases is relatively small. However, the seriousness, the impact and the concerns about human trafficking, in the Netherlands and worldwide, could also prompt the judiciary to reflect on the requirements for criminal liability and to express their conclusions in uniform principles. Naturally, the judiciary is not bound by instructions issued to prosecutors, but the underlying idea, the desire for uniform principles for sentencing, does apply for both the judiciary and the PPS.

Another relevant factor with respect to the formulation of orientation points is that the trend in sentencing in human trafficking cases can be identified by analysing earlier judgments. In that case, however, the formulation of orientation points would then be based solely on earlier precedent, without having regard to the fact that statutory sentences have been increased on several occasions in recent years - and the reasons why. It should also be noted that a bill to further increase the maximum sentences was recently tabled in Parliament.²⁵ The main driving force behind these developments is the seriousness of the offence, which usually constitutes a very serious violation of the victim's human dignity and integrity for an extended period of time, often resulting in permanent psychological harm and other consequences. It is therefore relevant to ask how these developments should be addressed and how the seriousness of the offence of human trafficking should be perceived in developing orientation points. For example, in situations where human trafficking involves sexual exploitation, a parallel could be drawn with the offence of rape under Article 242 DCC. Both offences cover a situation in which the victim is forced to submit to acts that involve the sexual penetration of his or her body through the use or threat of violence or some other form of coercion. Furthermore, perpetrators can earn a lot of money from human trafficking, which is another aspect that could be a factor in determining the sentence but which is frequently not considered in the grounds for sentencing, even in cases of other forms

23 Letter from the Minister of Security and Justice of 31 May 2011, *Parliamentary Documents II 2010/11*, 28 638, no. 53. In a letter to parliament in June 2012, the minister wrote that the Legal Uniformity Committee of the LOVS had concluded that there was too little case law and too little information about sentencing for human trafficking to produce orientation points. "The LOVS recently asked the Legal Uniformity Committee to investigate the possibility of formulating orientation points again. The aim is to complete this study in the second half of this year", *Parliamentary Documents II 2011/12*, 33 185, no. 6.

24 Enquiries were made to the sectors about this. The criminal sectors could supply information until 1 November 2012, whereupon the Legal Uniformity Committee would review whether orientation points could be produced, written information from LOVS, 31 August 2012.

25 On this point, see §2.1 (Legislative history).

of exploitation.²⁶ Consequently, this aspect might also not be included as a relevant factor if only earlier judgments are analysed for the purpose of formulating orientation points. Not just the impact of the offence on the victim, but also the financial benefit to the suspect needs to be considered.

6.2 Figures

This section contains a quantitative survey of sentences and measures demanded by the PPS and the sentences and measures imposed by the courts in human trafficking cases.

6.2.1 Sanctions demanded by the PPS

In 2010, the PPS demanded a full acquittal on all charges of human trafficking in seven cases involving sexual exploitation and in two cases relating to other forms exploitation. In 11 cases, all of them relating to sexual exploitation, the PPS demanded at least a partial acquittal for human trafficking.²⁷ In any case, demands for acquittal seem to have occurred more often in 2010 than several years earlier: in 2007, the PPS only once demanded a full acquittal on all charges relating to sexual exploitation.²⁸

Table 9 Nature of the sentences and measures demanded (2010)²⁹

Heaviest principal sentence demanded or demand for complete acquittal for human trafficking	In combination with demand for...	Sexual exploitation		Other forms of exploitation	
		N	%	N	%
Wholly unconditional prison sentence	Order for mandatory detention	2	2%	-	-
	Community service	-	-	3	10%
	Fine	1	1%	-	-
	-	52	54%	17	59%

In 2010, the sentence demanded for sexual exploitation usually (92% of the time) included at least an unconditional prison sentence; the percentage is slightly lower (86%) in cases of other forms of exploitation.

26 In the PPS's Instructions for Human Trafficking in the sense of servitude and labour exploitation, for the purposes of the sentence to be demanded a distinction is also made according to the number of victims, based on the idea that there is a strong financial incentive to exploit as many victims as possible (*Government Gazette*. 2012, 8227). The Instructions for Human Trafficking in the sense of sexual exploitation do not mention this aspect (*Government Gazette*. 2010, 13 154).

27 In three cases, the demand was for complete acquittal on one of the charges for human trafficking. The other cases involved acquittal on some of the charges, for example with respect to a particular victim or a charge under a specific subsection.

28 Amsterdam District Court 7 September 2007, 13-528069-06 (not published). See NRM7, p. 454.

29 This analysis covered combinations of principal sentences, hospital orders, orders for placement in a juvenile custodial institution and demands for a full acquittal for human trafficking. Other types of measure and associated sentences, such as compensation orders and forfeiture orders, are ignored here.

Heaviest principal sentence demanded or demand for complete acquittal for human trafficking	In combination with demand for...	Sexual exploitation		Other forms of exploitation	
		N	%	N	%
Subtotal: wholly unconditional prison sentence as heaviest principal sentence demanded		55	57%	20	69%
Partially conditional prison sentence	Community service	7	7%	-	-
	Fine	5	5%	-	-
	-	22	23%	5	17%
Subtotal: partially conditional prison sentence as heaviest principal sentence demanded		34	35%	5	17%
Subtotal: wholly unconditional or partially conditional prison sentence as		89	92%	25	86%
Wholly conditional prison sentence	Community service & Fine	-	-	1	3%
Community Service	-	1	1%	1	3%
Full acquittal on charges for human trafficking offences	-	7	7%	2	7%
Total		97 ³⁰	100%	29	100%

The heaviest principal sentence demanded by the PPS was an entirely unconditional prison sentence in 57% of sexual exploitation cases and 69% of cases involving other forms of exploitation, and a partially conditional prison sentence in 35% and 17% of cases, respectively. These percentages do not differ much from those in cases of sexual exploitation in 2007.³¹ Of the 89 wholly or partially unconditional prison sentences demanded in sexual exploitation cases in 2010, seven were combined with a community service sentence³², six with a fine³³ and in two cases with a demand for detention under a hospital order for mandatory psychiatric care. In cases involving other forms of exploitation, three of the 25 demands for wholly or partially unconditional prison sentences were combined with a demand for a sentence of 240 hours of community service. In one case of sexual exploitation and one case involving other forms of exploitation, the highest principal sentence demanded was a community service sentence (of 240 hours³⁴ and 120 hours, respectively); this had never occurred in cases of sexual exploitation in 2007.³⁵ Finally, in one case of other forms of exploitation, the heaviest principal sentence demanded was an entirely conditional prison sentence in combination with a community service sentence of 200 hours and a fine of € 5,000.³⁶

30 111-14=97. In four judgments, the sentence demanded was not specified. Whether the demand is mentioned depends on the text of the judgment.

31 NRM7, p. 454.

32 Ranging from 100 to 240 hours.

33 Ranging from € 1,000 to € 15,000.

34 In this context, it is remarkable that in one case the period of the offence charged (exploitation) was 4.5 years – and the PPS felt this had been proved – but the PPS demanded a sentence of 240 hours of community service (Arnhem District Court 20 January 2010, *NJFS*: 2010, 115).

35 NRM7, p. 485.

36 Utrecht District Court 5 October 2010, *LJN*: BO2835.

Table 10 Length of the unconditional part of the prison sentences demanded, by category (2010)

	Sexual exploitation								Other forms of exploitation ³⁷	
	Only Art. 273a/f (1)(3) DCC charged ³⁸		Only human trafficking ³⁹ charged		Both human trafficking and other offences charged		Total		Total	
	N	%	N	%	N	%	N	%	N	%
Up to 6 months	4	100%	6	19%	5	10%	15	17%	4	16%
>6 months - 1 year	-	-	8	25%	6	12%	14	16%	3	12%
>1-2 years	-	-	9	28%	13	25%	22	25%	9	36%
>2-3 years	-	-	5	16%	8	15%	13	15%	7	28%
>3-4 years	-	-	3	9%	5	10%	8	9%	1	4%
>4-5 years	-	-	-	-	10	19%	10	11%	1	4%
>5 years	-	-	1	3%	5	10%	6	7%	-	-
Total	4	100%	32	100%	52	100%	88⁴⁰	100%	25	100%

In 58% of all cases in which a wholly or partially conditional prison sentence was demanded for sexual exploitation, the prison sentence demanded was not more than two years. The figure was 64% in cases of other forms of exploitation and 75% in cases in which only human trafficking with respect to sexual exploitation was charged.⁴¹

The average length of the unconditional prison sentence demanded in cases of sexual exploitation was approximately 2.4 years in 2010. The average sentence demanded in cases of other forms of exploitation

37 In contrast to length of the unconditional prison sentences demanded in the judgments relating to sexual exploitation, in this category no distinction is made between judgments in which only human trafficking was charged and judgments in which both human trafficking and other offences were charged. The reason for this is that human trafficking was the sole charge in only two of the 25 judgments in which a wholly or partially unconditional prison sentence had been demanded. This is too few to make a comparison with the other 23 judgments.

38 The Instructions on Human Trafficking differ for offences under subsection 3 and the sentences imposed for offences under this subsection also differ to such an extent that they are presented in a separate column; see §4.5.4 (Subsection 3, Sentencing).

39 Excluding the cases in which charges were only brought under Article 273a/f(1)(3) DCC.

40 Two judgments concern the same suspect and the same set of facts: The Hague District Court 7 May 2010, 09-920393-09 (not published) – a minor, and The Hague District Court 7 May 2010, 09-757516-09 (not published) – an adult. The PPS decided in this case to demand a single sentence for both offences. The length of the sentence demanded in this case is therefore only included once, bringing the total to 88 rather than 89.

41 Among which, the sentence demanded was never higher than six months in the four cases in which charges were brought only under Art. 273f(1)(3) DCC.

was roughly six months shorter - less than two years. When only human trafficking with respect to sexual exploitation was charged,⁴² the average length of the sentence demanded (approximately 1.6 years) was 18 months shorter than it was if other offences were also charged (approximately 3.1 years).⁴³

Table 11 Average length of the unconditional part of the prison sentences demanded (2010)

		Average length in days	Minimum length	Maximum length
Sexual exploitation	Charges brought only under Art. 273a/f (1)(3) DCC	144.5 ⁴⁴	1 month ⁴⁵	6 months ⁴⁶
	Only human trafficking ⁴⁷ charged	589.3 ⁴⁸	13 days ⁴⁹	6 years ⁵⁰
	Both human trafficking and other offences charged	1,116.9 ⁵¹	13 days ⁵²	10 years ⁵³
	Total	880.9 ⁵⁴	13 days	10 years
Other forms of exploitation	Total	673.0 ⁵⁵	16 days ⁵⁶	5 years ⁵⁷

42 Except in those cases in which charges were brought only under Art. 273f (1)(3) DCC (in which the average unconditional prison sentence was 4.7 months).

43 This difference is very significant: $t: -3.74$; $df: 81.97$; $p: 0.00$.

44 $N: 4$, $SD: 76.1$.

45 Den Bosch District Court 19 February 2010, *LJN: BL5308*.

46 Arnhem District Court 9 December 2010, 05-702758-10; 05-702760-10 (not published) and Groningen District Court 14 October 2010, *LJN: BO0437*.

47 Excluding the cases in which charges were brought only under Art. 273a/f (1)(3) DCC.

48 $N: 32$ (42 judgments in which no offences other than human trafficking were charged – four judgments in which the sentence demanded was not mentioned – two judgments in which a complete acquittal was demanded – four judgments in which charges were brought only under Art. 273a/f (1)(3) DCC). $SD: 496.5$.

49 Den Bosch District Court 19 February 2010, *LJN: BL5400*.

50 Rotterdam District Court 17 December 2010, 10-750178-06 (not published).

51 $N: 52$ (69 judgments in which other offences were charged in addition to human trafficking - 10 judgments in which the sentence demanded was not mentioned – five judgments in which a complete acquittal was demanded – one judgment in which the heaviest principal sentence demanded was community service – The Hague District Court 7 May 2010, 09-920393-09 (not published); the term demanded in this case is already included by virtue of The Hague District Court 7 May 2010, 09-757516-09 (not published)). $SD: 795.9$.

52 Rotterdam District Court 22 February 2010, 10-750130-09 (not published).

53 Rotterdam District Court 20 September 2010, 10-600000-09 (not published).

54 $N: 88$, $SD: 740.8$.

55 $N: 25$, $SD: 450.6$.

56 Zwolle-Lelystad District Court 30 November 2010, *LJN: BP0010*; *LJN: BP0008*.

57 Leeuwarden District Court 13 July 2010, *LJN: BN1233*.

6.2.2 Sentences and measures imposed

Table 12 shows the sentences and measures that were imposed⁵⁸ by the courts of first instance in 2010 in the judgments in which there was a conviction for at least human trafficking (with respect to sexual exploitation and/or other forms of exploitation).

Table 12 Nature of the sentences and measures imposed (2010)

Heaviest principal sentence imposed	In combination with ...	Sexual exploitation		Other forms of exploitation	
		N	%	N	%
Wholly unconditional prison sentence	Order for mandatory detention in a psychiatric hospital	1	1%	-	-
	-	33	48%	6	43%
<i>Subtotal: wholly unconditional prison sentence as heaviest principal sentence imposed</i>		34	49%	6	43%
Partially conditional prison sentence	Community service	7	10%	2	14%
	-	23	33%	5	36%
<i>Subtotal: partially conditional prison sentence as heaviest principal sentence imposed</i>		30	43%	7	50%
<i>Subtotal: wholly or partially unconditional prison sentence as heaviest principal sentence imposed</i>		64	93%	13	93%
Wholly conditional prison sentence	Community service	-	-	1	7%
	Fine	2	3%	-	-
	-	1	1%	-	-
Community service	-	1	1%	-	-
Conviction without imposition of any sentence or measure	-	1	1%	-	-
Total		69	100%	14	100%

58 This analysis covers combinations of principal sentences, hospital orders, orders for placement in a juvenile custodial institution and convictions where no sentence or measure was imposed. Other types of measure and associated sanctions, such as compensation orders and forfeiture orders, are ignored here.

In 93% of the convictions for both sexual and other forms of exploitation, at least part of the sentence imposed was an unconditional prison sentence. Of the 64 wholly or partially unconditional prison sentences for sexual exploitation, seven were imposed in combination with community service⁵⁹ and one was in combination with an order for mandatory detention in a psychiatric hospital. In cases of other forms of exploitation, the combination of a wholly or partially unconditional prison sentence and a community service sentence of 240 hours was imposed twice. In three cases of sexual exploitation, the heaviest sentence imposed was an entirely conditional prison sentence (all for a term of six months), with the sentence being accompanied by a fine of € 750 in two of those cases. Each of these cases involved an offence under Article 273f (1)(3) DCC. On one occasion, the heaviest sentence imposed – by the juvenile court – was an order to perform 120 hours of community service⁶⁰ and in one judgment no sentence or other measure was imposed following a conviction for human trafficking with respect to sexual exploitation.⁶¹ In one judgment involving other forms of exploitation, a wholly conditional prison sentence of six months was imposed, in combination with 180 hours of community service.⁶²

Community service

Since January 2012, it has no longer been possible to impose a community service sentence for human trafficking, except in combination with an *unconditional* prison sentence or custodial measure⁶³ of not more than six months.⁶⁴ Since 1 April 2012, the criminal courts have had wider discretion to impose conditional sentences, area exclusion orders and restraining orders. The Conditional Sentences Act (*Wet voorwaardelijke sancties*) also gives the courts wide discretion in imposing special conditions, possibly in combination with a longer probation period and electronic supervision.⁶⁵ Prison sentences of up to four years may be imposed conditionally, subject to additional special conditions if necessary. Although conditional prison sentences were imposed for human trafficking, there was seldom any mention of supervision by the probation service (whether in combination with mandatory treatment or not) in the judgments in 2010 that were analysed. On a couple of occasions, the special condition was stipulated that the perpetrator was not to act as a broker for prostitution or escort services during the period of probation.⁶⁶ The number of times that the probation service advised on sentencing was relatively small, and in fact the service provides advice relatively more often in cases of other forms of exploitation than in human trafficking cases involving prostitution.

59 Ranging from 60 hours to 240 hours.

60 Attempted human trafficking was declared proven, although the person against whom the offence was committed had not yet reached the age of 16 (Rotterdam District Court 28 January 2010, 10-750252-09 (not published)).

61 This involved an offence under Art. 273 (1)(3) DCC (Groningen District Court 14 October 2010, LJN: BO0439).

62 Utrecht District Court 5 October 2010, LJN: BO2835.

63 Article 22b (3) DCC, *Bulletin of Acts, Orders and Decrees*. 2012, 1.

64 Article 9 (4) DCC.

65 This is different from the Judicial Restraining Orders Act (*Wet rechterlijk gebieds- of contactverbod*), which creates the possibility for the court to impose restraining orders, without a conditional sentence, for minor offences. *Bulletin of Acts, Orders and Decrees*. 2011, 546.

66 Utrecht District Court 13 December 2010, LJN: BO9376; BO8073, Utrecht District Court 11 November 2011, LJN: BU4728; BU4709 (*Amersfoort escort service case*).

Table 13 presents a breakdown of the unconditional part of the prison sentences imposed, by length of sentence, for the 64 judgments in which suspects were convicted of at least sexual exploitation, and the 13 judgments in which suspects were convicted of at least other forms of exploitation and in which a wholly or partially unconditional prison sentence was imposed (see Table 12).

Table 13 Length of the unconditional part of the prison sentences imposed, by category (2010)^{67 68}

	Sexual exploitation							Other forms of exploitation ⁶⁷		
	Conviction only under Art. 273a/f (1)(3)/250a (1)(2) DCC		Conviction only for human trafficking ⁶⁸		Conviction for both human trafficking and other offences		Total		Total	
	N	%	N	%	N	%	N	%	N	%
Up to 6 months	6	75%	9	31%	3	11%	18	28%	4	31%
>6 months – 1 year	1	13%	8	28%	2	7%	11	17%	4	31%
>1-2 years	1	13%	7	24%	8	30%	16	25%	2	15%
>2-3 years	-	-	4	14%	5	19%	9	14%	1	8%
>3-4 years	-	-	-	-	4	15%	4	6%	2	15%
>4-5 years	-	-	1	3%	3	11%	4	6%	-	-
>5 years	-	-	-	-	2	7%	2	3%	-	-
Total	8	100%	29	100%	27	100%	64	100%	13	100%

In 70% of the judgments in which a wholly or partially unconditional prison sentence was imposed for at least sexual exploitation, the sentence was not more than two years. The figure for cases of other forms of exploitation was 77%, in judgments in which only human trafficking with respect to sexual exploitation was declared proven, it was as high as 86%.⁶⁹

67 In contrast to the length of the unconditional prison sentences imposed in the judgments involving sexual exploitation, in this category no distinction is made between judgments with convictions only for human trafficking and judgments with convictions for both human trafficking and other offences. The reason for this is that in only one of the 13 judgments in which a wholly or partially unconditional prison sentence was imposed was the conviction solely for human trafficking. This is too few to make a comparison with the other twelve judgments.

68 Excluding the cases in which there was a conviction only under Art. 273a/f(1)(3) / 250a (1) (2) DCC.

69 Among which, in six cases, the sentence was not higher than six months, one was between six months and a year and one was between one and two years in the eight cases in which charges only under Art. 273f(1)(3) DCC were declared proven.

The average length of an unconditional prison sentence imposed in sexual exploitation cases in 2010 was approximately 1.8 years. In cases of other forms of exploitation, the average sentence was approximately four months shorter.⁷⁰

The average term of the unconditional part of the prison sentences imposed in sexual exploitation cases was fractionally higher in 2010 than in 2007.⁷¹ If only human trafficking relating to sexual exploitation was declared proven,⁷² the average term of imprisonment (roughly 1.3 years) was almost 18 months shorter than when offences other than human trafficking involving sexual exploitation were also declared proven (approximately 2.7 years).⁷³

70 It is not really possible to compare the sentences in cases of sexual exploitation with the sentences in cases of other forms of exploitation, since such a comparison would have to be based on cases in which there was a conviction exclusively for human trafficking, assuming that other offences declared proven had no influence on sentencing. In relation to sexual exploitation, there were 37 sentences for only human trafficking, but only one sentence for other forms of exploitation. Because the latter number is so small, a quantitative comparison is impossible. The scale and nature of the other offences declared proven in cases of other forms of exploitation also differ from those in sexual exploitation cases (see Appendix 3, Table A1.8); the other offences in cases involving other forms of exploitation and of sexual exploitation cannot be regarded as comparable.

71 See NRM7, p. 457. The length of the (partially) unconditional prison sentences imposed in the judgments in which persons were convicted of at least human trafficking in relation to sexual exploitation in 2007 was 20.6 months, compared with 647.7 days (21.3 months) in 2010.

72 Except in those cases in which only offences under Art. 273f(1)(3) DCC were declared proven (for which the average unconditional prison sentence was 4.7 months).

73 This difference is very significant: U: 205.00; p: 0,00.

Table 14 Average length of the unconditional part of the prison sentences imposed (2010)

		Average length in days	Minimum length	Maximum length
Sexual exploitation	Only offences under Art. 273a/f (1) (3)/250a (1)(2) DCC declared proven	144.1 ⁷⁴	13 days ⁷⁵	15 months ⁷⁶
	Only human trafficking declared proven ⁷⁷	479.4 ⁷⁸	1 month ⁷⁹	5 years ⁸⁰
	Both human trafficking and other offences declared proven	977.7 ⁸¹	14 days ⁸²	6 years ⁸³
	Total	647.7 ⁸⁴	13 days	6 years
Other forms of exploitation	Total	527.4 ⁸⁵	101 days ⁸⁶	4 years ⁸⁷

*Rotterdam District Court, 17 December 2010*⁸⁸

In 2010, the longest and the shortest unconditional prison sentences were imposed in the same case:⁸⁹ five years (for one suspect) and one month (two suspects were sentenced to six months' imprisonment, with five months suspended). There were five suspects in this case. Another suspect was sentenced to 24 months, with 12 months suspended, and the fifth suspect was acquitted.

The case concerned a substantial trafficking operation, involving six women from Thailand who were put to work in prostitution in both Germany and the Netherlands. The principal offender was convicted of exploiting all six women over a period of two years and three months. The court found that the means of coercion used was abuse of a vulnerable position and that offences

74 N: 8, SD: 154.2.

75 Den Bosch District Court 19 February 2010, *LJN*: BL5400.

76 Assen District Court 6 April 2010, 19-810221-06 (not published).

77 Excluding the cases in which only offences under Art. 273a/f (1)(3) / 250a (1) (2) DCC were declared proven.

78 N: 29, SD: 416.0.

79 Rotterdam District Court 17 December 2010, 10-750215-06; 10-750216-06 (not published).

80 Rotterdam District Court 17 December 2010, 10/750178-06 (not published).

81 N: 27, SD: 635.1.

82 Rotterdam District Court 22 February 2010, 10-750130-09 (not published).

83 The Hague District Court 22 April 2010, 09-535062-09 (not published) and Rotterdam District Court 20 September 2010, 10-600000-09 (not published).

84 N: 64, SD: 581.3.

85 N: 13, SD: 449.5.

86 Haarlem District Court 8 December 2010, *LJN*: BO8985.

87 The Hague District Court 3 May 2010, *LJN*: BM3374.

88 Rotterdam District Court 17 December 2010, 10-750215-06; 10-750199-06; 10-750178-06; 10-750087-06; 10-750216-06 (not published).

89 This is based on cases in which only human trafficking was declared proven, excluding the cases in which only offences under Art. 273a/f (1)(3) / 250a (1) (2) DCC were declared proven.

under subsections 1, 3 and 6 had been proven. Two of the women were recruited in Thailand. The victims were illegal residents and had incurred substantial debts for the trip, which bound them to the offenders. The principal offender was seen as the person who coordinated and controlled the entire operation. The public prosecutor demanded a prison sentence of six years, but the court saw a number of reasons to mitigate the sentence, including the fact that the case “certainly did not involve the gravest form of sexual exploitation”. In mitigation for the two offenders who were given the shortest unconditional prison sentences, the court also found that they were guilty of “a form of exploitation that was limited in terms of its nature and seriousness”. They were found guilty of exploiting two victims for a period of three months under subsections 1 and 6, in concert with the principal offender. In its grounds for sentencing, the court took into account the fact that the suspect had only played a facilitating role and was not guilty of any form of coercion, although it found that the suspect had abused the victims’ vulnerable position: they were living here illegally and did not speak the language properly and they were kept under control. They had to surrender half of their earnings to the escort agency. The suspect or his accomplice took a substantial part of the other half of the earnings to pay off the debt, something the suspect was aware of. Considering the means of coercion declared proven, it is difficult to reconcile the court’s finding that no coercion was used. With this finding, the court also failed to acknowledge that human trafficking is, in itself, a violent crime of intent, regardless of the means of coercion used. In addition, no coercion is required under subsection 6.⁹⁰

Unconditional prison sentences of longer than four years were the exception in 2010. The situation seems to be changing, since relatively higher sentences have been imposed in a number of human trafficking cases in first instance in recent years.⁹¹ Given the sometimes major differences in cases and in grounds for sentencing, it is impossible to say precisely what factors have been decisive for the sentences ultimately imposed. (On the factors considered in sentencing, see section §6.3.)

6.2.3 Differences in sentences demanded and imposed

In 2010, the sentence imposed by the court in cases involving sexual exploitation was usually (85%) lighter than the sentence demanded by the PPS,⁹² and in almost all other cases the sentence was equal to the demand. In any case, in that year the courts of first instance did not impose heavier sentences than the PPS had demanded, although they had in 2007,⁹³ and have again done so since the beginning

⁹⁰ See §4.4 (Coercion and free will) and Chapter 2 (Article 273f DCC).

⁹¹ Some examples: Utrecht District Court 1 June 2011, *LJN*: BQ6884 (eight years unconditional); Utrecht District Court, sitting in Almelo, 18 February 2011, *LJN*: BP5092 (*Sneep II*) (more than seven years, specifically 86 months, unconditional); Zwolle-Lelystad District Court 16 August 2011, *LJN*: BR5048 (*Kluivingsbos*) (seven years unconditional); Den Bosch District Court 28 January 2011, *LJN*: BP2304 (six years unconditional); Rotterdam District Court, sitting in Arnhem, 9 September 2011, *LJN*: BS1141 (five years unconditional); Haarlem District Court 21 July 2011, *LJN*: BR2862 (six years unconditional); Arnhem District Court 4 April 2012, *LJN*: BW3216 (nine years unconditional); Alkmaar District Court 3 February 2012, *LJN*: BV2848 (*Sierra*) (six years and nine months unconditional).

⁹² This is based on 69 judgments that led to convictions for at least human trafficking minus three judgments in which the sentence demanded was not mentioned = 66.

⁹³ It occurred five times (7%) in 2007, see NRM7, p. 456.

of 2011.⁹⁴ In more than half of the cases (57%) of other forms of exploitation (N: 14), the sentences imposed were milder than demanded, in five cases (36%) they were the same and in one case a heavier⁹⁵ sentence was imposed than the PPS had demanded.

Naturally, a number of reservations have to be made about these figures: it is not possible to compare the sentences demanded and the sentences imposed in every case. For example, in a number of cases in 2010 the PPS demanded a sentence that was different in nature to the sentence that was imposed.⁹⁶ Lighter sentences were also sometimes imposed when the court found that fewer offences had been proven than had been charged.⁹⁷ The courts can also – on the grounds of the non-punishment principle – impose a lighter sentence if a suspect has been a victim of human trafficking.⁹⁸ One case in which the court imposed both higher and lower sentences than demanded on four suspects is the so-called *Kroe-poek* case.

*The Hague District Court, 3 May 2010*⁹⁹

In this case, four suspects were on trial for offences including other forms of exploitation,¹⁰⁰ specifically forcing 11 persons from Indonesia to bake prawn crackers under wretched conditions. The suspects were a couple, who were regarded as the principal offenders and profited most from the exploitation, and two suspects who were seen as an essential link between the travel agent and the male principal offender. The PPS demanded a prison sentence of three years against the male principal offender, which the court found to be inadequate given the seriousness of the offence.

94 Sometimes a suspect has been sentenced to an unconditional prison sentence that is *higher* than the sentence demanded by the PPS, because the district court or the court of appeal found that the demand did not adequately reflect the nature and seriousness of the offences, as in Leeuwarden Court of Appeal 23 February 2011, *LJN*: BP5527; Leeuwarden Court of Appeal 4 May 2011, *LJN*: BQ3556; Haarlem District Court 21 July 2011, *LJN*: BR2862 (*Maas*).

95 In one case (The Hague District Court 3 May 2010, *LJN*: BM3374), a higher sentence than demanded was imposed. The public prosecutor demanded an unconditional prison sentence of three years and the court imposed a sentence of four years.

96 See, for example, Den Bosch District Court 17 February 2010, 01-839066-09 (not published). In this case, the PPS had demanded an unconditional prison sentence of three years and a hospital order. The court imposed a prison sentence of four years, with one year suspended with a probation period of two years.

97 Haarlem District Court 8 December 2010, *LJN*: BO8985. The court ruled that human trafficking had been proven and assessed the seriousness of the offence differently in its grounds for sentencing. In that context, it then found that although the acts concerned constituted human trafficking, what had actually happened was closer to a form of false representation (Art. 326 DCC). See also §4.6.4 (Intention of exploiting is not an element of the offence under subsection 4).

98 See, for example, Zwolle-Lelystad District Court 16 August 2011, *LJN*: BR5056 (*Kluivingsbos*), in which the court considered the fact that the suspect was also a victim of human trafficking to be a mitigating circumstance. On this point, see also §7.5 (Victims in the criminal process and the non-punishment principle).

99 The Hague District Court, 3 May 2010, *LJN*: BM3374; 09-993033-09; 09-993035-09; 09-997160-09 (not published).

100 People smuggling and intentional violations of the Housing Act were also charged.

The court imposed a heavier sentence, four years, observing that this would be a particularly severe sentence for the suspect in view of the fact that he was blind. For the female suspect, the public prosecutor demanded an unconditional prison sentence of 18 months. The court rejected the advice of the probation service, which argued that an unconditional prison sentence should not be imposed because she had three children to raise, and suspended six months of the sentence to deter her from repeating the offence. The woman appealed. The court of appeal acquitted her of intentional violations of the Housing Act, but did not follow the district court in the sentencing for human trafficking and people smuggling. By then there was also a *pro justitia* (psychiatric) report, and the court of appeal found that the suspect had played a smaller role in the offences than her husband. The court imposed a prison sentence of six months, entirely conditional, and an order to perform 240 hours of community service.¹⁰¹

Sentences of 15 and 12 months in prison, respectively, were demanded for the two other suspects. The 12-month sentence was found to be appropriate and necessary. The court found that substantially fewer offences had been proven against the other suspect, but felt there was a risk of recidivism, prompting it to impose a prison sentence of 10 months, with four months suspended for a probation period of two years.

6.3 Determination of sentences

Since July 2009, the maximum sentence for human trafficking without aggravating circumstances has been eight years' imprisonment.¹⁰² For all qualified forms of human trafficking – human trafficking committed under aggravating circumstances – the maximum sentence is a term of imprisonment not exceeding 12 years. Aggravating circumstances in relation to human trafficking include commission of the offence by two or more persons acting in concert, commission of an offence against a victim who is younger than 16 years, the offence has resulted in serious physical injury or threatened the life of another person, and the offence has resulted in the death of another person.¹⁰³ This maximum sentence

101 The Hague Court of Appeal 24 January 2012, *LJN*: BV1712.

102 The maximum sentence for human trafficking without aggravating circumstances was imprisonment for six years from January 2005 to 1 July 2009. For aggravated forms of human trafficking, the maximum sentences were eight, ten and twelve years imprisonment, and fifteen years if the offence led to the death of the victim.

103 The maximum sentences for human trafficking were increased from 1 July 2009. The specific changes – with respect to prison sentences – were as follows: in the first subsection (human trafficking without aggravating circumstances) – the maximum sentence was increased from six to eight years; for human trafficking committed by two or more persons acting in concert or committed with respect to a victim under the age of sixteen, the maximum sentence was increased from eight to twelve years; for human trafficking committed under the aggravating circumstance that it resulted in serious physical injury or threatened another person's life, the maximum sentence was increased from twelve to fifteen years; for human trafficking resulting in a person's death, the maximum sentence was increased from fifteen to eighteen years. The cumulative effect of aggravating circumstances as referred to in the third subsection lapsed, and with it the fourth subsection, *Bulletin of Acts, Orders and Decrees*. 2009, 245. This provision fixed the maximum sentence – until 1 July 2009 – for human trafficking committed in concert and in respect of a victim younger than sixteen years at ten years.

for aggravated forms of human trafficking means that pre-trial detention can be applied on the basis of the so-called ‘12-year ground’, which represents a significant expansion of the possibilities for applying pre-trial detention.¹⁰⁴ Human trafficking can also be punished with a fine of up to € 76,000 (fifth category).¹⁰⁵ There are many other factors relating to the circumstances under which an offence is committed and to the suspect that can influence sentencing, such as whether or not it is a repeat offence, the degree of violence used, the number of victims and the duration of the exploitation.

In the following sections, we review the application of the aggravating circumstances currently specified in the law (§6.3.1), other factors that seem to influence sentencing (§6.3.2) and factors that are incorrectly taken into account in sentencing (§6.3.3). The bill to implement the EU Directive on Human Trafficking, which contains two new aggravating circumstances, is discussed in §6.4.

6.3.1 Aggravating circumstances

6.3.1.1 By two or more persons acting in concert

The first aggravating circumstance specified in the law is the commission of human trafficking by two or more persons acting in concert. In 2010, co-perpetration in human trafficking was specified as an aggravating circumstance in 89 (80%)¹⁰⁶ indictments and in 36 (52%)¹⁰⁷ convictions in cases involving sexual exploitation. In cases involving other forms of exploitation, the figures were 79% and 64%, respectively. One would expect a finding that co-perpetration has been proved to be taken into account in the sentencing. However, this aggravating circumstance was almost never explicitly mentioned in the grounds for sentencing. On the other hand, however, the specific role of a suspect (that of facilitator¹⁰⁸ or transporter, for example) often does constitute a mitigating factor in sentencing when an offender is convicted of co-perpetration in human trafficking. Co-perpetration itself is even sometimes regarded as a *mitigating* factor in sentencing, as in the following judgment of The Hague Court of Appeal.

*The Hague Court of Appeal, 1 April 2011*¹⁰⁹

The suspect was convicted on appeal of co-perpetration in human trafficking and the rape of a 14-year-old girl. There were six suspects in this case. The suspect’s role, according to the evidence, was that it was his idea to get the girl to work in prostitution, that he arranged accommodation for her and that she had to surrender the money she earned to him. The period of exploitation was almost four months. The court found this to be a short period and, in the grounds for sentencing, described the victim as a minor without explicitly mentioning that she was 14 years old. The court then imposed a lighter sentence than the district court had imposed and the Advocate General had argued for “because the suspect was just one of the co-perpetrators of the human trafficking offence and his acts were connected with the acts of others, as well as the

104 See §2.1 (Legislative history).

105 On the grounds of Art. 251 DCC, a person can also be deprived of certain rights, such as the right to hold public office, to serve in the armed forces and to serve as an adviser before the courts or as an official administrator. An offender who commits human trafficking in the course of a profession may be disqualified from practising that profession. A penalty of forfeiture can also be imposed, Art. 33 DCC.

106 N=111=100%.

107 N=69=100%.

108 Rotterdam District Court 17 December 2010, 10-750215-06; 10-750216-06 (not published).

109 The Hague Court of Appeal 1 April 2011, LJN: BR4470.

relatively short period involved". In light of the presence of two aggravating circumstances specifically mentioned in the act, this is a remarkable finding. The court imposed a prison sentence of 30 months, with 10 months suspended.¹¹⁰ The district court had imposed a prison sentence of 40 months.

6.3.1.2 Victims younger than 16 years

Another aggravating circumstance specified in Article 273f (3) DCC is if the victim is under the age of 16. Fifteen (14%)¹¹¹ indictments explicitly stated (by giving a date of birth, for example) that sexual exploitation had been committed with respect to a victim below the age of 16. In nine cases (13%),¹¹² the court found that at least one victim was younger than 16. In cases of other forms of exploitation in 2010, there were no victims under the age of 16. This aggravating circumstance was not always mentioned in the grounds for sentencing,¹¹³ as the judgment of The Hague Court of Appeal cited above shows.

Human trafficking is not yet an aggravating circumstance with respect to *all* underage victims – younger than 18 year – but that will change with the implementation of the EU Directive on Human Trafficking.¹¹⁴ NRM7 already contained a recommendation to raise the age limit for constituting an aggravating circumstance from 16 to 18.¹¹⁵ In 2010, in at least 10 (9%) indictments there was a victim of sexual exploitation who was a minor aged between 16 and 18 and in 18 judgments, the courts found that the underage victims named in the 25 indictments concerned had been proven to be victims.¹¹⁶ In the cases of other forms of exploitation, four indictments included an underage victim, but the court did not find that it had been proven that they were victims in any of the four judgments.¹¹⁷

110 A month was deducted because the reasonable period had been exceeded.

111 $N=111=100\%$.

112 $N=69=100\%$.

113 Arnhem District Court 8 September 2010, *LJN*: BN6764. This case involved a number of underage victims, two of whom were younger than 16. The court did not differentiate between them in the grounds for sentencing, but did mention in the defendant's favour that neither he nor his co-defendants had used physical violence. This was a case of forced prostitution of underage girls; Rotterdam District Court 22 February 2010, 10-750044-09 (not published). In this case, it was found that a 14-year-old girl was forced into prostitution and the court also specifically referred to her age in the grounds for sentencing.

114 See Art. 4 (2) (a) in conjunction with Art. 2 (6) of the EU Directive on Human Trafficking; Bill to implement the EU Directive on Human Trafficking, *Parliamentary Documents II 2011/12*, 33 309, no. 2 and no. 3.

115 NRM7, recommendation 2. It was noted there that the aggravating circumstance based on the age of sexual majority (16 years in the Netherlands) was irrelevant for human trafficking in the sex industry or in other sectors. The recommendation to expand the aggravating circumstance in the human trafficking provision to all minors has also been made by various children's rights organisations with respect to sexual exploitation.

116 There were 20 unique underage victims who appeared in 25 indictments and 14 underage victims who were found to have been victims in 18 judgments. See Chapter 7 (Victims).

117 These were two unique underage victims who appeared in the four indictments. See Chapter 7 (Victims).

6.3.1.3 Serious physical injury

The aggravating circumstance of serious physical injury is not often explicitly mentioned in an indictment or judicial finding of fact. It was never charged in 2010.

Forced abortion

Although no charges were brought for the aggravating circumstances within the meaning of Article 273 f (4) DCC in 2010, the act of forcing or inducing a person to have an abortion was mentioned in an indictment and declared proven on a number of occasions. On several occasions, it was also apparent from the judgment itself that a victim had been forced to have an abortion. While the suspect was not explicitly charged with it and it was not included as an aggravating circumstance, in light of Article 82 DCC, there would have been grounds for doing so. The consequence, the death of the woman or the removal of the foetus, can be regarded as a ‘result’ within the meaning of subsection 4, regardless of whether the means of coercion were violent. But quite apart from the question of whether a forced abortion should be regarded as such, it is obvious that the fact of a forced abortion should always influence the sentence. Although this influence can regularly be seen in the judgments studied, there is no discernible fixed line.¹¹⁸

Forced prostitution, where the victim also had to submit to unprotected sex – and was advertised as doing so – was declared proven as an attempt to cause serious physical injury by the Utrecht District Court.¹¹⁹ Being infected with HIV is also regarded as serious physical injury,¹²⁰ and under certain circumstances, getting a tattoo can also be regarded as serious physical injury. In the list of indicators of human trafficking – which is attached as an appendix to the PPS’s Instructions on Human Trafficking – tattoos are mentioned as features that indicate dependency on the pimp or the operator of a business. The Supreme Court ruled that a situation in which a tattoo was placed on an unconscious woman constituted serious physical injury.¹²¹ Human traffickers regularly require their victims to get a tattoo.¹²² Not only forcing a person to get a tattoo, but also removing a tattoo causes physical injury.¹²³ Psychological prob-

118 See §4.4.2 (Coercion and free will, Force and manipulation). See also Alkmaar District Court 3 February 2012, *LJN*: BV2848 (*Sierra*): “It is also particularly reprehensible that the suspect forced a young Bulgarian woman to have an abortion”, Arnhem Court of Appeal, sitting in Leeuwarden, 3 January 2012, *LJN*: BV0005.

119 Utrecht District Court 10 December 2008, *LJN*: BG6680.

120 See, for example, Leeuwarden Court of Appeal 22 January 2010, *LJN*: BL0299; BL0315 (*Groningen HIV case*). The Supreme Court’s finding that the cases had to be heard again related to a different issue: the question of causality, Supreme Court 27 March 2012, *LJN*: BT6397; BT6362.

121 Supreme Court 22 May 1990, *NJ*: 1991, 93, annotated by ‘t Hart. In his note, ‘t Hart also discusses the psychological consequences of an unwanted tattoo for a victim. In his view, a tattoo cannot be treated as something that is generally regarded by society as a (serious) form of physical injury, but it certainly could be under certain circumstances. One such circumstance that he mentions is that a tattoo is a form of ‘affront’ to the body in the sense of external violence, while “in the present case this unwanted tattoo ... must have been extremely psychologically upsetting for the victim”.

122 *NRM7*, p. 280. See also Werson 2012, pp. 137, 152; Utrecht District Court 16 July 2009, *LJN*: BJ3087, in which getting a tattoo was found not to constitute serious physical injury, but a sum of € 500 in compensation for material loss was awarded to have the tattoo removed.

123 The possibility for victims to claim compensation for material loss and emotional injury is discussed further in Chapter 8 (Compensation).

lems can also constitute serious physical injury. Amsterdam District Court described longer term psychological problems among victims of sex offences as serious physical injury.¹²⁴

Psychological injury

Amsterdam District Court found that Article 82 DCC allows the court discretion to regard situations other than the circumstances listed in that article as serious physical injury if the injury is sufficiently serious to be described as serious physical injury in common parlance. The court found that the victims' psychological complaints were so serious as to permanently and severely impair the daily lives of the complainants and found that such complaints would be described as serious physical injury in common parlance. The answer to the question of whether specific injuries should be regarded as serious physical injury is, in fact, largely reserved to the court that decides on the facts, whose ruling in the matter can only be reviewed to a limited extent on appeal.¹²⁵

6.3.2 Other factors affecting sentencing

The previous paragraphs have shown that the aggravating circumstances specified in the act frequently do not play a role in sentencing. There is also no consistency in the application of other factors that could influence sentencing. For example, in the *Sneep* cases, the number of victims declared proven dictated the sentencing (see §6.1 (Instructions and orientation points, text box *Sneep II*)), but in another judgment, this was an aspect that was ignored in the sentencing.¹²⁶ While the duration of a human trafficking offence is taken into account in sentencing more consistently, it is naturally important for a uniform method to be used to establish the duration of the offence.

Duration of human trafficking offence versus duration of exploitation in prostitution

Where the duration of the offence is considered as a factor in determining the sentence, sometimes only the period during which the victim was exploited is considered and the period of recruitment and transport is disregarded.¹²⁷ However, human trafficking starts with the recruitment of victims. It is therefore also important to carefully consider the period of the commission of the offence. Sometimes, for the purposes of sentencing, a distinction is made between the moment a victim was recruited and the moment the first sexual acts were performed. In one case, for example, the victim was a minor at the time it was established she had been recruited, but had

¹²⁴ Amsterdam District Court 14 October 2011, *LJN*: BT7651.

¹²⁵ Supreme Court 14 February 2006, *LJN*: AU8055. Following the Amsterdam District Court ruling of 14 October 2011 (*LJN*: BT7651), the PPS lodged an appeal in cassation in the interest of the law. [The Supreme Court subsequently ruled that psychological consequences that cannot automatically be regarded as an impairment of the intellectual faculties within the meaning of Art. 82 (2) DCC, cannot be regarded as “serious physical injury”, Supreme Court 19 February 2013, *LJN*: BX9407].

¹²⁶ See, for example, a recent ruling of Den Bosch District Court, in which the court found that the number of women recruited was not decisive for the sentence to be imposed. “Rather, what is decisive is the length of the period declared proven”. Den Bosch District Court 24 May 2012, *LJN*: BW6451.

¹²⁷ See, for example, Rotterdam District Court, sitting in Arnhem, 16 February 2010, 10-603063-08 (not published), in which the period of human trafficking declared proven was four months. Only the period during which the victim had actually worked in prostitution was considered for the purposes of determining the sentence, which was two months.

just turned 18 at the time of her first escort client. The defence argued that since the victim was already an adult at the time of her first client, the suspect had to be acquitted on the charges relating to the fact that she was a minor. The court rejected this defence in so far as the recruitment was concerned, but accepted it with respect to the performance of sexual acts. Consequently, in the grounds for sentencing, the victim's minority was not seen as an aggravating factor.¹²⁸ In other cases, the recruitment period – the so-called grooming period – has been treated as part of the human trafficking offence.¹²⁹

The table below shows the average length of the human trafficking offence with the longest duration that was declared proven.¹³⁰

Table 15 Average duration of proven human trafficking offence with the longest duration per conviction, in days (2010)

Conviction	Average	Minimum	Maximum
Duration of proven human trafficking offence with the longest duration with respect to sexual exploitation, in days	366.0 ¹³¹	1 ¹³²	1,979 ¹³³
Duration of proven human trafficking offence with the longest duration with respect to other forms of exploitation, in days	365.6 ¹³⁴	2 ¹³⁵	1,108 ¹³⁶

The average duration of a proven offence was approximately one year with respect to both sexual and other forms of exploitation. The shortest period of sexual exploitation was one day; in other words, the human trafficking offence started and ended on the same day. With other forms of exploitation, the shortest period was two days. The human trafficking offence with the longest duration continued for

128 See Amsterdam District Court 1 October 2010, 13-400961-09; 13-400354-09 (not published).

129 See, for example, Haarlem District Court 21 July 2011, L/N: BR2862.

130 If a human trafficking offence is split because a victim reached adulthood, the duration of the two consecutive offences is considered, since they constitute the same set of facts. In addition, the duration of a proven human trafficking offence is not the same as the duration of the actual exploitation.

131 N: 69, SD: 419, 3.

132 Groningen District Court 14 October 2010, L/N: BO0437. The day on which the proven human trafficking offence started and ended was one and the same day in this case, so the offence actually lasted less than a day. This case was therefore included as zero in calculating the average, but a zero would appear strange in the table, since it might lead to the conclusion that no period of human trafficking was declared proven.

133 Zwolle-Lelystad District Court 10 December 2010, 07-660045-10 (not published).

134 N: 14, SD: 421,4.

135 Dordrecht District Court 20 April 2010, L/N: BM1743; 11-500195-09 (not published). The days on which the longest-lasting proven human trafficking offences started and ended in these cases were successive days, so the duration was actually less than two days. The offences were included as lasting one day in calculating the average.

136 The Hague District Court 12 May 2010, L/N: BM4240; 09-650001-08; 09-650002-08 (not published)

almost five and a half years for sexual exploitation and for just over three years with respect to other forms of exploitation.

Although the existence of a *pro justitia* report or a recommendation from the probation service can sometimes influence sentencing, recidivism naturally plays a role. In that context, it is important for the court to have access to judicial records about the suspect not only *in the Netherlands*¹³⁷ but also in other countries. For example, in one case, the fact that *international* judicial records showed that the suspect had previously been sentenced to lengthy prison sentences outside the Netherlands was one of the factors that prompted Rotterdam District Court to find that only an unconditional prison sentence of several years was appropriate and required.¹³⁸

It is worth mentioning here that an EU framework decision was adopted in 2009 on the organisation and content of the exchange of information extracted from criminal records between member states.¹³⁹ This framework decision lays down specific rules designed to improve the exchange of information about convictions handed down against citizens of the European Union, as well as – in appropriate cases – convictions registered in the criminal records of a member state and the deprivation of rights arising from those convictions. The European Criminal Records Information System (ECRIS) is intended to provide a computerised system for the standardised exchange of information extracted from national criminal records.¹⁴⁰ In the future, the system is expected to enable the courts to have access to abstracts from the criminal records from a suspect's country of origin.

It is clear from the case law studied that failure to comply with the requirement to bring the suspect to trial within a reasonable time¹⁴¹ has been a factor in sentencing on more than one occasion.¹⁴² In that context, it is important to realise that the period that elapses between arrest and hearing at trial can be the result, in part, of requests for legal assistance that have to be made to other countries in view of the often international and transnational nature of the offence.

137 Groningen District Court 28 June 2010, *LJN*: BM9806. This was a special case of recidivism: the suspect had started to engage in human trafficking again immediately after completing his sentence.

138 These were judicial records from Hungary and Austria (Rotterdam District Court, sitting in Arnhem, 9 September 2011, *LJN*: BS1141). The suspect was sentenced to an unconditional term of imprisonment of five years. Compare this with, for example, Groningen District Court 15 March 2012, 18-670470-10 (not published), in which, in the grounds for sentencing, the court took account of the fact that the suspect did not have a previous criminal record in the Netherlands. This suspect was not born in the Netherlands and lived in Germany, so this finding in fact had little significance. The court convicted for human trafficking in the sex industry for a period of three months with respect to a 16-year-old girl and a young woman and imposed an unconditional prison sentence of nine months.

139 Council Framework Decision 2009/315/JHA of 26 February 2009 (OJ 2009, L 93/23).

140 On this point, see also the Decision of the Minister of Security and Justice of 23 March 2012 containing amendment of the Police Records Decree (*Besluit politiegegevens*) and the Judicial Records Decree (*Besluit justitiële gegevens*), Bulletin of Acts, Orders and Decrees. 2012, 130.

141 Article 6 of the European Convention on Human Rights.

142 See, for example, Amsterdam District Court 10 September 2010, 13-527405-07 (not published) and Arnhem District Court 8 September 2010, *LJN*: BN6762.

6.3.3 Factors that are wrongly taken into account

Sometimes circumstances are treated as mitigating factors in sentencing when they should not be. One example is when an offence involves minors and/or an infringement of Article 273f(1)(3) DCC, where no means of coercion is required, and the court nevertheless allows the absence of coercion to weigh in favour of the suspect.¹⁴³ Courts also sometimes take into account the absence of violence, which is inconsistent when a person is convicted of a violent crime of intent.

On a few occasions, the fact that the victim *was working in prostitution* before the exploitation has led the court to mitigate the sentence demanded. This generally happens in cases under subsection 3, but also occurs in the case of convictions under other subsections. The fact that victims had already worked in prostitution or knew that they were going to work in the sector is immaterial in the event of a conviction for human trafficking. With exploitation in the agriculture sector, the victim's prior knowledge that he or she would be picking asparagus or the fact that the victim had also worked in the agricultural sector in his or her country of origin has – correctly – been found to be irrelevant, also in relation to sentencing. Prostitution should therefore not be regarded as a profession in which the risk lies with the victim.

Victim already working in prostitution

In 2011, for example, Amsterdam Court of Appeal ruled that all of the victims were aware that they would be working in prostitution before they travelled to the Netherlands. They were also aware that they would have to surrender half of their income.

According to the court, although this in no way justified the offences declared proven, it did colour the background against which the sentencing should take place and led the court to impose a lower sentence than was demanded.¹⁴⁴ Amsterdam District Court¹⁴⁵ also found 'in favour of the suspect' that the victim was already working as a prostitute before he started to exploit her. And Utrecht District Court¹⁴⁶ also found that the fact that both victims were already working in prostitution before they met the suspect should be taken into account in the grounds for sentencing.

Where exploitation in prostitution is concerned, *working and living conditions* are irrelevant. In this context, Utrecht District Court rendered a remarkable judgment.¹⁴⁷

*Utrecht District Court, 11 November 2011*¹⁴⁸

In this case, two suspects were convicted of human trafficking. One of the suspects approached a number of young foreign men and invited them to work for him in prostitution. The suspect promised them a certain standard of living conditions and a good income. Many of the youths accepted the invitation because of their poor financial situation. When the young men joined the suspect, the living conditions and the money they earned with prostitution proved less attractive

¹⁴³ See §4.4 (Coercion and free will) and §4.5.4 (Subsection 3, sentences).

¹⁴⁴ Amsterdam Court of Appeal 26 October 2011, *LJN*: BU4222 (*Judo*). Similarly, The Hague Court of Appeal 30 June 2010, *LJN*: BO2794

¹⁴⁵ Amsterdam District Court 23 June 2010, 13-520052-09; 13-692015-10; 13-692020-10 (not published).

¹⁴⁶ Utrecht District Court 14 July 2010, *LJN*: BN5110.

¹⁴⁷ Similar judgments can be found in Chapter 2 (Article 273f DCC).

¹⁴⁸ Utrecht District Court 11 November 2011, *LJN*: BU4728.

than the suspect had told them. The court found that the suspect had misled the youths who came to work for him and that he had misused them. It counted against the suspect the victims felt they had been treated badly and prejudiced by the suspect. The suspect had allowed the youths to live and work in poorer conditions than normal and the youths had to surrender at least half of the money they earned to the suspect. The court convicted the suspect of human trafficking, but found that the youths had all been working in prostitution when they had been approached by the suspect and were therefore aware of the escort world and the customary standards and values prevailing in that world. This meant, according to the court, that it was not the most serious form of human trafficking. “The suspect was therefore not guilty of a grave violation of the physical integrity of the youths who worked for him. The wrong in this case lies more in the circumstances under which the youths had to live and work than the nature of the work that the youths had to perform. Regardless of all this, however, the suspect’s actions can be described as human trafficking and he can be accused of more than just poor employment practices. Partly in view of the large number of youths that were exploited by the suspect in various ways over a lengthy period and the disdain that, in the court’s view, the suspect showed towards those youths, the court finds that a heavy sentence is justified ...”¹⁴⁹

The reasoning adopted by the court here applies to cases of other forms of exploitation. Escort services are prostitution, and forced prostitution is, by definition, exploitation.¹⁵⁰ The court also failed to appreciate that if human trafficking is declared proven, there is a violation of Article 4 of the European Convention on Human Rights.¹⁵¹ This applies for the grounds for sentencing as much as it does for the reasons given for the conviction.

It also seems strange that a court would find the fact that suspects have *not used physical violence* as a mitigating factor in cases involving human trafficking with respect to minors. After all, means of coercion are not an element of the offence when the human trafficking involves minors.¹⁵² In addition, human traffickers use means of coercion that are not directly violent in nature (for example, deception with regard to a loving relationship), but which can ultimately have the same effect for the victim as the use or threat of violence, namely, his or her exploitation in prostitution. Taking the absence of physical violence into account as a mitigating factor in sentencing also seems illogical from this perspective, since human trafficking has to be regarded as a violent crime of intent *per se*.¹⁵³

149 In this case, the PPS demanded a prison sentence of four years, with one year suspended, with a probation period of five years. The court convicted for three human trafficking offences and for people smuggling, and sentenced the defendant to 26 months, with six months suspended, but with a probation period of five years and the special condition that the offender “shall in no way engage in mediation in prostitution and escort services in the widest sense of the words”.

150 On this point, see §2.2 (International principles) and the judgment of the European Court of Human Rights referred to there, *Rantsev v. Cyprus and Russia*.

151 See Chapter 2 (Article 273f DCC).

152 See Art. 273f(1)(2),(5) and (8) DCC. For example, Arnhem District Court 8 September 2010, LJN: BN6764; BN6762 and The Hague District Court 23 December 2010, 09-757506-10 (not published).

153 On this point, see §4.4 (Coercion and free will) and §8.6 (Violent Crimes Compensation Fund).

Sometimes the grounds for sentencing in a human trafficking case include a finding with regard to the criminal nature of human trafficking that is more appropriate for the offence of *people smuggling*. An example of such a finding is: “Human trafficking not only thwarts government policy on combating illegal residence in and illegal entry into the Netherlands, but also contributes to maintaining a community of illegal immigrants, which frustrates and perverts the government’s social policy, or could do so. The suspect has consciously cooperated in the exploitation of the complainants.”¹⁵⁴ Unlike human trafficking, the victim of the offence of people smuggling is the Dutch state.¹⁵⁵ In such a finding, the possible impact of the offence on victims plays no role, although that is the key to the efforts to combat human trafficking.

6.4 Bill to implement the EU Directive on Human Trafficking

The EU Directive on Human Trafficking¹⁵⁶ provides that the maximum sentence for human trafficking committed under certain circumstances must be at least 10 years of imprisonment. One of those circumstances is human trafficking committed against victims who are particularly vulnerable, a category that in any case includes children, according to the directive.¹⁵⁷ Other aggravating circumstances specified in the EU directive are where the offence is committed within the framework of a criminal organisation, where the life of the victim is endangered intentionally or by gross negligence, or where the offence involves the use of serious violence or has caused particularly serious harm to the victim.¹⁵⁸ The maximum sentence for these qualified forms of human trafficking, according to the directive, must be at least 10 years’ imprisonment.

Under current Dutch legislation, human trafficking without aggravating circumstances can be punished with a prison sentence of up to eight years.¹⁵⁹ For all qualified forms of human trafficking – human trafficking committed under aggravating circumstances – the maximum sentence is a term of imprisonment of at least 12 years. Aggravating circumstances include human trafficking committed by two or more persons acting in concert, human trafficking committed against a victim younger than 16 years, human trafficking resulting in serious physical injury or that threatens the life of another person, and human trafficking that results in death. At the end of February 2012, a bill was submitted providing for an increase in the maximum sentences. The bill proposes raising the maximum prison sentence for unqualified human trafficking from eight to 12 years. The maximum sentence for human trafficking that results in death would be life imprisonment or, temporarily, imprisonment for a maximum of 30

154 The Hague District Court 6 September 2010, *LJN*: BN6010; BN6027.

155 In contrast to human trafficking, in the Dutch Criminal Code people smuggling is not included under the title ‘Offences against personal liberty’ but under the title ‘Offences against public authority’.

156 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 (OJ 2011, L 101/1).

157 In the EU Directive, a child (a person younger than 18 years) is regarded as a particularly vulnerable victim. Article 2 (6) of the EU Directive on Human Trafficking.

158 Article 4 (2) of the EU Directive on Human Trafficking.

159 The maximum sentence for human trafficking without aggravating circumstances was six years’ imprisonment from January 2005 until 1 July 2009. For qualified human trafficking, the maximum sentences rose to eight, 10 and 12 years, and 15 years when the offence resulted in the death of the victim.

years.¹⁶⁰ The proposed increases in the maximum sentences are in line with the NRM's earlier recommendation, made in relation to the bill to implement the EU Directive on Human Trafficking.¹⁶¹ The bill also responds to the recommendation made on the point that the age of sexual majority is not a suitable criterion as an aggravating circumstance, since the offence of human trafficking is no longer restricted to sexual exploitation.¹⁶²

6.4.1 Particularly vulnerable victims

The EU directive considers a child (a person younger than 18 years) to be a 'particularly vulnerable victim'. It is proposed that the grounds for imposing a higher sentence under Article 273f (3) DCC should be expanded to human trafficking committed against a person under the age of 18 years or against a person whose vulnerable position is abused. This approach would mean that in addition to the victim being a minor, "other features of the victim could also cause the set of facts in the case to fall under this aggravating ground".¹⁶³ Under 'abuse of a vulnerable position', the bill includes "a situation in which a person has no genuine or acceptable alternative than to submit to the misuse". There are various examples of such situations, such as the fact that the victim has run away from a youth custodial institution or has a drug addiction.¹⁶⁴ The preamble to the directive mentions a number of other factors that could fall within the scope of the 'abuse of a vulnerable position', such as gender, pregnancy, state of health and disability.¹⁶⁵ Other examples might be illegal residence in the country and reduced mental capacity.¹⁶⁶

6.4.2 Human trafficking preceded, accompanied or followed by violence

Under the current legislation, if human trafficking is accompanied by serious violence, that violence does not in itself constitute an aggravating circumstance; it falls under the violence as a means of coercion and as such is a circumstance under which the offence is committed. In that sense, the degree of violence also currently plays a role in sentencing. The EU directive explicitly mentions the use of serious violence as an aggravating circumstance.¹⁶⁷ When it is a very serious crime (for example, when the life of the victim was threatened or the offence was accompanied by the use of serious violence such as torture, forced drug or medication usage, rape or other serious forms of psychological, physical or sexual violence, or when the victim has otherwise suffered serious physical harm), this must be reflected in

¹⁶⁰ *Parliamentary Documents II* 2011/12, 33 185, no. 2. On this point, see §2.1 (Legislative history).

¹⁶¹ Letter from the National Rapporteur on Trafficking in Human Beings of 13 October 2011 to the Minister of Security and Justice concerning implementation of EU Directive 2011/36/EU on the prevention and combating of trafficking in human beings and protection of its victims, appendix to *Parliamentary Documents II* 2011/12, 33 309, no. 3. See §2.1 (Legislative history).

¹⁶² *Parliamentary Documents II* 2011/12, 33 309, no. 3, p. 13.

¹⁶³ *Parliamentary Documents II* 2011/12, 33 309, no. 3, p. 13.

¹⁶⁴ On this point, see also §4.4 (Coercion and free will).

¹⁶⁵ Recital (12) of EU Directive on Human Trafficking. The PPS's Instructions on Human Trafficking in the sense of sexual exploitation give as an example of particular vulnerability 'mental/physical disability', *Government Gazette*. 2010, 13 154.

¹⁶⁶ See, for example, the PPS's Instructions on Human Trafficking in the sense of servitude and labour exploitation, *Government Gazette*. 2012, 8227. Another example might be an autistic disorder, see, for example, Zutphen District Court 21 August 2012, *LJN*: BX5202.

¹⁶⁷ Article 4 (2) (d) of the EU Directive on Human Trafficking.

a more severe sentence, according to the preamble to the directive.¹⁶⁸ It is irrelevant, in that context, whether this violence resulted in serious physical injury and it is therefore, in that sense, different in nature to the aggravating circumstance referred to in Article 273f (4) DCC. This raises the question of whether violence, as referred to in the EU directive, only relates to the means of coercion or if it can also signify the form and degree of violence used in the exploitation itself. In the case law, it appears that violence that is used in human trafficking often forms an aggravating circumstance that the court takes into account in sentencing.¹⁶⁹ In the PPS's Instructions on Human Trafficking in the sense of sexual exploitation, as well as in the instructions relating to servitude or labour exploitation, the degree of violence is already seen as an aggravating circumstance.¹⁷⁰ This element from the EU directive is now also included in the bill as a separate aggravating circumstance.¹⁷¹

168 Recital (12) of the EU Directive on Human Trafficking.

169 See, for example, The Hague District Court 30 March 2012, *LJN*: BW1791, Utrecht District Court 6 April 2012, *LJN*: BW2290, Leeuwarden Court of Appeal 1 March 2012, 24-001047-11 (not published), Utrecht District Court, sitting in Almelo, 18 February 2011, *LJN*: BP6711 (*Sneep II*). These cases mainly involved the issue of violence as a means of coercion. If manipulative means of coercion are used, the absence of violence is sometimes found to be a mitigating factor in sentencing. See also §6.3.3 (Factors that are wrongly taken into account).

170 See §6.1 (Instructions and orientation points).

171 *Parliamentary Documents II* 2011/12, 33 309, no. 3, p. 14.

This chapter presents statistics pertaining to the victims of human trafficking who appeared in the judgments in first instance in 2010. In the previous study of case law that appeared in NRM7, there were 257 non-unique victims in the cases involving human trafficking in the sex industry that were heard in first instance in 2007. Because the number of unique victims was not known in 2007, it is impossible to make a proper comparison with the figures for 2010. At the end of the chapter, in §7.5, the treatment of victims is discussed.

It should be noted that the figures from CoMensha¹ for the number of victims in 2010 (N: 993) cannot be compared with the figures on victims presented in this chapter, firstly because a great many victims registered by CoMensha do not ultimately play a role, as a witness or otherwise, in a criminal case. Some victims are not even covered by an investigation. Furthermore, there is often a period of more than a year between the time a victim is registered by CoMensha and the completion of a case in first instance, so victims who were registered by CoMensha in 2010 will usually not have appeared as a victim in a criminal case in the same year. Consequently, there is probably little or no overlap between the two sets of figures.

7.1 Number of unique victims identified by the PPS

In the 111 judgments in cases of human trafficking cases in the sex industry, 147 unique victims were identified, and 70 unique victims were identified in the 29 judgments concerning other forms of exploitation.² Some persons were victims of more than one suspect and therefore appeared in more than one indictment. The table below shows how often a unique victim, identified as such by the PPS, was a victim of more than one suspect. In addition, some persons were victims of both sexual and other forms

1 CoMensha registers every possible victim of human trafficking reported to it in the Netherlands. In theory, every known victim in the Netherlands (for example, known to the police or to a social service agency) should be reported to CoMensha; in practice, this does not always happen. [For more information about the victims registered with CoMensha, see National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Mensenhandel in en uit beeld. Cijfermatige rapportage (2007-2011)*, The Hague: BNRM 2012. The English translation (*Trafficking in human beings: visible and invisible. A quantitative report (2007-2011)*) will be published shortly at bnrm.nl].

2 Some judgments refer to unknown victims - persons who have not been identified and are therefore not included among the 147 or 70 unique, identified victims. See §4.2.1 (Article 261 of the Code of Criminal Procedure and nullity of indictment on substantive grounds).

of exploitation³, so there is some overlap between the 147 victims of sexual exploitation and the 70 victims of other forms of exploitation.

Table 16 Number of suspects per victim (2010)

	Number of victims of sexual exploitation		Number of victims of other forms of exploitation	
	N	%	N	%
1 suspect	81	55%	9	13%
2 suspects	36	24%	27	39%
3 suspects	13	9%	23	33%
4 suspects	9	6%	11	16%
5 suspects	8	5%	-	-
Total	147	100%	70	100%

According to the PPS, there were at least two suspects involved with respect to 45% of the victims of sexual exploitation. That figure is far higher with respect to victims of other forms of exploitation (87%), which could imply that other forms of exploitation occur more often in an organised context. On the extent to which complicity has been treated as an aggravating circumstance in the ultimate sentencing, see §6.3.1.1 (Two or more persons acting in concert).

7.2 Number of victims declared proven

The courts of first instance ruled on the proof of victimisation in relation to 144⁴ unique and identified victims of sexual exploitation and 70 unique and identified victims of other forms of exploitation.⁵ The following table gives a breakdown of these figures. Occasionally, the courts declared unidentified persons to have been victims, but because they were not identified, those persons are not considered here.

3 It is therefore not possible to aggregate the figures for sexual and other forms of exploitation in the following tables.

4 The indictments in three cases in which one and the same victim was mentioned were declared null and void (Alkmaar District Court, 15 April 2010, 14-018037-03; 14-018035-03; 14-018036-03 (not published)) and the charges for the human trafficking offences relating to two other victims were dismissed (Zwolle-Lelystad District Court, 27 December 2010, LjN: BO9988).

5 An offence is sometimes declared partially proven, for example for a shorter period than charged or with regard to one offender rather than several.

Table 17 Persons found to have been victims (2010)

	Number of victims of sexual exploitation		Number of victims of other forms of exploitation	
	N	%	N	%
Victimhood (partially) proven	93	65%	39	56%
Victimhood not proven	51	35%	31	44%
Total	144	100%	70	100%

With respect to 65% of the unique and identified victims of sexual exploitation on which the courts of first instance ruled, their victimhood was declared proven. In relation to other forms of exploitation, the courts found victimhood to have been proven in relatively fewer cases (56%).

7.3 Victims by gender and age

The following table shows the breakdown by gender of victims in the indictment and victims in convictions for sexual and other forms of exploitation.

Table 18 Victims by gender (2010)

	Sexual exploitation				Other forms of exploitation			
	Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment		Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment	
	N	%	N	%	N	%	N	%
Male	1	1%	1	1%	9	13%	3	8%
Female	146	99%	92	99%	35	50%	15	38%
Unknown	-	-	-	-	26	37%	21	54%
Total	147	100%	93	100%	70	100%	39	100%

With a single exception, the victims of sexual exploitation were all women.⁶ For 37% of the victims of other forms of exploitation, it was not possible to determine their gender from the judgments,⁷ but at least half of the victims were female and at least 13% were male. In other words, males were more frequently victims of other forms of exploitation than of sexual exploitation in 2010.

6 In other years, suspects were prosecuted for human trafficking involving male victims. For example, in a case before Utrecht District Court in 2011, two suspects were convicted of human trafficking in relation to 12 foreign men (Utrecht District Court, 11 November 2011, LJN: BU4709; BU4728).

7 It was also impossible to determine the gender of some victims from their names.

Victims by age category

The following table shows the breakdown of victims by age category.⁸ Where applicable, in the case of underage victims – who were declared victims by the court and who became adults in the course of the offence charged – the judgments were studied to investigate whether the period during which they were minors was also actually declared proven. This proved to be the case in every instance.

Table 19 Victims by age group (2010)

	Sexual exploitation				Other forms of exploitation			
	Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment		Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment	
	N	%	N	%	N	%	N	%
< 16 years	13	9%	8	9%	-	-	-	-
16 or 17 years	7	5%	6	6%	2	3%	-	-
Adult	127 ⁹	86%	79 ¹⁰	85%	68	97%	39	100%
Total	147	100%	93	100%	70	100%	39	100%

At least 20 (14%) of the 147 victims of sexual exploitation were minors, of whom 13 (9%) were younger than 16 years (two victims were only 13 years old).¹¹ A further nine victims (6%) were identified who were only barely adults (between the ages of 18 and 21 years) at the time they became victims. The size of this group may be underestimated since there is no legal reason to specify the age of victims in this category in the indictment. For the victims of sexual exploitation whose victimhood was found by the courts to have been proven, the age distribution of victims is practically the same as for the victims that were mentioned in the indictment. With respect to two of the 70 victims of other forms of exploitation, the indictments explicitly showed that they were minors at the time of their victimisation. These two girls were allegedly forced to smuggle drugs, but the charges were not declared proven.¹²

8 The ages of the victims were determined initially on the basis of their date of birth and the commencement date of the first human trafficking offence mentioned in the indictment in which the victim appeared. The victim's date of birth was not always mentioned, however, but without specifying a date of birth, the indictment sometimes says how old the victim was or to which age group the victim belonged at the time of the offence (for example, by bringing charges under Art. 273a/f (1)(2), (5) or (8) or (3)(2) DCC). Otherwise, if there was no way of telling from the indictment that the victim was a minor, the victim was assumed to be an adult.

9 At least nine victims were only barely adults (between 18 and 21 years).

10 At least six victims were only barely adults (between 18 and 21 years).

11 Rotterdam District Court 19 October 2010, 10-750227-09 (not published); The Hague District Court, 7 May 2010, LJN: BM3656; 09-920393-09; 09-757654-09; 09-900652-09; 09-757516-09 (not published). In these cases, the suspects were acquitted on the charges of human trafficking.

12 The Hague District Court 17 February 2010, LJN: BL4279; BL4298; 09-754012-09; 09-754074-09 (not published).

Occasionally, in addition to human trafficking with respect to minors, charges are brought for offences under Article 280 DCC: concealing or obstructing efforts by authorities to discover the whereabouts of a minor who has been removed or had him- or herself removed from the person exercising legal authority over him or her.¹³ No such charges were brought in a single human trafficking case in 2010.

7.4 Victims recruited abroad by region of origin and region of origin of underage victims

It emerges from the judgments that 73 (50%) of the 147 victims of sexual exploitation were recruited abroad. This means that the other 74 victims (50%) were recruited in the Netherlands or that the judgments were silent on the question of recruitment. The victimhood of 54 of the victims who were recruited abroad was declared proven.¹⁴ Of the 70 victims of other forms of exploitation, 46 (66%) were recruited abroad, and of these, 33 were declared proven to be victims.¹⁵

The original country of origin of victims is not, by definition, the country or region of recruitment, since a victim could be recruited in a country other than his or her country of origin.¹⁶ In addition, a victim might originally have come from a country other than the Netherlands but not have been recruited by the suspect concerned, so this issue would not have been addressed in the judgment.

13 See, for example, Groningen District Court 15 March 2012, 18-670470-10 (not published).

14 This is 58% of the 93 victims declared proven and 74% of the 73 victims who were recruited abroad.

15 This is 85% of the 39 victims declared proven and 72% of the 46 victims who were recruited abroad.

16 See, for example, Alkmaar District Court 5 October 2010, 14-810152-10 (not published). In this case, the victim was recruited in Greece but was originally from Bulgaria.

Table 20 Victims by region of origin (2010)

	Sexual exploitation				Other forms of exploitation			
	Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment		Number of unique, identified victims in the indictment		Number of unique, identified victims in the judgment	
	N	%	N	%	N	%	N	%
Netherlands ¹⁷	52	35%	29	31%	24	34%	6	15%
Eastern Europe ¹⁸	60	41%	41	44%	20	29%	12	31%
Asia ¹⁹	17	12%	14	15%	26	37%	21	54%
Other ²⁰	8	5%	7	8%	-	-	-	-
Unknown ²¹	10	7%	2	2%	-	-	-	-
Total	147	100%	93	100%	70	100%	39	100%

More than a third of the victims of both sexual exploitation and of other forms of exploitation were from the Netherlands. Most other victims – and in the case of other forms of exploitation, all victims – were from Eastern Europe and Asia. The victims from Eastern Europe came from the same countries of origin with respect to sexual and other forms of exploitation (Romania, Poland and Bulgaria), but not a single country in Asia appears in both lists (sexual exploitation: Thailand, China and Malaysia; other forms of exploitation: India, Indonesia and the Philippines). However, this finding is more likely connected with the small number of human trafficking investigations in 2010, particularly of other forms of exploitation

- 17 With Dutch victims, it is often not explicitly stated that the victim was from the Netherlands. When a judgment refers only to recruitment in the Netherlands, where the suspect is from the Netherlands and the victim has a Dutch name, it is assumed that the Netherlands is the country of origin of this victim.
- 18 **Sexual exploitation: indictment:** 14 victims (10%) came from Romania, 14 (10%) from Hungary, of whom one was from Hungary or Romania, nine (6%) from Poland, eight (5%) from Bulgaria, one of whom was from Bulgaria or Germany, five (3%) from the Czech Republic, five (3%) from Latvia, two (1%) from Slovakia, one (1%) from the former Yugoslavia and two (1%) from an unspecified country in Eastern Europe; **conviction:** 12 (13%) victims came from Romania, 11 (12%) from Hungary, six (6%) from Bulgaria, one of whom was from Bulgaria or Germany, five (5%) from Poland, five (5%) from Latvia, one (1%) from the Czech Republic and 1 (1%) from the former Yugoslavia. **Other forms of exploitation: indictment:** 13 victims (19%) came from Poland, six (9%) from Romania and one (1%) from Bulgaria; **convictions:** 11 victims (28%) came from Poland and one (3%) from Bulgaria.
- 19 **Sexual exploitation: indictment:** 11 victims (7%) came from Thailand, four (3%) from China and two (1%) from Malaysia; **conviction:** 10 victims (11%) came from Thailand, two (2%) from China and two (2%) from Malaysia. **Other forms of exploitation: indictment:** 13 victims (19%) came from India, 11 (16%) from Indonesia, and two (3%) from the Philippines; **convictions:** 11 victims (28%) came from Indonesia and 10 (26%) from India.
- 20 **Sexual exploitation: indictment:** three victims (2%) came from Benin, two (1%) from Germany, two (1%) from Belgium and one (1%) from Turkey; **conviction:** two victims (2%) came from Benin, two (2%) from Germany, two (2%) from Belgium and one (1%) from Turkey.
- 21 It is not always clear from the indictment what the victim's original country of origin was.

(N: 13, see Appendix 3, Table A1.2) than a reflection of an actual difference between sexual and other forms of exploitation.

Most underage victims of sexual exploitation (85%) came originally from the Netherlands. The other 15% comprised two victims from Hungary and one from Romania. In this respect, the underage victims of sexual exploitation differ from adult victims of sexual exploitation²² in the sense that only a minority (30%) of adult victims are from the Netherlands.²³ The victimhood of underage Dutch victims was also declared proven relatively more often (65%) than among adult Dutch victims (51%).²⁴ The two underage victims of other forms of exploitation were also from the Netherlands, but given the small number of cases, no further analyses or conclusions are possible. The courts declared that the victimhood of both victims had not been proven.²⁵

7.5 Victims in the criminal process and the non-punishment principle

Considerable efforts have been made in recent years to improve the position of victims in the criminal process. One of the results has been the introduction of the Victims' Status (Legal Proceedings) Act.²⁶ The EU Directive on Human Trafficking that was adopted last year also contains a number of important obligations specifically relating to the protection of victims of human trafficking, including separate provisions for vulnerable victims, particularly children. These provisions are designed to protect the victim, with due regard to the guarantee of the suspect's right to a fair trial.

A person's status as a victim of human trafficking is not yet specified as a possible ground for dismissing charges. This earlier recommendation by the NRM seems all the more necessary since the principle in the EU directive is not limited to non-punishment, but has been extended to non-prosecution.²⁷ The same applies for the NRM's earlier recommendation to include a provision in the PPS's Instructions on Human Trafficking that when an offence is committed by a victim, the fact that the suspect is a victim should be noted in the official report.²⁸ In this way, the PPS can be made aware that the individual is a victim and can actually make a decision as to whether this person should be prosecuted.²⁹

22 N: 117 – the region of origin of ten (adult) victims is unknown, see Table 20.

23 This difference is very significant: X^2 : 22,01, df: 1, p: 0,00.

24 This difference is not significant: X^2 : 0,82, df: 1, p: 0,37.

25 This case was discussed earlier in §5.1 (Suspects and perpetrators by gender, age group and region of birth).

26 *Bulletin of Acts, Orders and Decrees*. 2010, 1, which entered into force on 1 January 2011. This act contains provisions on subjects including the right to be kept informed about the criminal proceedings (including the outcome) against the suspect, the right to be treated correctly, the right to information about the possibilities of claiming compensation during the trial and the right to speak at the trial.

27 NRM7, recommendation 36. The Minister of Security and Justice said that this point would be covered in the proposed amendment of the Instructions on Human Trafficking (*Parliamentary Documents II* 2011/12, no. 3, p. 7).

28 NRM7, recommendation 37. See also Huberts & Ten Kate 2012, pp. 81-86.

29 If it is decided to prosecute a suspect who is also a victim, the public prosecutors in the cases against the human trafficker and the victim should inform one another (NRM7, second part of recommendation 37).

Criminal proceedings are often a stressful experience for victims in general, but especially for victims of human trafficking, since they have to relive their traumatic experiences and are often, rightly, fearful and afraid of the person who put them in that position. ‘Secondary victimisation’³⁰ is a very real risk and the treatment of victims during the criminal proceedings is relevant in that respect. Correct treatment includes keeping victims informed, if they wish, of the course of the case, including developments relating to the suspect’s pre-trial detention. The PPS plays a crucial role in this, and rules are laid down on this subject in the current Instructions on Human Trafficking³¹ and the Instructions on Victim Care.³² However, a victim often also has to testify at a trial and might have to tell his or her story repeatedly, up to and including the trial. Invoking the EU Directive on Human Trafficking, the PPS tries when it can to prevent that and, for example, tries to arrange for interviews to be held outside the presence of the suspect.³³ There are ways of protecting victims without losing sight of the suspect’s right to a fair trial, by allowing a witness to give evidence using audio and visual communication technologies, for example.³⁴

The judiciary is also devoting more attention to the position of vulnerable victims during the hearing. But even after the hearing, it is important to remain alert to the fact that a victim might read the judgment or be informed of its content. In that context, how the judgment, and particularly the grounds for sentencing, are formulated is relevant. Sometimes, for example, the court finds in favour of the defendant that the case involved a ‘relatively short period of commission’³⁵ or that the suspect had earned ‘relatively little income’ with respect to one or more victims.³⁶ Without wishing to detract from the merits of these findings, they are sometimes expressed in terms that are, for the reader of the judgment (and hence also for the victim), unfortunate.

One of the provisions in the EU Directive, which applies for all victims of human trafficking, embraces the so-called non-punishment principle.³⁷ This provision provides that member states must ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of human trafficking for their involvement in criminal activities that they have been compelled to commit as a

30 On the subject of secondary victimisation, see, for example, Van den Berg 2012; Wijers & de Boer 2010; Winkel et al. 2010.

31 *Government Gazette* 2008, 253. New Instructions are expected to take effect from 1 January 2013.

32 *Government Gazette* 2010, 20476.

33 Article 12 of the EU Directive on Human Trafficking (2011/36/EU) contains a number of provisions designed to protect victims of human trafficking during the criminal investigation and proceedings by, for example, avoiding unnecessary repetition of interviews, avoiding visual contact between victims and suspects by allowing the use of appropriate means, including communication technologies, and avoiding the giving of evidence in open court. Article 15 of the Directive contains further provisions to protect underage victims.

34 See Bronkhorst 2011.

35 See, for example, The Hague District Court 6 September 2010, *LJN*: BN6042. “A major factor for the court is the relatively limited period during which the exploitation took place.” This case involved a period of 10 months.

36 Alkmaar District Court 14 October 2011, *LJN*: BT8889. See also Groningen District Court 15 March 2012, 18-670470-10 (not published), in which the court found “that the suspect’s earnings were minimal”.

37 On this principle, see also NRM7, Chapter 6.

direct consequence of being subjected to the human trafficking.³⁸ In the Dutch context, Article 9a DCC (a guilty verdict without punishment) and the ‘principle of prosecutorial discretion’, as laid down in Article 167 of the Code of Criminal Procedure, are relevant in this respect.³⁹

*The Hague Court of Appeal, 19 January 2010 (Mehak)*⁴⁰

This case involved a very serious offence, jointly committed by a young woman who had been in a situation of exploitation since she was roughly 13. The exploitation was also declared proven on appeal. Before the court of appeal, the suspect invoked psychological forces beyond her control, a defence that was rejected by the court. She also invoked the non-punishment principle. The court found that “in law it can be assumed that [person 1] and [person 2] exploited the suspect, who is from the Indian culture, by, in brief, illegally allowing the suspect to stay in their home in the Netherlands and putting her to work in their household, and that on 28 January 2006 [person 1] instructed the suspect to beat and/or tie up [victim] in order to expel the evil spirit in [victim].” The defence of psychological forces beyond her control was rejected on the grounds that the suspect could reasonably have been expected to look for ways of sparing the health and life of the victim, by defying the anger of [person 1] and/or [person 2] if necessary. After rejecting the defence of psychological forces beyond her control and setting out the grounds for sentencing, the court then discussed the defence based on the non-punishment principle. The court found “that there was no sufficiently direct connection between the systematic assaults on [victim] before 28 January 2006 and the manslaughter of [victim] on 28 January 2006 and the work that the suspect had to perform during the exploitation by [person 1] and [person 2]. In view of that, and the seriousness of these offences, the non-punishment principle should not be applied.”

The court reviewed the non-punishment-principle defence in relation to the work that the suspect had to perform and not in relation to the degree of control the human traffickers exercised over the suspect and the degree to which they could influence her freedom to make her own choices. This does not appear to correspond with the intention of the non-punishment principle. On appeal to the Supreme Court, it was argued that by virtue of the non-punishment principle, the court of appeal was obliged to apply Article 9a DCC. This defence was correctly rejected by the Supreme Court.⁴¹ The court of appeal’s reasons for rejecting the application of the non-punishment principle were not raised. In the advisory

38 Article 8 of the EU Directive on Human Trafficking (2011/36/EU). The term ‘non-punishment principle’ no longer actually covers the current scope, since the term in the EU Directive has been extended from non-punishment to include non-prosecution, and therefore goes further than Article 26 of the Council of Europe’s Convention on Action against Trafficking in Human Beings.

39 The applicability of grounds for exculpation is also conceivable, Huberts & Ten Kate, 2012, pp. 81-86.

40 The Hague Court of Appeal 19 January 2010, *LJN*: BK9410. See also NRM7, p. 509; NRM8, p. 82.

41 Supreme Court, 6 December 2011, *LJN*: BP9394. Article 26 of the Council of Europe’s Convention does not contain any such obligation. The Convention was in fact not yet in force at the time of the hearing on appeal.

opinion in this case,⁴² the Advocate General noted that there was no complaint that the sentence imposed was surprising, but also recommended rejection of the appeal.

42 Supreme Court, 6 December 2011, *LJN*: BP9394 (advisory opinion of A-G Machielse). See also Supreme Court, 26 June 2012, *LJN*: BV1642, in which the appeal against Den Bosch Court of Appeal 4 July 2011, *LJN*: BR0235 was rejected with respect to the non-punishment principle. The ground of appeal was that the PPS should have declined to prosecute. The court of appeal had applied Art. 9a DCC.

8 Compensation

8.1 Modalities of compensation

There are various ways in which victims of human trafficking can receive compensation for injury or loss they have suffered.¹ Compensation can be awarded for material loss – such as medical costs, earnings that have been confiscated or withheld or damage to property – or for emotional injury. For example, victims can join criminal proceedings to recover compensation as an aggrieved party.² The intervention is a civil claim that is governed by the applicable civil law rules on tort.³ A second possibility of securing compensation is an order by the court for the offender to pay compensation. The court can make this order at the request of the aggrieved party, upon demand by the PPS,⁴ or *ex officio*,⁵ meaning that an order to pay compensation can be imposed even if a victim has not filed a civil claim.⁶ If an order to pay compensation is made, the Central Fine Collection Agency (CJIB) collects the compensation for the victim (see §8.4). Victims can also apply for compensation to the Violent Offences Compensation Fund.⁷

As a result of the Victims' Status (Legal Proceedings) Act – which entered into force on 1 January 2011 – the new criterion used by the court to assess the admissibility of a claim by a victim is whether it places a disproportionate burden on the criminal proceedings rather than whether the claim is simple (readily provable).⁸ Since 1 January 2011, it has also been possible for the State to pay the compensation to the victim if the offender has not fully complied with an order to pay compensation within eight months of the judgment becoming final.⁹ Because human trafficking is regarded as a violent crime or sex crime,

1 See NRM5, pp. 58 ff., NRM7 p. 466.

2 See Arts. 51a-51f in conjunction with Art. 361 Dutch Code of Criminal Procedure. They can do so before or during the hearing of the case.

3 Art. 6:162 Dutch Civil Code.

4 By virtue of this provision, the PPS can also demand an *ex officio* order to pay compensation if no aggrieved party claim has been submitted. See also Instructions on Victim Care, §2.4.2 (*Government Gazette*, 2010, 20476).

5 Art. 36f DCC.

6 “Although the order can be made if no civil claim has been submitted, it is unlikely to happen in the absence of information about the existence of the injury or loss or whether the victim still requires compensation and, if so, the extent of the injury or loss”, Claassens & Wabeke 2005, p. 87.

7 For other possibilities of securing compensation not discussed in this chapter, see NRM5, pp. 58 ff.

8 Art. 361 (3) of the Code of Criminal Procedure. Act of 17 December 2009, *Bulletin of Acts, Orders and Decrees* 2010, 1; entry into force on 1 January 2011, *Bulletin of Acts, Orders and Decrees* 2010, 291.

9 Art. 36f (6) DCC.

there is no maximum amount for the advance that victims of human trafficking can receive under this scheme.¹⁰ Naturally, these changes to the law are not reflected in the figures for 2010. However, the impact of the new criterion is discussed in this chapter on the basis of more recent case law.

At international level, there are still calls to establish a connection between the confiscation of illegal earnings and compensation,¹¹ as was again recently explicitly stated in the EU Directive on Human Trafficking, which has still to be implemented.¹² It is therefore noteworthy that, conversely, the European Commission's proposal for a directive on freezing and confiscation of the proceeds of crime does not make a connection with compensation for victims. After all, human trafficking is one of the offences that should fall under the scope of application of this directive.¹³ The EU Directive on Human Trafficking does, in any case, require member states to ensure that victims of human trafficking have access to existing schemes of compensation for victims of violent crimes of intent.¹⁴ In the Netherlands, this would refer to the Violent Offences Compensation Fund (see §8.6 below).

The various methods by which victims can secure compensation for injury or loss they have sustained are not, as the following sections will show, always applied consistently and are not always effective. It is often difficult for victims to understand the procedures. Accordingly, there is still also considerable room for improvement in the information provided to victims. This point has been addressed by the Human Trafficking Task Force¹⁵ and that has led to a number of actions.

Human Trafficking Task Force

The aim of the Task Force is to improve victims' recourse to compensation for injury or loss, particularly though applications to the Violent Offences Compensation Fund. A leaflet on the rights and duties of victims of human trafficking is being prepared, explaining the possibility of securing a payment from the Violent Offences Compensation Fund, as well as other ways for victims of human trafficking to receive compensation. The information in this leaflet is primarily intended for victims and it will be distributed among the organisations involved in combating human trafficking and providing care for victims. When the leaflets are being distributed, the relevant agencies will be specifically informed of the possibilities afforded by the Violent Offences Compensation Fund for victims of human trafficking. It is also the intention that all correspondence from the PPS to victims and persons who notify human trafficking offences will include a standard text referring to the possibility for victims of violent crimes to apply for a payment from the Violent Offences Compensation Fund.

10 Decree of 24 July 2010, adopting the Advance on Compensation Order (Implementation) Decree [*Uitvoeringsbesluit voorschot schadevergoedingsmaatregel*], *Bulletin of Acts, Orders and Decrees* 2010, 311.

11 NRM7, p. 34. The OSCE, UNHCR and the Council of Europe all recommend using the proceeds from crime to compensate victims or to establish funds to help and rehabilitate victims. In this context, see also Article 14 (2) of the UN Convention against Transnational Organised Crime.

12 EU Directive on Human Trafficking (2011/36/EU), recital §13.

13 See the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union, 12 March 2012, COM(2012)85.

14 Article 17 of the EU Directive on Human Trafficking (2011/36/EU).

15 Human Trafficking Task Force 2011.

The following section starts with the presentation of some figures relating to aggrieved party claims in cases of other forms of exploitation tried by the courts of first instance in 2010. Because there are not many cases, the results are presented briefly and supplemented with a discussion of several more recent cases. The next section is devoted to cases of sexual exploitation in 2010. There are more of these cases, so this section is more extensive. The figures presented here cannot all be compared with the results from the previous study in NRM7 because this time the unique claims have been analysed – in contrast with the previous study.

After discussing both the quantitative and qualitative results of the study, further information is provided on payments made by the Violent Offences Compensation Fund and the relationship between the confiscation of illegally obtained profits and compensation.

8.2 Compensation and other forms of exploitation

The number of cases of other forms of exploitation is small, both in absolute terms and relative to the number of cases of sexual exploitation. The same applies for the number of claims by aggrieved parties in these cases. Since less information is available, it is more difficult to draw general conclusions from the judgments in these cases. For this reason, the findings are briefly discussed, with the emphasis on some noteworthy cases. Judgments from 2011 and 2012 are also reviewed, although the quantitative research only covered judgments at first instance in 2010.

8.2.1 Nature and amount of the claims filed

Seventy unique victims were identified in the 29 judgments studied; 21 (30%) of these victims filed an aggrieved party claim at least partly with respect to the human trafficking offences charged. Eleven (52%) of the 21 claims were exclusively related to human trafficking. Only those claims are discussed in the following sections. Since some claimants were victims of multiple suspects, some of the claims were made against more than one suspect.¹⁶

¹⁶ These suspects are usually held jointly and severally liable for the injury or loss suffered. The order may then be imposed jointly and severally for the full amount of the compensation. The suspects are therefore not individually ordered to pay part of the total compensation (prorated to the number of liable persons). This joint and several liability arises from the fact that, under civil law, a claim must be awarded jointly and severally and the same civil law standards must be applied in imposing the order to pay compensation (Claassens & Wabeke 2005, p. 91).

Table 21 Nature of aggrieved party claims submitted relating exclusively to human trafficking (2010, other forms of exploitation)

	Number	Total amount of claim known
Exclusively emotional injury	-	-
Exclusively material loss	2	2
Both material loss and emotional injury	4	4
Unknown	5	1
Total	11	7

As the above table shows, in five judgments the nature of the claims was not mentioned. In four of the other six cases, the claim was for both injury and loss. In two cases, the claim was only for material loss. No judgment involved a claim solely for emotional injury. Where the nature of the claim is not known, the amount was often also not mentioned (only once in five cases).

The following table shows the average amount claimed solely in relation to human trafficking.

Table 22 Amount of known aggrieved party claims relating exclusively to human trafficking (2010, other forms of exploitation)

	Average compensation claimed	Minimum	Maximum
Claim for emotional injury	€ 1,625.00 ¹⁷	€ 500.00	€ 5,000.00
Claims for material loss	€ 11,975.17 ¹⁸	€ 3,512.05	€ 31,292.79
Claim for injury or loss of an unspecified nature	€ 18,151.00 ¹⁹	n.a. (N: 1)	n.a. (N: 1)
Total amount claimed	€ 13,786.01²⁰	€ 4,012.05	€ 36,292.79

On average, claims for emotional injury were far lower than the amounts claimed for material loss (€ 1,625.00 compared with € 11,975.17). The average total amount per claim was € 13,786.01. The smallest claim was € 4,012.05²¹ and the largest € 36,292.79.²²

17 N: 4, SD: 2,250.

18 N: 6, SD: 10,136.81.

19 N: 1.

20 N: 7, SD: 11,039.25.

21 Haarlem District Court 8 December 2010, LJN: BO8985.

22 Arnhem District Court 17 November 2010, 05-702246-10 (not published).

8.2.2 Claims wholly or partially awarded

The following table shows how many of the 11 claims that related solely to human trafficking were awarded by the court.

Table 23 Number of aggrieved party claims awarded relating exclusively to human trafficking (2010, other forms of exploitation)

	N	%
Claim partially awarded	3	27%
Claim dismissed	7	64%
Other	1	9%
Total	11	100%

Three claims (36%) were partially awarded. The amounts awarded in these three claims related exclusively to material loss. The average amount awarded was € 1,478.21.²³ The total amount claimed is also known for each of these three awards on which the total average is based.²⁴ The smallest amount awarded was € 755.25 and the largest €1,986.93. In all three cases, an order to pay compensation was imposed.

As shown above, only three of the 11 claims were partially awarded. The claims were all in the same case,²⁵ in which three persons were induced by the suspect to take out telephone subscriptions (through deception). The claims were awarded solely for the material loss the victims had suffered.

Haarlem District Court, 8 December 2010^{26 27}

The material loss in the aggrieved party claim⁶ related to the subscription costs paid by the victims. The court found that the claim for the subscriptions costs arose directly from the proven human trafficking offence. Only 25% of the claim was awarded, however. The rest of the claim was dismissed because, according to the court, the extent to which the loss was also the result of circumstances that could be attributed to the aggrieved party within the meaning of Article 6:101 of the Dutch Civil Code could not be easily established. It is not clear from the judgment what caused the court's doubts on this point. The court also gave no reasons for awarding 25% of the claim. In other words, it did not explain its method of calculation. The methods of calculation adopted by the courts are reviewed in more detail in the discussion of the cases of sexual exploitation below.

²³ N: 3, SD: 643.18.

²⁴ A comparison of the average of these three claims, for both material loss and emotional injury (€ 6,909.62), and the average of the three related amounts awarded - only for material loss (€ 1,478.21) - shows that, on average, around 21% of the total amount claimed was awarded. This represents 0% of the claims for emotional injury (which were € 500 in all three cases) and 23% of the claims for tangible loss.

²⁵ Haarlem District Court 8 December 2010, 15-700445-10 (not published).

²⁶ Haarlem District Court 8 December 2010, LJN: BO8985.

²⁷ The part of the claim for emotional injury was not awarded. The court found that it had not been adequately shown that the victims had suffered emotional injury.

8.2.3 Claims not awarded

As Table 23 shows, 10 of the 11 claims were at least partially dismissed. In five cases, the reason was that the claim was not simple in nature. In the other five cases, the court found that it had not been proven that the person concerned was a victim. In the case in the category 'Other', the aggrieved party claim was submitted with respect to a human trafficking offence but, after the suspect was acquitted on that charge, the claim was awarded in full in relation to the alternative charge of obtaining property by false pretences.²⁸

*Alkmaar District Court, 8 December 2011*²⁹

In a case in which a suspect was convicted of exploiting three Ukrainians, the claim of victim 3 was dismissed in so far as it related to wages still owed to him because the claim would be a disproportionate burden on the criminal proceedings. No reasons were given.³⁰ The court's decision is remarkable, since during the discussion of the evidence it was explained quite specifically what work the victim had performed and over what period and what wages he had received (if he had actually received any wages). The question is whether investigating what wages were still owed would in fact have unduly burdened the proceedings, especially since the courts are also permitted to make an estimate of the amount of the loss.³¹ The judgment provides too little information to answer that question.

8.3 Compensation and sexual exploitation

The previous section discussed cases involving other forms of exploitation. In this section, the focus shifts to aggrieved party claims and orders to pay compensation in cases of sexual exploitation. Since there have been more judgments on sexual exploitation, the discussion is more detailed, starting with a review of the quantitative data regarding aggrieved party claims. This is followed by information about the extent to which claims are awarded and orders to pay compensation are imposed.

8.3.1 Number, nature and amount of claims filed

Of the 147 victims identified by the PPS in human trafficking cases in the sex industry (in first instance in 2010), only 42 victims (29%) submitted an aggrieved party claim relating at least in part to the human trafficking offences that were charged. Twenty-six (62%) of the 42 claims related to injury or loss suffered solely as a result of human trafficking. The figures in this section relate only to these 26 claims, since they provide information about amount of damages claimed solely as a result of human trafficking. Since some victims were the victim of more than one suspect – and sometimes more than one victim

²⁸ The amount claimed and awarded was only for material loss and amounted to € 14,598.93.

²⁹ Alkmaar District Court 8 December 2011, *LJN*: BU8346.

³⁰ Reasons are often not given and the court makes do with the finding that handling the aggrieved party claim would constitute a disproportionate burden on the proceedings (Candido 2011, pp. 354-359; Wingerden 2008, pp. 62-68).

³¹ Art. 6:97 of the Dutch Civil Code, second sentence: "The court shall assess the damage in a manner most appropriate to its nature. Where the extent of the damage cannot be determined precisely, it shall be estimated."

made submitted an aggrieved party claim against a single suspect. Accordingly, the 26 claims relate to 38 suspects:³² 29 unique persons.

Nature of claims submitted

The following table shows the nature of the 26 claims relating solely to human trafficking and the number of cases in which the amounts claimed were specified in the judgment.

Table 24 Nature of aggrieved party claims submitted relating exclusively to human trafficking (2010, sexual exploitation)

	Number	Total amount of the claim is known
Exclusively emotional injury	3	3
Exclusively material loss	-	-
Both material loss and emotional injury	15	10 ³³
Unknown	8	5
Total	26	18

In every case in which the nature of the claim was mentioned in the judgment, the claim was for emotional injury³⁴, usually together with a claim for material loss.³⁵ In 18 of the 26 cases, the amount of the claim was specified in the judgment. If the claim was dismissed (because the suspect was acquitted, for example), it was not always possible to ascertain its amount and nature (material loss or emotional injury).

Claims for material loss generally involve earnings that had to be surrendered, but another example is the cost incurred to remove a tattoo placed under coercion. It is established case law that money that a suspect has taken or that has been surrendered to him or her must, in principle, be regarded as material loss. In an atypical case, the court had difficulty with this.³⁶ The case involved an 11-year-old girl whose father (the suspect) sold her sexual services to third parties. The court dismissed the claim for this element of the material loss, reasoning that, in contrast to the claims awarded in previous case law, this was not a case of voluntary prostitution for which the prostitute had not been paid the money due to her. Although the judgment is understandable, this finding disregards the essence of Article 273f DCC. A factor in this decision may have been the fact that the victim was aged 11 and the suspect was her father. However, this sort of material loss, as will be shown by the judgments discussed below, is not limited to situations where the work in prostitution was agreed in advance.

32 Seventeen claims with respect to one suspect, six claims with respect to two suspects, and three claims with respect to three suspects.

33 Seven (in which the amount is broken down into material loss and emotional injury) plus three (in which only a total amount is mentioned).

34 Eighteen times (3+15).

35 Fifteen times.

36 Alkmaar District Court 21 March 2012, LJN: BV9569.

Amount of submitted claims

Table 25 shows the average amount of the claims relating solely to human trafficking.

Table 25 Amount of aggrieved party claims filed relating exclusively to human trafficking (2010, sexual exploitation)

	Average compensation claimed	Minimum	Maximum
Claim for emotional injury	€ 4,930.00 ³⁷	€ 2,000.00	€ 9,100.00
Claim for material loss	€ 30,238.44 ³⁸	€ 276.28	€ 100,000.00
Claims for emotional injury and material loss	€ 65,424.67 ³⁹	€ 12,100.00	€ 164,949.00
Claims for injury or loss of an unspecified nature	€ 31,637.00 ⁴⁰	€ 5,500.00	€ 88,000.00
Total claim	€ 34,190.44⁴¹	€ 3,376.28	€ 164,949.00

The average claim for emotional injury was far lower than the amount claimed for material loss (€ 4,930.00 compared with € 30,238.44), a similar pattern to that in cases of other forms of exploitation. The average amount of a claim was € 34,190.44. The smallest claim was € 3,376.28⁴² and the largest was € 164,949.00.⁴³

Roermond District Court, 24 August 2010⁴⁴

This case concerned a victim who was exploited for five days in the sense that she was forced by the suspect to pay him from the proceeds from sexual acts with a third party. These were one-off sexual acts, for which the other person was charged with and convicted of rape. The victim's claim was € 3,100 for emotional injury and € 276.28 for material loss, a total of € 3,376.28. The claim was not challenged and the court found both amounts to be entirely reasonable. A special feature of the case is that the court did not award the entire amount of both claims jointly and severally, but, in view of the differing nature of the two offences declared proven, divided the amount in two.

37 N: 10, SD: 1,861.33.

38 N: 7, SD: 33,598.57.

39 N: 3, SD: 86,264.19.

40 N: 5, SD: 33,450.97.

41 N: 18, SD: 43,159.34.

42 Roermond District Court 24 August 2010, 04-850250-06 (not published).

43 The Hague District Court 24 March 2010, 09-650047-09 (not published).

44 Roermond District Court 24 August 2010, 04-850250-06 (not published).

*The Hague District Court, 24 March 2010*⁴⁵

The suspect in this case, in which a victim claimed the highest amount in damages in 2010 (€ 164,949), was the owner of a massage parlour. The court found that it had been proven that the suspect had exploited the victim for two years in the sex industry and had received a large share of the money the victim had earned. The claim was for both material loss and emotional injury. The division between the two elements is not clear from the judgment and the court found no causal connection between the material loss and the proven offence. The nature of the material loss cannot be ascertained from the judgment, but what does emerge is that the suspect and the victim had formed a relationship in which the suspect, as an alternative healer, 'treated' the victim. The court dismissed this element of the claim and found that the claim for emotional injury, for a sum of € 2,500, could in fairness be awarded and was simple to establish, since it had been established that the aggrieved party had suffered emotional damage directly as a result of the proven offence.

In §8.3.2 there is a further discussion of the differences in the awarding of claims for material loss and emotional injury. As regards material loss, the discussion focuses mainly on the points of departure adopted in awarding claims for earnings in the sex industry that were confiscated or had to be surrendered. The discussion of claims for emotional injury concentrates on the extent to which aspects such as violence and the duration of the exploitation are considered in awarding compensation.

8.3.2 Number, nature and amount of partially awarded claims

Table 26 Number of aggrieved party claims awarded relating exclusively to human trafficking (2010, sexual exploitation)

	N	%
Claim awarded	3 ⁴⁶	12%
Claim partially awarded and partially dismissed	14	54%
Claim dismissed	7	27%
Claim not assessed (human trafficking charges to which the claim related were dismissed)	2	8%
Total	26	100%

⁴⁵ The Hague District Court 24 March 2010, 09-650047-09 (not published).

⁴⁶ Roermond District Court 24 August 2010, 04-850250-06 (not published); Groningen District Court 28 June 2010, LJN: BM9806; Zwolle-Lelystad District Court, 10 December 2010, 07-660045-10 (not published).

Seventeen claims (65%) were at least partially awarded by the courts – in three cases entirely. In the 21 cases⁴⁷ in which the aggrieved party claims were wholly or partially dismissed, the main reasons were that the claim was not simple in nature⁴⁸ or that the court found that the individual had not been proven to be a victim. Claims were also not awarded, at least in part, because the relevant part of the claim had not been adequately substantiated or there was no causal connection between the facts found proven and the items claimed.

Nature of claims that were wholly or partially awarded

The following table shows the nature of the 17 claims that were wholly or partially awarded and the number of cases in which the amounts awarded were specified in the judgment.

Table 27 Nature of aggrieved party claims awarded relating exclusively to human trafficking (2010, sexual exploitation)

	Number
Exclusively material loss	-
Exclusively emotional injury	9
Both material loss and emotional injury	7
Unknown	1
Total	17

In every case in which the nature of the claim was mentioned in the judgment, the claim was for emotional injury,⁴⁹ often also with a claim for material loss.⁵⁰

47 14+7.

48 Ten times. This criterion was amended with effect from 1 January 2011, Victims' Status (Legal Proceedings) Act, *Bulletin of Acts, Orders and Decrees* 2010, 1 and *Bulletin of Acts, Orders and Decrees* 2010, 291. Under the current legislation, the criterion is now 'not a disproportionate burden on the criminal proceedings'.

49 Sixteen times (9+7).

50 Seven times.

*Amount of claims that were wholly or partially awarded***Table 28** Amount of aggrieved party claims awarded that were related exclusively to human trafficking (2010, sexual exploitation)

	Average compensation awarded	Minimum	Maximum
Awarded for emotional injury	€ 3,484.38 ⁵¹	€ 500.00	€ 7,250.00
Awarded for material loss	€ 29,728.75 ⁵²	€ 276.28	€ 100,000.00
Awarded for damage whose nature is not specified	€ 88,000.00 ⁵³	n.a. (N: 1)	n.a. (N: 1)
Total amount awarded	€ 20,697.13 ⁵⁴	€ 1,500.00	€ 105,000.00

As with the amounts of the claims, the average amount awarded for emotional injury is a lot lower than the amount awarded for material loss (€ 3,484.38 compared with € 29,728.75). On average, the total amount per claim is € 20,697.13, and in every case, an order to pay compensation was imposed. Of the 17 claims awarded, on which this total average is based, the total amount of the claim is also known in 11 cases. Comparing the average of these 11 claims (€ 43,759.12⁵⁵) with the average of the 11 amounts awarded in relation to them (€ 26,200.12⁵⁶), it is found that, on average, approximately 60% of the amount claimed was awarded. The lowest amount awarded was € 1,500⁵⁷ and the highest was € 105,000.⁵⁸

The Hague District Court, 25 November 2010⁵⁹

The lowest amount of compensation, € 1,500, was awarded in this case. The victim had claimed a sum of € 6,000 for emotional injury. She did not make any claim for material loss. The court found that she had been exploited for six months in the sex industry. The court also found that it had been proved that the victim had to surrender all the money she earned during that period to the suspect. The defence argued for acquittal and requested that the claim be dismissed on that

51 N: 16, SD: 1,725.85.

52 N: 7, SD: 34,345.72.

53 N: 1.

54 N: 17, SD: 31,179.14

55 N: 11, SD: 53,028.69.

56 N: 11, SD: 37,159.26.

57 The Hague District Court 25 November 2010, LJN: BO5076.

58 Zwolle-Lelystad District Court, 10 December 2010, LJN: BO7662. Confirmed by Leeuwarden Court of Appeal 3 January 2012, LJN: BV0005.

59 The Hague District Court 25 November 2010, LJN: BO5076.

ground. The amount of the claim for emotional injury was therefore not disputed.⁶⁰ Nevertheless, the court reduced the amount in ‘fairness’ to € 1,500. This may have been due to the fact that the suspect was charged with exploitation for a period of three years and the court only found a period of six months had been proven, but that is not specified in the judgment.

*Zwolle-Lelystad District Court, 10 December 2010*⁶¹

The victim in this case submitted a claim for € 100,000 for material loss and € 5,000 for emotional injury. Explaining the claim of *material loss*, she argued that during the period in prostitution for which charges had been brought, she had earned € 300 to € 700 a day. She had to surrender all of her earnings to the suspect. She based the calculation on a sum of € 100 a day in surrendered income; this amount was multiplied by 50 months (five years, with an average of two months that she had not worked each year), making a total of € 1,000. Her counsel stressed at the hearing that, to avoid any discussion at that time, a very conservative estimate had been made. The PPS argued that the claim should be awarded in full and that an order to pay compensation should be attached to it. The court found that the investigation at the hearing had adequately shown that the aggrieved party had suffered damage as a direct result of the acts of the suspect that had been declared proven. The court found it plausible that the amount of € 100 for every day worked was a minimum, referring in that context to judgments of Amsterdam Court of Appeal⁶² and Arnhem Court of Appeal⁶³, in which a sum of € 100 for every day worked was also adopted. As mentioned above, the court awarded the entire claim and issued a compensation order for the total sum of € 105,000.

8.4 The compensation order

An order to pay compensation is almost always linked to the awarding of the aggrieved party’s claim. The great advantage of the compensation order is that it is executed by the PPS and not by the victim.⁶⁴ In addition to this practical advantage, it could also prevent the continuation of a relationship (usually unwanted by the victim) between a victim and the suspect. As mentioned above, a recent change in the law – with effect from 1 January 2011 – has also made it possible for the State to pay the compensation to the victim if the offender has not fully complied with his or her obligations after eight months.

60 As a rule, if the suspect does not dispute the civil claim, the claim will have to be awarded unless, as the civil courts usually say in default judgments, it appears unjust or unfounded. *Aanbevelingen civiele vordering en schadevergoedingsmaatregel m. b. t. the Wet Terwee en de Wet ter versterking van de positie van het slachtoffer*, October 2011, <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-strafrecht/Documents/Wet-Terwee.pdf> (accessed on 23 September 2012).

61 *Zwolle-Lelystad District Court, 10 December 2010, LJN: BO7662.*

62 *Amsterdam Court of Appeal 18 February 2010 (not published).*

63 *Arnhem Court of Appeal 15 July 2009 (not published).*

64 This was regarded by the legislature as one of the major advantages of the compensation order. Cf. *Parliamentary Documents II 1989/90, 21 345, no. 3, p. 17.*

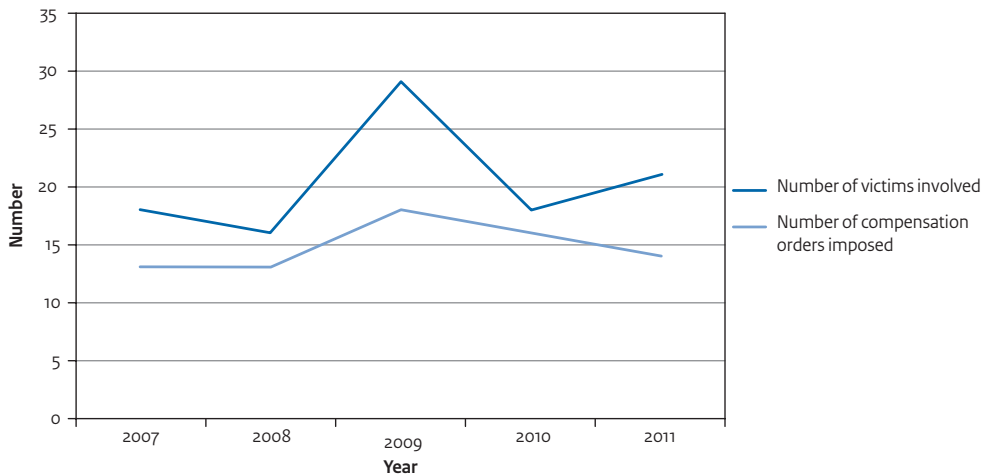
8.4.1 Compensation orders imposed between 2007 and 2011

The CJIB has provided BNRM with further details about compensation orders imposed in human trafficking cases. These are anonymous data at case level, in other words compensation orders that were imposed with respect to individual offenders⁶⁵ who have been irrevocably convicted of at least human trafficking⁶⁶ – but not, by definition, exclusively⁶⁷ of human trafficking.

Number of compensation orders imposed and number of victims involved

Figure 1 shows the trend in the number of compensation orders imposed each year in the period 2007 to 2011 and the number of victims on whose behalf compensation orders were imposed.⁶⁸

Figure 1 Number of compensation orders imposed and number of victims involved (2007-2011)



In the last five years (2007-2011), the number of judgments in human trafficking cases in which no further appeal was possible and in which the CJIB was responsible for collecting the compensation payments was between 13 and 18 cases a year. These were usually compensation orders in favour of a single victim (in 55 (74%) of a total of 74 cases in five years). These 74 cases involved a total of 102 victims, with a maximum of four victims per compensation order imposed.

⁶⁵ The CJIB only becomes involved in cases when the judgments have become final and irrevocable. This can be the same year as the court's ruling, but may also be later.

⁶⁶ Cases were selected on the basis of the article numbers under which offenders were convicted (Arts. 250ter, 250a, 273a and 273f DCC).

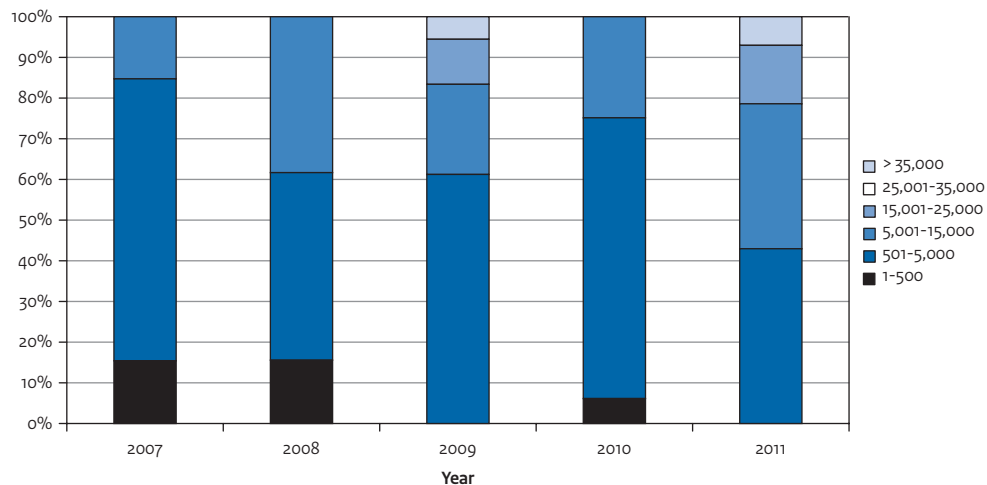
⁶⁷ Some of the compensation orders shown will therefore also have been imposed for human trafficking in combination with other offences.

⁶⁸ For the table with the detailed overview of these data (including index figures and the relative growth compared with the preceding year), see Appendix 3, Table A2.1.

Compensation orders by amount imposed

Figure 2 shows the amounts of the compensation orders imposed by the courts.⁶⁹

Figure 2 Compensation orders by amount (2007-2011)



The amounts imposed are usually (65%) not more than € 5,000 per *offender* (not per victim), and in more than a quarter of cases, the amount imposed was between € 5,001 and € 15,000.

Compensation orders by disposal⁷⁰

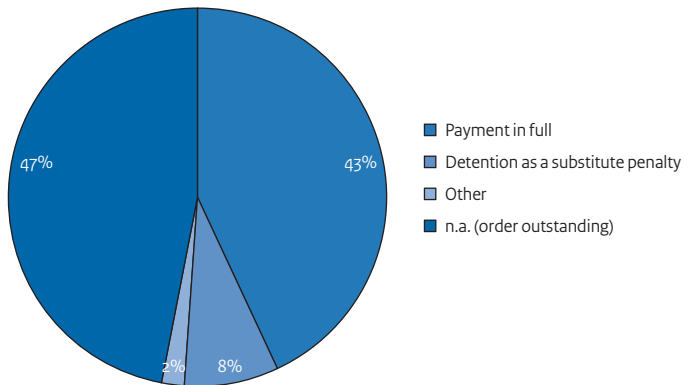
Figure 3 shows whether and, if so, how the compensation orders imposed over the period 2007-2011 had been disposed of by the reference date of 3 June 2012.⁷¹

69 For the table with the detailed overview of these data, see Appendix 3, Table A2.2.

70 The method of disposal refers to the final action taken by the CJIB, whereupon the case is closed for the CJIB. An offender who is ordered to be detained as a substitute penalty, for example, is still obliged to pay the amount of compensation ordered to the victim, but without further intervention by the CJIB. For the CJIB, the case has then been disposed of, but the offender has not yet paid the amount due to the victim(s).

71 For the table with the complete and detailed overview of these data (including a breakdown of the data by year), see Appendix 3, Table A2.3.

Figure 3 Compensation orders by disposal (total for 2007-2011)



Collecting compensation is a time-consuming process, as is apparent from the large proportion (48%) of outstanding cases, which are, logically, mainly cases from the most recent years. For example, 31% of the 13 orders imposed in 2007 and 86% of the 14 orders made in 2011 were still outstanding at the beginning of June 2012. However, the fact that an order is still outstanding does not mean that nothing has been paid. The court may, for example, decide that compensation can be paid in instalments, or the CJIB can, in certain cases, agree to a payment schedule (under strict conditions). When a case has been disposed of, it has usually been by means of payment in full. Furthermore, six cases in the last five years have been disposed of (for the CJIB) with an order for detention as a substitute penalty. In those cases, the offender had not paid the compensation in full and (by order of the public prosecutor) the period of detention determined by the court as a substitute penalty at the time of the judgment was enforced. The period of detention does not replace the compensation, but is used as leverage. However, even if it does not produce results, the CJIB's involvement ends and the collection of the compensation is left to the victim personally. The victim is given a warrant with which he or she can authorise a bailiff to enforce the order, which, in practice, means the victim is left almost empty-handed.

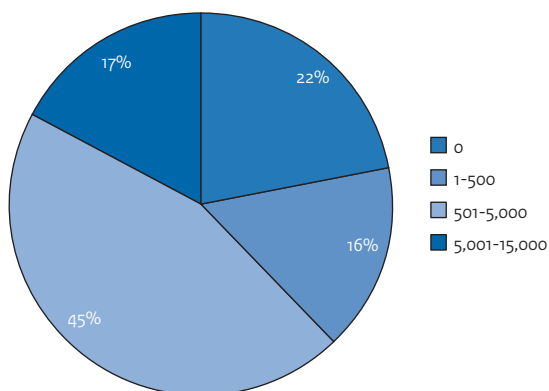
Compensation orders by amount paid

Figure 4 shows what amounts had been collected by the reference date of 3 June 2012 in the cases where a compensation order had been imposed in the period 2007-2011.⁷²

The cases in which no money had yet been collected might be cases that are still outstanding, but they could also be cases where, for example, the substitute penalty of detention was enforced because it had not been possible to collect the money (even a portion of it). The cases in which some money had already been collected might be cases that were disposed of, but they could also, for example, be outstanding cases in which part of the amount due had already been paid (compare the total of 35 outstanding cases and the 16 cases in which nothing had yet been paid in Appendix 3, Table A2.3 and Table A2.4).

72 For the table with the complete and detailed overview of these data (including a breakdown of the data by year), see Appendix 3, Table A2.4.

Figure 4 Compensation orders by amount paid (total for 2007-2011)



8.4.2 Compensation orders imposed *ex officio*

Compensation orders can also be imposed *ex officio*.⁷³ The courts have the discretion to impose an order even if the aggrieved party has not submitted a claim. A good example of this is a Supreme Court case from 2011. The case involved a mentally handicapped man who had been exploited.

*Supreme Court, 20 December 2011*⁷⁴

The victim in this case was a man who functioned at the level of a 10-year-old.⁷⁵ Although he did not submit an aggrieved party claim, the court of appeal found that there were grounds to impose a compensation order *ex officio*. The court then awarded the man an advance on the compensation for emotional injury of € 500. On appeal to the Supreme Court, the defence argued that the court should not have imposed the compensation order because the failure to submit an aggrieved party claim showed that the victim did not require compensation.⁷⁶ However, the Supreme Court ruled that that had not been shown during the hearing. In his advisory opinion for the judgment, A-G Silvis said that it cannot be concluded from the failure of an aggrieved party to join the proceedings that the aggrieved party did not want compensation. And even if that had been the case, the court would in fact still have been free to impose the order since the court had complete discretion in sentencing within the limits of substantive criminal law; the compensation order is an order, in other words a sanction, and therefore falls within the court's discretion in sentencing. The legislature does assume, however, that the courts will not impose a compensation order if it is apparent that the victim does not want it.⁷⁷

73 Article 36f DCC. See also *Aanbevelingen civiele vordering en schadevergoedingsmaatregel m.b.t. de Wet Terwee en de Wet ter versterking van de positie van het slachtoffer*, October 2011, <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-strafrecht/Documents/Wet-Terwee.pdf> (accessed on 23 September 2012).

74 Supreme Court 20 December 2011, LjN: BR0448.

75 Amsterdam Court of Appeal 14 January 2010, 21-002724-08 (not published).

76 Supreme Court 20 December 2011, LjN: BR0448.

77 *Parliamentary Documents II* 1989/90, 21 345, no. 3, p. 20.

A compensation order was also imposed *ex officio* in the appeal in the case of the asparagus farmer in Someren because the court of appeal arrived at a higher sum than the amount claimed in its estimate of the damages.

*Den Bosch Court of Appeal, 6 July 2012*⁷⁸

In the appeal in the case against an asparagus farmer in Someren, the court of appeal awarded aggrieved party claims related to unpaid salary. To calculate the compensation, the court first calculated how many hours the aggrieved party had worked for the suspect. With respect to aggrieved party X, it followed from the evidence that he had worked 12 to 14 hours a day for 22 days. The court found that the total number of hours could reasonably be fixed at 13 (hours per day) x 22 (days) = 286 hours. That total was multiplied by the minimum hourly wage applicable during the period of the offence (€ 7.12), so the injured party was still owed a sum of € 2,026.32. Advances received, money for food and lodging and meal vouchers were deducted from that sum, leaving an amount of € 1,625.32. With respect to two other aggrieved parties, the court found that they were entitled to more back pay than they had claimed and imposed a compensation order for that higher amount. In civil proceedings, the amount awarded cannot be higher than the amount claimed by a party because the court is deciding on the claims of the parties.⁷⁹

There were no cases in 2010 in which the court imposed a compensation order *ex officio*. Nevertheless, there were cases in which it would have been reasonable to do so, such as the case decided by Rotterdam District Court, sitting in Leeuwarden.⁸⁰ In that case, the court calculated that the victim had earned an estimated € 600,000. The victim had been allowed to keep almost none of that money; practically all of it disappeared into the pockets of the suspect and his fellow suspects. The victim had not submitted an aggrieved party claim but, in this case, the court could have imposed a compensation order *ex officio*.

8.5 Reasoning

The previous sections have shown that the amount of the claims awarded varies greatly, without any discernible line in the reasoning adopted. It is still often unclear what underlying factors formed the basis for awarding a particular sum. It is also apparent that the courts arrive at the amount to be awarded in very different ways; there is great disparity in their methods of calculation.

Nevertheless, it is important that the method of calculating the compensation payment is clearly explained and that it is linked to the evidence in the case. This was highlighted again in a recent judgment of the Supreme Court,⁸¹ when a ruling of the Amsterdam Court of Appeal⁸² was appealed on the grounds that it had not given adequate reasons for awarding a claim.

*Supreme Court, 20 September 2011*⁸³

78 Den Bosch Court of Appeal 6 July 2012, LJN: BX0599.

79 Article 23 Code of Civil Procedure.

80 Leeuwarden District Court 29 April 2010, 17-974002-09; 17-974005-09 (not published).

81 Supreme Court 20 September 2011, LJN: BQ3787.

82 Amsterdam Court of Appeal 17 March 2010, LJN: BL7890.

83 Supreme Court 20 September 2011, LJN: BQ3787.

The period of exploitation declared proven in this case was more than a month and the statement submitted as evidence by the victim showed that for one week she had surrendered all of her earnings to the suspect, and for three days, she had surrendered € 20 a day. The claim was based on four weeks, with the argument that the average earnings were € 400 a day for seven days a week. For the sake of convenience, the aggrieved party limited the claim to € 100 a day. The court of appeal based its award on a period of three weeks' worked, on the basis of € 100 a day and a working week of six days. The Supreme Court ruled that this decision had not been adequately reasoned since the court of appeal had not explained why the award was based on three weeks. Neither the Supreme Court, nor the A-G in his advisory opinion, referred to the arbitrary point of departure adopted by the court of appeal of six rather than seven days worked.

The following subsection first discusses the various methods of calculation adopted by the courts. Estimates of the amounts earned in the prostitution sector are calculated in different ways and the policies on the amount of a partial award to be granted by way of an advance also vary. In the following discussion of claims for emotional injury, what stands out is that it is not clear what value is assigned to factors such as the victim's age, the duration of the exploitation and the degree of violence used.

8.5.1 Different methods of calculating material loss

In human trafficking cases, various methods are used to calculate material loss in the form of earnings that are confiscated or withheld. The examples below illustrate some of the methods that have been used in the case law, apart from the adoption of a standard of a minimum amount of € 100 a day.

*Amsterdam Court of Appeal, 30 September 2011*⁸⁴

In this case, the court of appeal partially awarded the claims of two victims. The court adopted the same method of calculation for both victims, based on the number of weeks, six working days per week and the amount they said they earned each day. The court assumed a sum of € 648 a day for one victim and € 1,000 a day for the other.⁸⁵ The court deducted the costs that the suspect had incurred for each victim or the money that the suspect had repaid to her. The court then awarded 10% of the ensuing amounts by way of an advance, finding that handling the rest of the claim would constitute a disproportionate burden on the criminal proceedings. This calculation resulted in the awarding of claims of € 66,873 for one victim and € 70,200 for the other. This method of calculation is similar to the method employed by the court of appeal in the case against the asparagus farmer in Someren.

*Den Bosch District Court, 28 January 2011*⁸⁶

The court awarded a claim by the aggrieved party for material loss in the amount of € 5,300. "The court bases this on a period of 60 days, during which the victim had an average of three clients a day who paid an average of € 50 (60 x 3 x 50). From this, it deducts a sum of € 50 a day because the victim herself also used some of the cocaine. According to the suspect, he bought the cocaine at well below the regular price. The court also deducts € 350 a month for food and lodging. In that context, it has taken note of the suspect's own statement that the housing costs were € 150 a

84 Amsterdam Court of Appeal 30 September 2011, LJN: BT6850 (*Judo*).

85 The difference cannot be seen from what is stated in the judgment.

86 Den Bosch District Court 28 January 2011, LJN: BP2304.

month for an additional resident and the statements showing that little money was spent on food. The above results in a sum of $(60 \times 3 \times 50) - (60 \times 50) - (2 \times 350) = \text{€ } 5,300.$ "

*Haarlem District Court, 21 July 2011*⁸⁷

In this case, two victims were awarded € 200,000 in compensation for material loss. The court based this on the victims' statements that they earned € 500 to € 1,000 a day, and then adopted a sum of € 500 for safety's sake. The court also calculated, on the basis of the period of exploitation, that there were probably also days when they did not work and/or were on holiday and fixed the number of days worked at 300 a year. Over three years, therefore, they had earned € 450,000 ($3 \times 300 \times \text{€ } 500$). No costs were deducted, but the court found that half of the money was surrendered to the suspect, and it then rounded off the amount downwards to € 200,000 in loss of income.

*Breda District Court, 4 August 2010*⁸⁸

This example concerns the handling of a claim for confiscation of illegally earned profits rather than the calculation of compensation. Nevertheless, it is worth mentioning because the court based its estimate on an investigation into the earnings in legal prostitution carried out by Regioplan in 2006. The court itself entered the research report into the proceedings. The report showed that prostitutes earned an average weekly turnover of almost € 1,100. The court then estimated the amount earned by the women who worked for the offender at $\text{€ } 1,075 \times 4 = \text{€ } 4,300$ a month. The court then found that it was plausible that the offender had earned the following amount: $14.5 \text{ months} \times 3 \text{ women} \times \text{half of } \text{€ } 4,300 = \text{€ } 93,525$ (the court also found it plausible that all of the girls who worked for the offender in prostitution had been required to surrender half of their earnings).

Why the Amsterdam Court of Appeal awarded an advance of 10% and the Haarlem District Court awarded 50% of the claim cannot be ascertained from the judgments. Lawyers for some aggrieved parties have based the claims on earnings of € 100 a day from prostitution in order to avoid a discussion.⁸⁹ That the amounts earned are probably not the same in every sector of prostitution and that not all prostitutes work the same number of days are factors that could and should certainly play a role in the calculations, but there should at least be greater consistency in the methods used to establish the amount to be awarded. It might also overcome the need to employ minimum amounts, which might be many times lower than the amount of earnings actually confiscated or withheld.

In a case on 26 July 2012, Leeuwarden District Court adopted a fairly transparent method of calculation.⁹⁰ In this case, the suspect was sentenced to six years in prison for violent exploitation of a young woman over a period of seven years. The court based the award on earnings of € 500 a day. The victim had claimed a sum of € 1,200,000 for material loss. The PPS's principal demand was for the entire amount, and alternatively the awarding of € 350,000 by way of an advance. The court based its calculation of the amount of the award on the victim's statement that she worked six days a week on average and 44 weeks

87 Haarlem District Court 21 July 2011, L/JN: BR2862 (*Maas*).

88 Breda District Court, 4 August 2010, L/JN: BN3284

89 As, for example, in Zwolle-Lelystad District Court, 10 December 2010, L/JN: BO7662.

90 Leeuwarden District Court, 26 July 2012, L/JN: BX3800.

in the year, and estimated her annual income at € 132,000. Noting that it had been proven that the victim had had to surrender her income from prostitution to the suspect for a period of seven years, the court then multiplied the estimated annual income by seven, and so came to damages of € 924,000, the highest amount ever awarded in a human trafficking case in the Netherlands. It is not clear from the judgment whether the suspect challenged the amount of the compensation, although the defence claimed that the evidence showed that the money had not all gone to the suspect. The court disregarded any costs incurred by the suspect, nor did it calculate a percentage of the award as an advance. In that context, the court assumed that the victim had surrendered all of the money she had earned to the suspect, although the findings of fact state “or at least a substantial part thereof”.

This judgment shows that in a criminal case involving lengthy exploitation in prostitution, working hours, working weeks and earnings are aspects to be considered in assessing the evidence. These are precisely the elements that allow a calculation such as $44 \times 6 \times € 500$ to be made, so, in that sense, making the calculation would not necessarily constitute a disproportionate burden on the criminal proceedings.

8.5.2 Damages for emotional injury in cases of sexual exploitation

In 2010, at least⁹¹ 23 victims were identified who had submitted successful claims for emotional injury as an aggrieved party with respect to offences including human trafficking. Sixteen of the claims awarded related exclusively to human trafficking,⁹² with the average claim being € 3,484.38⁹³ and the amounts awarded ranging from € 500⁹⁴ to € 7,250⁹⁵. In the case in which the lowest amount was awarded for emotional injury, the claimant had been a victim for three months, and in the case in which the highest amount was awarded, for 24 months. The period during which the claimant was a victim is by no means always a factor in cases in which damages for emotional injury are awarded. For example, € 5,000 has been awarded for periods ranging from nine months⁹⁶ to 65 months⁹⁷ and € 3,000/€ 3,100 for periods from six days⁹⁸ to 33.5 months.⁹⁹ Looking at the average award per month of victimhood, the amount

91 In Groningen District Court, 28 June 2010, *LJN*: BM9806 a claim of € 88,000 relating exclusively to human trafficking was awarded in full. This might have partly included emotional injury, but this was not shown by the judgment and is therefore disregarded here.

92 Ultimately, also in Utrecht District Court 14 July 2010, *LJN*: BN5110 and Amsterdam District Court 1 October 2010, 13-400961-09; 13-400354-09 (not published) damages for emotional injury (€ 5,000 on both occasions) were awarded with respect only to human trafficking. Because the claims in these cases were not exclusively related to human trafficking these two awards are not included here (or in Table 26-28).

93 *SD*: 1.725,85.

94 Utrecht District Court 13 December 2010, *LJN*: BO9376; BO8073.

95 Assen District Court 6 April 2010, 19-810221-06 (not published).

96 Groningen District Court 16 December 2010, *LJN*: BO8125.

97 Zwolle-Lelystad District Court 10 December 2010, *LJN*: BO7662.

98 Roermond District Court 24 August 2010, 04-850250-06 (not published).

99 Utrecht District Court 13 December 2010, *LJN*: BO9376; BO8073.

ranges from € 77 to € 683 per month (rounded off).¹⁰⁰ More than half (56%) of the 16 claims awarded for human trafficking were higher than € 300 a month.¹⁰¹

Other factors – such as the nature and degree of violence and the victim's age – that might have partially contributed to the amount of compensation awarded for emotional injury are also not explicitly mentioned in the judgments. For example, two victims in the same case, one of whom was a minor¹⁰² when she first became a victim and the other an adult, both received € 5,000 in compensation for emotional injury. The underage victim was a victim for more than a month and the means of coercion used with respect to both victims were more or less the same.¹⁰³ It is possible that other factors caused the judge in this case to decide that both victims should receive the same amount, but the court gave few if any reasons for awarding the claim – at least as regards the compensation for emotional injury – and it is therefore impossible to say how the amount of compensation was determined. Consequently, it remains difficult for victims to know how they should formulate an aggrieved party claim with respect to emotional injury.

8.5.3 The criterion 'disproportionate burden on the criminal proceedings'

The new statutory criterion of 'not a disproportionate burden on the criminal proceedings' rather than 'manifestly not simple in nature' for assessing the admissibility of claims might in future lead to claims being heard more frequently in criminal proceedings.¹⁰⁴

After all, the main pretext for this change in the law was to ensure that where possible – and more frequently than in the past – the criminal judge should decide on the substance of a claim by an aggrieved party. When submitting the amendment, members of parliament Wolfsen and Teeven argued that the simple fact that a claim is disputed, that it is not immediately supported by sufficient evidence, that witnesses or experts have to be heard or that the amount claimed is higher than average should no

100 The case in which € 3,100 was awarded for emotional injury with respect to six days of victimhood (Roermond District Court, 24 August 2010, 04-850250-06 (not published)) is disregarded here. This sum would come to around € 15,736 per month of victimhood.

101 Four victims received less than € 150 a month, three victims received between € 150 and € 300 a month, five victims received between € 300 and € 500 a month and four victims received more than € 500 a month.

102 The court declared the charges with respect to this victim proven for the entire period; in other words, also while she was still a minor.

103 Groningen District Court 16 December 2010, LjN: BO8125.

104 See Art. 361 (3) DCC. Act of 17 December 2009, *Bulletin of Acts, Orders and Decrees* 2010, 1; entry into force on 1 January 2011, *Bulletin of Acts, Orders and Decrees* 2010, 291. The effect of this amendment should not be underestimated. The criminal judge is instructed to make a serious effort to decide on the substance of a civil claim wherever possible. This is also why the criterion 'disproportionate burden' was introduced. In addition, in many cases, if the damages cannot be determined precisely on the basis of the evidence, they can often be estimated (Art. 6:97 of the Dutch Civil Code) or only partial dismissal of the claim will suffice, *Aanbevelingen civiele vordering en schadevergoedingsmaatregel m. b. t. de Wet Terwee en de Wet ter versterking van de positie van het slachtoffer*, October 2011, <http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-strafrecht/Documents/Wet-Terwee.pdf> (accessed on 23 September 2012).

longer be a reason to dismiss the claim.¹⁰⁵ It was noted that what would make the difference was the willingness of individual judges to carry out the express intention of the legislature to deal with more claims rather than the actual wording of the new criterion for admissibility.¹⁰⁶

The following judgment of the Supreme Court, however, leaves the courts a lot of discretion to rule that a claim represents a disproportionate burden on the criminal proceedings. In any case, the judgment does not entirely reflect the legislature's intention in amending the criterion.

*Supreme Court, 3 July 2012*¹⁰⁷

In a judgment on 10 February 2011, Leeuwarden Court of Appeal ruled that the claim for compensation for material loss constituted a disproportionate burden on the criminal proceedings and dismissed it. Nor did the court award an advance.¹⁰⁸ The court based its decision on the new criterion, which, given the background to the amendment, should have produced a more favourable result for the aggrieved party. The court found that a period of more than eight years of exploitation in prostitution had been proven and established that the victim had earned roughly € 1,000 a day. The total amount claimed was more than € 1.5 million. The suspect and the aggrieved party both appealed to the Supreme Court. The aggrieved party argued that the court of appeal could also have partially awarded the claim. In his advisory opinion for the judgment, A-G Knigge shared that view. On the grounds of the findings with respect to the duration of the human trafficking, the amount of the earnings and their appropriation by the suspect, Knigge said that in his view it was clear that the aggrieved party had suffered serious material loss and found the court of appeal's judgment to be incomprehensible. The Supreme Court, however, ruled that the court of appeal's decision with respect to the disproportionate burden was not an incorrect interpretation of the law and rejected the appeal. This ruling is disappointing in light of the objective of introducing the new criterion for admissibility.

Given the large differences in the claims awarded by the courts, the methods of calculation adopted and the scant reasoning provided if the claim is awarded, it is not yet possible to draw any conclusions. However, the amounts being awarded by the courts on aggrieved party claims do seem to be rising.

8.6 Violent Offences Compensation Fund

Victims¹⁰⁹ can also apply to the Violent Offences Compensation Fund (further referred to as the Compensation Fund) for financial compensation for both material loss and emotional injury. The Compensation Fund was established by the Violent Offences Compensation Fund Act and it receives an annual

¹⁰⁵ *Parliamentary Documents II* 2007/08, 30 143, no. 16.

¹⁰⁶ Candido 2011, pp. 354-359, referring to M. Groenhuijsen in DD 2008, 10, pp. 121 ff.: "the effectiveness of the statutory provisions concerning mandatory compensation [...] also depends on the attitude of criminal judges". See also Alkmaar District Court, 21 March 2012, *LJN*: BV9569, in which the new criterion seems to have led to an expansion of the possibilities for handling the aggrieved party claim.

¹⁰⁷ Supreme Court, 3 July 2012, *LJN*: BW3751.

¹⁰⁸ Leeuwarden Court of Appeal 10 February 2011, 24-002640-09 (not published).

¹⁰⁹ Or their surviving relatives (in this context, see Article 7 of the Violent Offences Compensation Fund Act).

subsidy from the Minister for the costs of its implementation.¹¹⁰ The Compensation Fund can make payments to victims¹¹¹ of violent crimes of intent that are committed in the Netherlands¹¹² and have resulted in serious physical or psychological injury. The amount of the payment is determined according to principles of reasonableness and fairness and the maximum amounts that can be awarded are laid down in a ministerial regulation.¹¹³ The Compensation Fund can pay compensation of up to € 10,000 for emotional injury, which it defines as “the loss or temporary or permanent diminution of enjoyment of life”.¹¹⁴ The maximum compensation for material loss is fixed at € 25,000.¹¹⁵

Material loss only qualifies for restitution from the Compensation Fund if it “is the direct result of the injury suffered because of the violent offence”.¹¹⁶ The Compensation Fund can consult medical and psychological experts – a physician or its own medical adviser – in assessing the nature and seriousness of the physical or psychological injury,¹¹⁷ and may decline to make a payment if the damage is partly the result of a circumstance that is attributable to the victim.¹¹⁸ It also takes account of other damages or

110 Follows from Article 2 (1) of the Violent Offences Compensation Fund Act.

111 The payment can also be made to surviving relatives of victims in accordance with Article 3 (1)(2) of the Violent Offences Compensation Fund Act.

112 Article 1 of the EU Directive concerning the compensation of victims of offences (2004/80/EG): “The member states must ensure that, when an intentional violent crime is committed in another member state, where the applicant for the compensation is not normally resident, the applicant has the right to submit his or her application to a body or another organ in the member state in which he or she is residing”. In addition, it also provides, for example, *which* member state is responsible for paying the compensation and *when*. See NRM5, p. 60.

113 In accordance with Article 4 (1) and (2) Violent Offences Compensation Fund Act.

114 Compensation Fund Policy Rules 2012, p. 7.

115 Established by a regulation of the State Secretary for Security and Justice of 2 December 2011, no. 194986, establishing the maximum amounts for payments on the grounds of the Violent Offences Compensation Fund Act (Regulation on maximum amounts for payments by Violent Offences Compensation Fund).

116 Compensation Fund Policy Rules 2012, p. 9. Some exceptions to this are possible.

117 In the article ‘Menschenhandel en Medisch-psychologische Rapportages’ (to be published), De Vries argues for the relevance of medical and psychological reports at various stages when a victim of human trafficking comes in contact with the authorities. The article looks at how medical and psychological reports are weighed in the decisions made by the IND and the Violent Offences Compensation Fund, but also refers to the importance of such reports from the very moment that a victim is identified by a social worker, an investigative agency, etc., so that medical and psychological reports can be consulted throughout the chain.

118 This can also lead to the award of a smaller amount (Article 5 of the Violent Offences Compensation Fund Act). With respect to victims of human trafficking, whether a victim was already working in prostitution or knew in advance of the (probability of) sexual exploitation or of the removal of organs is not a factor in awarding financial compensation.

compensation that have been or could be paid to the victim as a result of the offence in deciding whether to make a payment.¹¹⁹

This section reviews the applications submitted and awarded in the period 2009-2011, followed by a description of the nature and amount of the payments made. Finally, the two most important policy changes implemented by the Fund in 2012 in relation to human trafficking are discussed. These two policy changes are laid down in the new policy document on human trafficking that took effect on 3 August 2012.¹²⁰

8.6.1 Number of applications submitted and awarded

At BNRM's request, the Fund provided quantitative data about applications by victims of human trafficking for financial compensation from the Fund in the period 2009-2011.¹²¹ In this section, the number of applications made and the number awarded and rejected are compared with the corresponding figures for 2007 and 2008.¹²²

Number of applications

The figure below shows the number of applications for financial compensation made by victims of human trafficking.¹²³

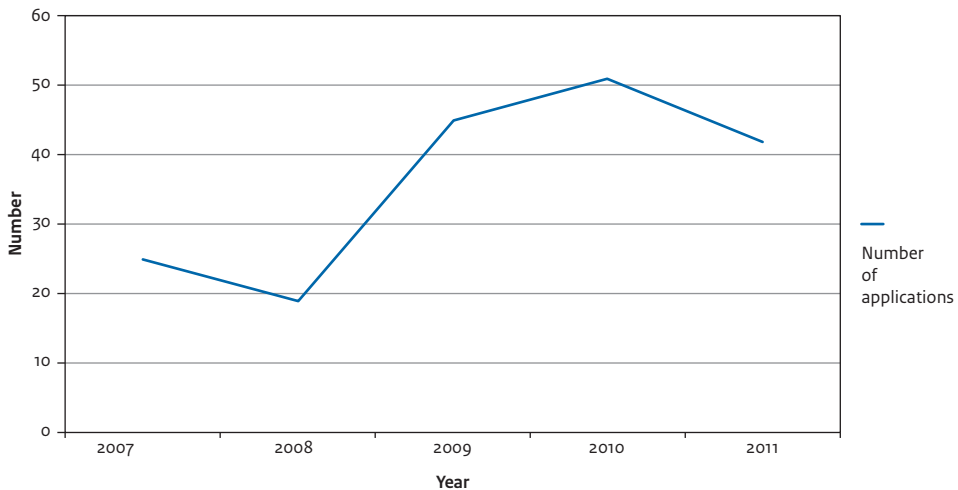
119 When making a payment, the Compensation Fund retains the right to set it off immediately or at a later stage against other compensation for damage that has been or will be paid to the victim as a result of the crime (see Article 6 of the Violent Offences Compensation Fund Act).

120 The new policy document on human trafficking provides that the policy applies to all on-going cases involving an original application or an objection from the time of its entry into force (2012, p. 5, not published).

121 The data of the Violent Offences Compensation Fund can be broken down to the level of individual victims.

122 See NRM7, pp. 131-132.

123 See Appendix 3, Table A3.1 for a detailed overview of the number of applications.

Figure 5 Number of applications for financial compensation (2007-2011)

The number of applications for financial compensation since 2009 (N: 45 in 2009, N: 51 in 2010 and N: 42 in 2011) is evidently greater than the number of applications before 2009 (N: 25 in 2007 and N: 19 in 2008). The applications by victims of human trafficking were received mainly through law firms, Victim Support Netherlands, the police and agencies such as Juridisch Loket, FairWork and Stichting Humanitas.¹²⁴ On average, only 8% of all applications in the period 2009-2011¹²⁵ were not received through an organisation.

Number of applications awarded and rejected

The figure below shows the proportion of applications for financial compensation that were awarded and rejected in the period 2007-2011. These are figures relating to final decisions that had been made at the time the records were supplied to the BNRM.¹²⁶ It is therefore possible that some of the payments shown as awarded in the figure below were awarded after an objection. It is also possible that for some of the applications shown to have been rejected, objections were lodged at a later stage and the Compensation Fund had not yet made a decision at the time of this study.¹²⁷ For a number of decisions, it is clear that a sum was awarded after an objection had been lodged.¹²⁸ The following figure shows the decisions on the applications.¹²⁹

¹²⁴ See Appendix 3, Table A3.2 for a detailed overview of the number of referring agencies. See also NRM7, p. 158 for the referrals of applications before 2009.

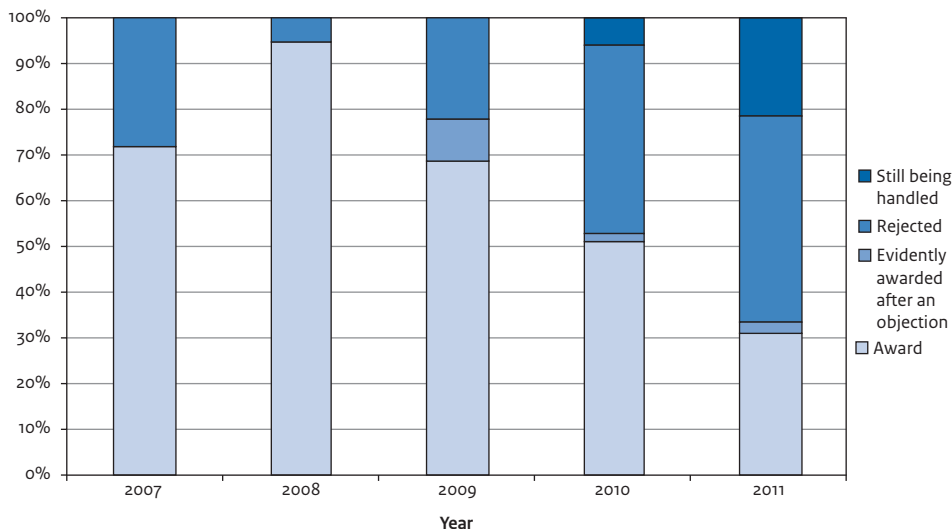
¹²⁵ BNRM has the specific numbers per referral for this period.

¹²⁶ BNRM received the data on 28 August 2012.

¹²⁷ Verbal information from the Violent Offences Compensation Fund, 4 September 2012.

¹²⁸ These are applications for which the registered decision is a rejection, although financial compensation was paid to the victim of human trafficking (verbal information from the Violent Offences Compensation Fund, 30 August 2012).

¹²⁹ See Appendix 3, Table A3.3 for a detailed overview of these data.

Figure 6 Decisions on applications for financial compensation (2007-2011)

In 2007, 72% of the total number of applications for financial compensation were approved. The number of applications that were approved peaked at 95% in 2008 and subsequently declined to 69% in 2009, 51% in 2010 and 31% in 2011. If the applications awarded after an objection are included, the proportion of claims awarded fell to 78% in 2009, 53% in 2010 and 33% in 2011. Obviously, the decline in the proportion of claims awarded means that the proportion of claims that were rejected rose after 2008 (to 22% in 2009, 41% in 2010 and 45% in 2011).¹³⁰

8.6.2 Nature and amount of financial compensation

As discussed above, financial compensation can be paid for both emotional injury and material loss. This section concerns financial compensation awarded *in primo* as well as the applications that were awarded after an objection had been lodged, as shown in Figure 6.

Financial compensation for emotional injury

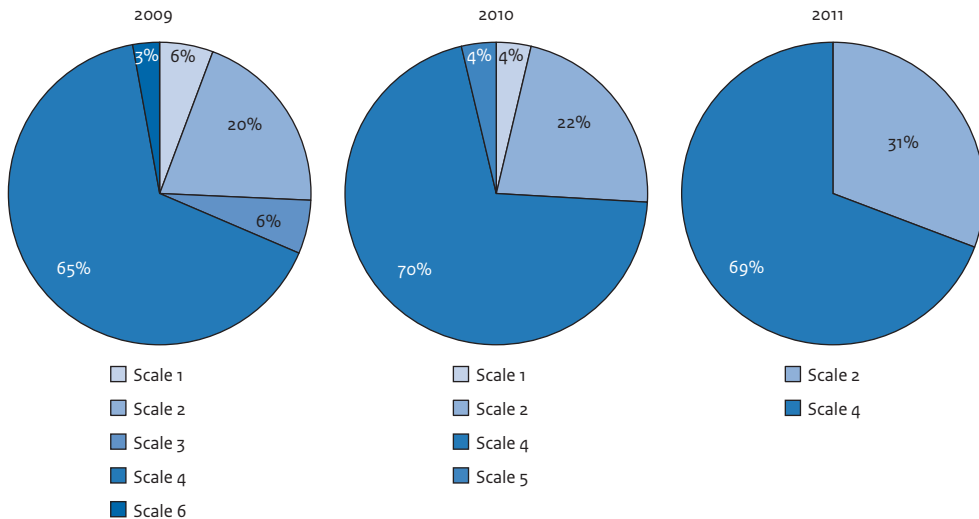
The Compensation Fund employs a list in which physical injury is divided into eight categories. In the figure below, the compensation payments awarded for emotional injury are broken down according to the scales for these categories.¹³¹ In the classification that has been in effect since 1 January 2012, scale 1

¹³⁰ It is theoretically possible that victims from recent years are still awaiting a decision on an objection after their application was initially rejected (verbal information, Violent Offences Compensation Fund, 4 September 2012).

¹³¹ See Appendix 3, Table A3.4 for a detailed overview of these data.

is the minimum compensation payment for emotional injury (€ 600) and scale 8 is the maximum payment (€ 10,000).¹³² The new scales are used for all decisions on applications made after 1 January 2012.¹³³

Figure 7 Application of scales for emotional injury damage (2009-2011)



These figures show that the variation in the application of the scales for financial compensation for emotional injury declined in the period 2009-2011. In 2011, the payments awarded for compensation for emotional injury in 2011 fell into scale 2 and scale 4, which were in fact also the scales most commonly applied in 2009 and 2010, although some payments lower than scale two and higher than scale four were also awarded in those years. The smallest payments in the period 2009-2011 were payments in scale 1 in 2009 and 2010 and the highest payment was in scale 6 in 2009.

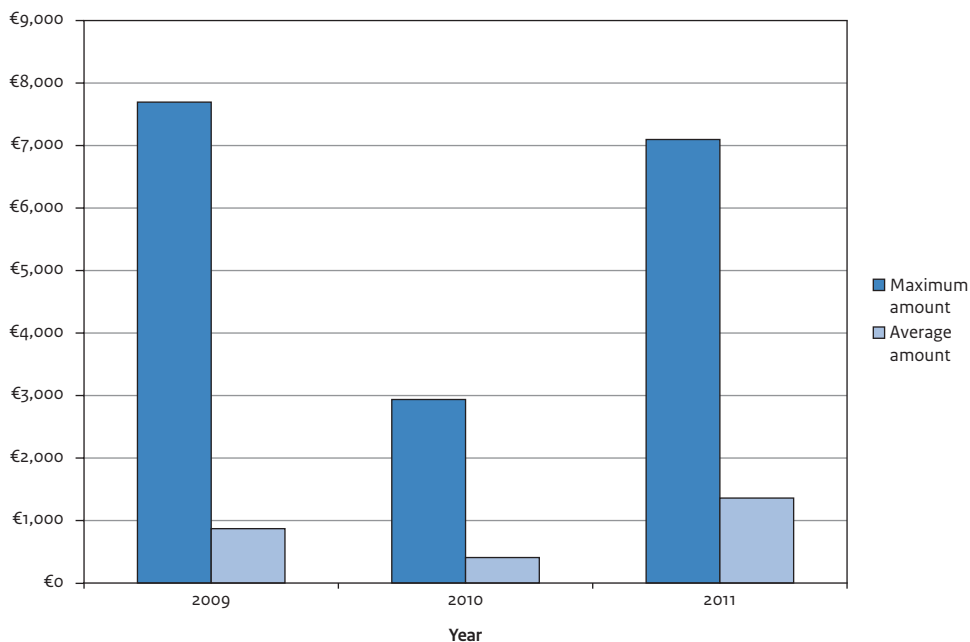
¹³² Before the policy change, the decision to award a payment in a specific scale was “determined on the basis of the nature and seriousness of the injury. Other circumstances were also taken into account.” (Policy Rules of the Violent Offences Compensation Board 2012, p. 7). In the new policy document, the scale is awarded on the basis of four factors: nature, seriousness, duration and frequency (Policy Document on Human Trafficking 2012, p. 4, not published). See also §8.6.3.

¹³³ Before 1 January 2012, the Compensation Fund had two series of scales. The most common is given below, together with the new scales that have applied since 1 January 2012: Scale 1 - € 550 (old), € 600 (new); Scale 2 - € 1,400 (old), € 1,500 (new); Scale 3 - € 2,100 (old), € 2,300 (new); Scale 4 - € 2,750 (old), € 3,000 (new); Scale 5 - € 4,150 (old), € 4,500 (new); Scale 6 - € 5,500 (old), € 6,000 (new); Scale 7 - € 8,250 (old), € 9,000 (new); Scale 8 - € 9,100 (old), € 10,000 (new). Until 1 January 2012, even older scales were used for applications relating to violent offences that dated from before 1994, which could still be handled because of an excusable breach of the deadline. These were irregular amounts because of the conversion from the guilder to the euro. For the purpose of comparing the compensation awarded, the relevant amounts for violent offences dating from before 1994 are also divided into the scales provided by the Violent Offences Compensation Fund (Written information from the Violent Offences Compensation Fund, 3 September 2012).

Financial compensation for material loss

The following figure shows the financial compensation paid for material loss in the period 2009-2011.¹³⁴ As mentioned above, the maximum payment the Compensation Fund can award for material loss is € 25,000.¹³⁵ It is important to note that the database that was supplied does not make it clear to what extent the amounts were set off against compensation orders imposed by the courts.¹³⁶

Figure 8 Financial compensation for material damage (2009-2011)



On average, the highest payments were made in 2011. The average amount paid for material loss in 2011 was € 1,366,¹³⁷ compared with a sum of € 866¹³⁸ in 2009 and € 403¹³⁹ in 2010. The maximum amounts paid in 2009 and 2011 were in excess of € 7,000 (€ 7,725 in 2009 and € 7,114 in 2011), while the maximum amount paid in 2010 was significantly less (€ 2,940). All the amounts paid in 2010 were significantly lower; three-quarters were € 515 or less. The corresponding figures in 2009 and 2011 were € 951 and € 2,110, respectively.¹⁴⁰

134 The minimum amount paid was € 0 (N:1 in 2009), which is therefore not shown in the table.

135 See also the Policy Rules of the Violent Offences Compensation Fund, §2.9, p. 9.

136 See Appendix 3, Table A3.5 for a detailed overview of these data.

137 SD: 2,149.

138 SD: 1,758

139 SD: 620

140 See Appendix 3, Table A3.6 for a detailed overview of these data.

Trends

Four general trends can be discerned from the data in this section. First, the number of applications for financial compensation has been significantly greater since 2009.¹⁴¹ Second, since 2009, there has been a relative decline in the number of applications for payments from the Compensation Fund awarded to victims of human trafficking. Third, there has been less disparity, at least since 2009, in the application of the scales for financial compensation for emotional injury. And finally, although fewer applications were granted in 2011, on average the amounts awarded as compensation for material loss were higher in 2011 than in 2009 and in 2010.

8.6.3 New policy document

During the symposium 'Human trafficking in chains' organised by the Compensation Fund on 13 May 2011, it was suggested that the policy on human trafficking that was in place at that time needed to be revised.¹⁴² Taking this suggestion to heart, the Compensation Fund adopted a new policy document on human trafficking on 3 August 2012, which entered into force on the same date.¹⁴³ The two most important policy changes are described below.

The first change is that, in accordance with Article 17 of the EU Directive on Human Trafficking,¹⁴⁴ victims of human trafficking are given access to the Compensation Fund's scheme when it is shown to be plausible that human trafficking occurred.¹⁴⁵ Under the Compensation Fund's former policy, there was an additional requirement of showing the plausibility that the human trafficking offence was also a violent crime of intent. The Fund decided to omit this requirement from the new policy document because it was contrary to Article 17 of the EU Directive on Human Trafficking, which provides that victims of human trafficking must have the same access to existing compensation schemes as victims of violent crimes of intent.¹⁴⁶

¹⁴¹ The number of applications for financial compensation has evidently been larger since 2009 (N: 45 in 2009, N: 51 in 2010 and N: 42 in 2011) than the number of applications before 2009 (N: 25 in 2007 and N: 19 in 2008).

¹⁴² The Compensation Fund also mentioned human trafficking as a spearhead in its annual plan for 2011.

¹⁴³ "The working instructions will enter into force ... on the date of publication on the intranet" (Policy document on human trafficking 2012, p. 5, not published).

¹⁴⁴ In addition to the so-called requirement of plausibility, the application must also comply with the formal requirements laid down in the Violent Offences Compensation Fund Act and further explained in the Policy Document of the Violent Offences Compensation Fund in 2012.

¹⁴⁵ EU Directive (2011/36/EU) on preventing and combating human trafficking and protecting its victims, replacing Framework Decision 2002/629/JBZ of the Council of 5 April 2011, OJ 2011, L 101/1.

¹⁴⁶ In this context, see also the bill to implement the EU Directive (2011/36/EU) of the European Parliament and the Council on preventing and combating human trafficking and protecting its victims and replacing Council Framework Decision 2002/629/JBZ, *Parliamentary Documents II* 2011/12, 33 309 no.2.

Another change is that victims of sexual exploitation qualify for higher compensation for emotional injury.¹⁴⁷ On the basis of the former policy, victims of sexual exploitation were almost always awarded compensation on the basis of scale 2 (€ 1,500) or scale 4 (€ 3,000).¹⁴⁸ Under the new policy, victims qualify for compensation under one of the higher scales: from scale 3 (€ 2,300) to scale 7 (€ 9,000). The Fund expects the new policy to lead to higher financial compensation being awarded to victims of sexual exploitation. According to the new policy, the scale on which compensation is awarded depends on four factors: the nature, seriousness, frequency and duration of the human trafficking offence.

8.6.4 Victims and the Violent Offences Compensation Fund

Victims of human trafficking can apply to the Compensation Fund for financial compensation for material loss and emotional injury. As mentioned above, there is a maximum to the amount that the Fund can award. Accordingly, the amount of the compensation cannot be equated with the payments that can be awarded through the civil courts.¹⁴⁹ Essentially, the Compensation Fund makes a contribution towards restitution of loss suffered by a victim and it is inherent to the nature of a contribution that the loss suffered is not fully reimbursed. The Compensation Fund can also only make a payment on the basis of the damage that the victim has suffered as a result of physical injury arising from the violent offence committed against him or her. By extension, the Compensation Fund cannot therefore make any payment for material loss sustained in connection with the confiscation of money, for example.

8.7 Compensation in relation to the deprivation of illegally obtained profits

The relationship between an aggrieved party claim and an application for the deprivation of illegally obtained profits was discussed at length in NRM7,¹⁵⁰ where it was stressed how important it is for a financial report to be available at the time of the trial to buttress the claim of the aggrieved party. The judgment discussed there, in which The Hague District Court¹⁵¹ issued a confiscation order, illustrates that even when there is a financial report, the elements for calculating the victim's earnings are the length of the exploitation, the earnings per day, the number of days worked and any costs incurred by the suspect.

In human trafficking cases, the assets confiscated is generally money that has been earned by victims and should also be due to them. In that sense, it is different from money earned from drug trafficking. As mentioned at the beginning of this chapter, the connection between confiscation of illegally obtained profits and compensation for victims of human trafficking is also made in international instruments. For example, the EU Directive on Human Trafficking makes a close connection between confiscation and com-

147 For sexual exploitation (and for organ removal), serious injury is assumed to have occurred. The situation is different with other forms of exploitation, because, according to the Compensation Fund, the nature, seriousness, duration and frequency of these offences can differ significantly. According to the Compensation Fund, with these forms of human trafficking, the point of departure is medical opinion, which must show whether the victim has suffered serious physical injury (Policy document on human trafficking 2012, p. 4, not published).

148 This was the case with all payments of compensation in 2011. See §8.6.2.

149 Policy Rules of the Violent Offences Compensation Fund 2012, p. 7.

150 See NRM7, p. 471 ff. In this context, see also NRM7, recommendations 3 and 38.

151 The Hague District Court 29 April 2009, LjN: B14830.

pensation.¹⁵² This calls for a greater effort to ensure that the money confiscated in human trafficking cases is used for the proper purpose. In the Netherlands, however, in practice a consistent link between confiscation and compensation does not yet seem to be made in human trafficking cases.¹⁵³

The intention is to strengthen that link. In a recent letter to parliament, the Minister of Security and Justice wrote that if both a confiscation order and a compensation order are imposed in a criminal case, the principal beneficiary of the proceeds will be the victim.¹⁵⁴ This letter sets out government-wide policy with respect to the confiscation of the proceeds of crime, including organised crime. The basic principle is that people who break rules must not be allowed to retain money earned illegally or from crime. For that reason, the policy is aimed at compensating injured victims in every case, as well as increasing the risk of arrest for offenders. The policy applies equally to human trafficking, although that offence is not specifically mentioned in the letter. However, the intention is for confiscation to apply always for some offences, including labour exploitation (human trafficking), according to the minister.

If a pre-judgment attachment that has been levied for the purposes of a confiscation order is to be lifted, victims are usually consulted in advance in order to give them the opportunity to seize the assets before they are returned to the individual concerned.¹⁵⁵ To further promote compensation for victims, on 7 June 2012 a bill was tabled in parliament that would introduce the possibility of making an order to seize the assets of a suspect in favour of the victim.¹⁵⁶ The law does not currently allow for the seizure of assets for the purposes of a compensation order.

These measures concern the relationship between confiscation and compensation if a court orders compensation to be paid, either by awarding the aggrieved party's claim or on the grounds of an order to pay compensation, or a combination of both. In principle, the law does not directly provide any possibility for victims to assert a right to confiscated money without having their claim awarded.¹⁵⁷ However, one possibility might be to invoke Article 577b of the Code of Criminal Procedure. Subsection 2 of that article gives the courts¹⁵⁸ the possibility to decide that all or part of the amount confiscated will be paid to an aggrieved third party at the request of that party, without the addition of the phrase 'whose claim has been awarded in law'.¹⁵⁹ As far as is known, this option is rarely used. This procedure might be simpler,

152 EU Directive on Human Trafficking (2011/36/EU), recital § 13.

153 Art. 36e (8) DCC provides that in determining the amount to be confiscated, court-awarded claims of injured third parties will be deducted. In that sense, the link with confiscation is made for those persons whose claims have been awarded.

154 Letter from the Minister of Security and Justice of 12 July 2012, *Parliamentary Documents II* 2011/12, 29 911 no. 69, p. 14.

155 Letter from the Minister of Security and Justice of 12 July 2012, *Parliamentary Documents II* 2011/12, 29 911 no. 69, p. 14.

156 *Parliamentary Documents II* 2011/12, 33 295, no. 1.

157 Article 36e (8) DCC does not apply for them.

158 This involves an informal procedure in chambers.

159 See Zutphen District Court, 16 January 2004, *LJN*: AO6275, in which, although no aggrieved party claim had been awarded and no compensation order had been imposed in the criminal proceedings, the court nevertheless granted the injured party's request and ruled that the money confiscated should be paid to her.

and could perhaps provide more certainty, than civil proceedings, but the question is to what extent this procedure also offers the possibility of establishing the amount of compensation.¹⁶⁰

On occasion, the PPS decides not to request a confiscation order in favour of a claim for compensation filed by the victim as an aggrieved party in criminal proceedings. In that context, it is interesting to note the opinion of the Advocate General at Leeuwarden Court of Appeal, as set out in the judgment of the Supreme Court of 3 July 2012.¹⁶¹ In the opinion, the A-G said he was waiting with an application for a confiscation order because he felt it would be more equitable for the victim to receive her money than for the money to go to the government. This is the situation that Arnhem Court of Appeal was probably referring to when, after dismissing the claims of the aggrieved parties because of their complexity, it urged the PPS to use the proceeds of €242,300.52 from the confiscation order for the benefit of the aggrieved parties in a practical and equitable manner.¹⁶² This judgment, and the position taken by the A-G at Leeuwarden Court of Appeal, imply a realisation that it is not right that the State should profit from the exploitation.

The question is whether it is possible for the victim to make a request directly to the PPS and, naturally with supporting reasons, make a claim to some or all of the money confiscated. This is apparently the solution that the Leeuwarden Court of Appeal had in mind and seems a practical and reasonable option, which would also be in line with the EU Directive and its intention with respect to the use of money that has been confiscated.

The absence of an adequate statutory basis for claiming confiscated money, even if a claim is not awarded, means that victims depend for compensation on the personal views of magistrates, as the examples given here show. This is cumbersome and uncertain and is also contrary to the idea that a victim's entitlement to compensation is a right.

160 In the aforementioned judgment of Zutphen District Court, the amount was evident and unchallenged.

161 Supreme Court 3 July 2012, *LJN*: BW3751.

162 Arnhem Court of Appeal 17 October 2007, *LJN*: BB5775.

9.1 Key message

The analysis of case law leads to the following key message:

Within the criminal justice system, specialisation and training are needed to ensure that human trafficking cases are dealt with in a manner befitting the seriousness of the offence and the concern about human trafficking at national and international level. Another objective should be to pursue consistency in sentencing.

Human trafficking is a violation of human rights and an offence that undermines the fabric of society. It generates a lot of money and is sometimes perpetrated in the context of organised crime, and is often transnational. It is a form of crime that is facilitated by legitimate businesses and social structures, so the consequences can quickly be felt throughout society. The fact that so many Dutch offenders and Dutch victims, including minors, are involved and that preventive measures have not been sufficiently effective is a cause for serious concern. For those reasons, tackling human trafficking has been a priority of government policy for a number of years, but efforts to combat the problem must not stop at prosecution. The judiciary must also appreciate the urgency of handling these types of cases effectively. That calls for specialised and well-trained judges to ensure that decisions by the Supreme Court that have provided answers to legal questions are not missed by a district court somewhere in the country. There are enough cases each year to justify appointing specialised judges to handle them properly.

The provision of the criminal code pertaining to human trafficking (Article 273f DCC) is a complex provision to apply in practice because the text is based in part on international instruments and because every form of human trafficking is encompassed in this single article. The article also covers various forms of conduct with differing degrees of criminality. The complexity of the article is reflected in indictments, which are often extremely long and not always easy to comprehend. The provision in its current form has been on the statute book for more than seven years now and there is a growing body of case law, with the number of appeals having risen in the last few years. In 2009, the Supreme Court rendered an important judgment on exploitation outside the sex industry ('other forms of exploitation') and a number of cases are currently pending before the Supreme Court. Like the European Court of Human Rights, the Supreme Court could perhaps give some priority to hearing human trafficking cases in order to provide lower courts with guidelines for the interpretation of this difficult provision. This would give effect to the motto that was proposed in the legal journal *Trema* to be inscribed on the facade of the new Supreme Court building: "PRESSING LEGAL ISSUES: quickly heard, promptly answered." Specialised judges to hear human trafficking cases, the clear formulation of charges by the PPS and the early inter-

pretation of legal issues relating to human trafficking could help guarantee the proper handling of human trafficking cases. If these steps are taken, simplifying Article 273f DCC would not be expedient.

The ban on brothels was lifted in the Netherlands in 2000. The political reasoning behind the decision was that a system of licensing could remove prostitution from the criminal sphere. That has not happened, and even in licensed prostitution human trafficking occurs frequently. Prostitution and other forms of sexual services are legal forms of work in the Netherlands. The Dutch prostitution policy was regularly referred to in the judgments that were studied. For example, in cases brought under subsection 3, where persons are recruited or taken to work in prostitution in another country. In this type of case, the Dutch policy on prostitution is fairly regularly incorrectly invoked as a reason for not convicting or imposing a sentence. This sometimes also occurred in cases involving women, foreign or Dutch, who had previously worked in prostitution, suggesting that the judge apparently believed that the women were therefore willing to tolerate the risk of exploitation. Even with underage victims, judges occasionally seem to regard the choice to work as a prostitute as normal (even though the use of services of a prostitute who is a minor is strictly prohibited).

In the next section we briefly outline the main conclusions drawn from current jurisprudence on human trafficking. In general, the judgments are reasoned more extensively than they were at the time of the previous study and, even in the decisions that resulted in acquittal, judges described the offences that they *had found to be proved* in greater detail. This has helped provide more insight into the findings that formed the basis of judges' decisions.

The previous chapters laid the foundations for the key message of this report. At the end of this chapter, the key message is translated into a number of specific recommendations.

9.2 Current status of case law on human trafficking

9.2.1 Some figures (2010)

Convictions and acquittals

Of the 138 indictments for sexual exploitation (111) and other forms of exploitation (29), the charges led to convictions for human trafficking in 83 cases (60%). Two cases were related to both types of exploitation and are therefore only included once in the totals. In four cases, the court did not hear the case because the indictment was declared null and void or because the court denied the PPS's right to institute criminal proceedings and dismissed the case. The number of acquittals in human trafficking cases has been consistently high, and in 2010 the percentage of acquittals was higher in cases involving other forms of exploitation (52%) than in cases involving human trafficking in the sex industry (36%). As regards the percentage of acquittals in cases involving other forms of exploitation, the relatively recent criminalisation of the offence and the need to flesh out the definition of the offence in case law may be factors. Perceptions of other forms of exploitation could also play a role in the decisions in this type of case. In NRM9, how perceptions of the criminal nature of other forms of exploitation might influence the entire approach to them will be studied in more detail. The – irrelevant – views on Dutch prostitution policy, in particular, have been a factor in acquittals on charges of sexual exploitation. The proportion of convictions (65%) and acquittals (35%) in 2011 was not very different than in 2010.

Sentences demanded and imposed

In 2010, the PPS usually demanded at least an unconditional prison sentence, doing so slightly more often in cases of sexual exploitation (92%) than for other forms of exploitation (86%). The heaviest principal sentence demanded by the PPS was usually a wholly unconditional prison sentence, with a partially conditional prison sentence being demanded in 35% of sexual exploitation cases and 17% of cases of other forms of exploitation. This percentage does not differ much from the type of sentence demanded in sexual exploitation cases in 2007. In 58% of the judgments – in which a partially or wholly unconditional prison sentence was demanded for sexual exploitation – the PPS sought a prison sentence of two years or less. The figure in cases involving other forms of exploitation was 64%.

In the cases of sexual exploitation in 2010 that led to a conviction at least partly for human trafficking and in which at least a partially unconditional prison sentence was imposed, the average length of the unconditional prison sentence was approximately 1.8 years. The average in cases of other forms of exploitation was roughly four months shorter. It should be noted that the sentences in cases of sexual exploitation cannot be properly compared with the sentences in cases involving other forms of exploitation, mainly because other offences, apart from human trafficking, for which convictions are handed down in cases of other forms of exploitation, differ in nature and scale from the other offences found to have been proved in cases of sexual exploitation. The average length of the unconditional part of the prison sentence imposed in cases involving sexual exploitation was fractionally higher in 2010 than in 2007. If only human trafficking in relation to sexual exploitation was declared proven – with the exception of the cases where the conviction was related only to Article 273f (1)(3) DCC – the length of the unconditional part of the sentence (approximately 1.3 years) was on average almost 18 months shorter than if convictions were handed down for other offences in addition to human trafficking (approximately 2.7 years).

Suspects

The total number of unique suspects in this study was 135. The personal traits of suspects in the sex industry did not differ much from those in 2007 in terms of gender, age and country of birth. In this study, the characteristics of suspects of sexual exploitation have also been compared with those of suspects in cases involving other forms of exploitation. The comparison shows that the proportion of women suspected of other forms of exploitation is greater than the proportion of female defendants in the sex industry. Most suspects of human trafficking spent some time in provisional custody. By comparison with 2007, when 70% of the suspects in sexual exploitation cases were still in pre-trial detention at the time of their trial, that figure declined to 42% in 2010. In that year, 34% of suspects of other forms of exploitation were still in detention at the time of the trial.

Victims

The number of unique victims identified by the PPS and covered in this study totalled 147 for sexual exploitation and 70 for other forms of exploitation (with a small amount of overlap). Practically all of the victims of human trafficking in the sex industry are women. The indictments in 2010 showed that there were 20 underage victims (14%), of whom 13 were under the age of 16. In 14 cases, the court declared that it had been proved that these young girls were victims, which means that 15% of the proven victims in the sex industry were younger than 18. That is a significant and worrying number. Nine victims had just reached adulthood, but this may be a low estimate. The Netherlands was the country of origin of 85% of the underage victims; the other 15% came from Eastern Europe. There were scarcely any minors among the victims in cases of other forms of exploitation. More than a third of all victims of sexual exploitation

come from the Netherlands, with just over 40% from Eastern Europe – particularly Romania, Hungary, Bulgaria and Poland. Whereas Eastern Europe is the most important region of origin of victims of sexual exploitation, apart from the Netherlands, most victims of other forms of exploitation come from Asia.

Compensation

Only 42 (29%) of the 147 victims in human trafficking cases in the sex industry (in first instance in 2010) submitted a claim as an aggrieved party with respect to offences that included human trafficking. Twenty-six (62%) of the 42 claims were related to damage suffered solely as a result of human trafficking. The courts awarded 17 (65%) of these claims, three of them in full. The principal reasons given for denying the claim of an aggrieved party in the 21 cases in which the claim was declared at least partially inadmissible was that the claim was not simple in nature or that it had not been proved that the claimant was a victim. Some claims were also denied, either wholly or partially, because the relevant part of the claim had not been adequately substantiated or because no causal link was found to exist between the offences proved and the items claimed. In cases of other forms of exploitation, only three claims for compensation relating only to human trafficking were partially awarded in 2010.

In 2010, at least 23 victims successfully submitted an aggrieved party claim for emotional damages arising from sexual exploitation in cases involving human trafficking. Sixteen of the claims that were awarded were exclusively related to human trafficking. The amounts ranged from € 500 to € 7,250 and the average amount awarded was € 3,484.38. In the case in which the lowest amount was awarded for emotional damages, the claimant had been a victim for three months. The highest amount was awarded in a case where the claimant had been a victim for 24 months. The length of time the individual was a victim is frequently not a factor in the amount awarded in emotional damages. For example, € 5,000 has been awarded for periods ranging from nine to 65 months and € 3,000/€ 3,100 for periods ranging from six days to 33.5 months. The average amount awarded for each month that a person was a victim ranged from € 77 to € 683 (rounded off). More than half (56%) of the 16 victims were awarded more than € 300 per month.

9.2.2 Pitfalls

The indictment

Drawing up an indictment in a human trafficking case is often complex, partly because of the complexity of Article 273f DCC. The subsections of the first section of the Article encompass a relatively large number of separate acts, which partially overlap but can also differ in important respects. In most human trafficking cases, several of the subsections apply to the same set of facts, while there is also often more than one victim. Consequently, the indictment can be formulated in various ways. If, for example, the PPS chooses to combine minors and adult victims in a single charge, the judge may be wrong-footed with respect to the requirement of coercion. It is up to the PPS to formulate the indictment in such a way that a clear distinction is made.

Overlap between the acts in subsection 1 and subsection 4 can also lead to complications. An offender who, using coercion and with the intention of exploiting another person, provides accommodation for a person could at the same time – on the basis of the same method of coercion – be guilty of forcing or inducing the victim to make himself or herself available for performing work or services. It is impossible to determine in advance whether the acts that are criminal offences under subsection 1 and subsection

4 overlap; this depends on the specific circumstances of the case. In drafting the indictment a clear distinction has to be made between the acts relating to subsection 1 and to subsection 4. Even if the same acts could constitute evidence of an offence under subsection 1 and subsection 4, it is advisable to specify which acts contribute to the proof of which element of the offence under which subsection. It is also important to make a distinction between the terms 'situation of exploitation' and 'exploitation'. The intention of exploiting does not have to be imputed in the definition of the offence under subsection 4, nor does there have to be actual exploitation for the purposes of Article 273f (1)(1) or (2) DCC.

Other forms of exploitation

The point at which poor working conditions or situations in which services are performed tip over into exploitation remains a question that can only be answered by considering all of the circumstances of a specific case as a whole. This means that there will always be a grey area within which it is debatable whether a particular case involves human trafficking. Test cases of an experimental nature could help to delineate the boundaries of the concept of human trafficking. A welcome development is that the limits of the concept are currently being explored in Dutch case law.

The element 'with the intention of exploiting' in subsection 1 does not appear in the definition of the offence under subsection 4. It has, however, been read into subsection 4 ever since 'other forms of exploitation' were criminalised, with the argument that it is implied by the rationale of Article 273f DCC. The courts have also found a legal argument for incorporating exploitation and the intention of exploiting in the definition of the offence under subsection 4 in the list of various forms of exploitation in Article 273f (2) DCC. In the meantime, the Supreme Court has explicitly stated that 'the intention of exploiting' is not an element of the offence under subsection 4. Not reading 'the intention of exploiting' into subsection 4 has consequences for the scope of the provision. For a conviction for human trafficking in the case of other forms of exploitation, a situation must be excessive. In the *Chinese restaurant* judgment, the Supreme Court issued some guidelines on factors that indicate what constitutes an excessive situation: the nature and duration of the work performed, the restrictions imposed on the individual concerned and the economic benefit of the work for the employer. In weighing these and other relevant factors, the frame of reference must be the prevailing standards in the Netherlands.

Means of coercion

Human traffickers usually employ a combination of different means of coercion. Violent and manipulative means of coercion cannot automatically be ranked in order of seriousness. Nor can it be automatically assumed that physical injury to victims of exploitation in the sex industry is more serious than that of victims of other forms of exploitation. Psychological violence or manipulation can cause just as serious and lasting harm for a victim as physical violence. Some specific acts by human traffickers are sometimes treated differently in the case law. For example, forcing a woman to have an abortion is not always regarded as a means of coercion in the indictment; the same applies for rape, which sometimes is and sometimes is not also charged as a separate offence. However, it now seems to be established law that the detailed facts must be considered as a whole in deciding whether there has been coercion. After all, a person's spirits can be broken to such an extent by a mechanism of force, violence and other circumstances as to create a situation where that person is forced to work. It is interesting how the factor of domestic violence plays a role in this context.

Subtle means of coercion continue to pose particular problems in the case law. The causal relationship between the means of coercion and a person's decision to enter prostitution sometimes also causes

problems. Nevertheless, in the case law of the higher courts, it has been decided that it is irrelevant that other factors, not known to the suspect, might have contributed to that decision. If it is proved that means of coercion have been used, the consent of the victim is irrelevant and the causality is taken as a fact.

That consent is also irrelevant if the requirement of a form of coercion is not part of the definition of the offence, as is the case with minors. Children are also protected against themselves. The legislature has expressed the view that the will of a minor, and hence the minor's consent, has no significance. The EU Directive on Human Trafficking also assigns considerable importance to the protection of minors and other vulnerable persons against human trafficking. The protection of minors extends beyond legislation; it also receives significant attention at policy level. Nevertheless, the figures on the number of registered underage victims show that there is still a long way to go. The statistics presented in this report also show that children are still *too* often victims, particularly of sexual exploitation. And frequently these are particularly vulnerable children, such as children with a slight mental handicap or children who have run away from juvenile care facilities. Too many of the judgments we studied contained findings that could lead to the conclusion that the consent of the minor *was* considered relevant in deciding whether there was proof of human trafficking. Protection of underage victims of human trafficking must also be reflected in the case law.

Article 273f (1)(3) DCC

This subsection makes it a criminal offence to recruit people to work in prostitution in another country. The definition of the offence does not contain the elements of coercion or the intention of exploiting. This criminal provision implements the Geneva Convention of 1933 for the Suppression of the Traffic of Women of Full Age, and exploitation or the existence of a situation of exploitation is not required to meet the definition of the offence. In that sense, this subsection is a *fremdkörper* in this article. The provision is straightforward; the explanatory memorandum is clear. Nevertheless, this subsection has frequently given rise to an incorrect interpretation. For example, the requirement of exploitation or a requirement of the use of force or violence is often inferred in the definition of the offence, and in their absence, defendants are quite regularly wrongly acquitted. The Dutch prostitution policy and/or the EU labour market are also referred to in the assessment of charges based on this subsection. But the legislature and the Supreme Court are quite clear on this point. The provision is straightforward and there is no reason to read more into it than it says.

Attempt

Another issue to be addressed in connection with prosecution and trial is the concept of attempt. In international law, and consequently also in Dutch legislation, a number of acts are specifically categorised as human trafficking. Accordingly, the acts listed in Article 273f (1) (1) DCC in particular – such as recruitment, transport and accommodation – are broadly defined. This is why offences under Article 273f DCC are quickly completed offences, although the dividing line is not always easy to draw. The phase in which a victim is prepared for work in prostitution, the so-called 'grooming period', is not always treated in the same way. It is sometimes regarded as part of the recruitment element of the offence of human trafficking, but sometimes as attempt. The choice of subsection can make the difference between a conviction for attempt or for a completed offence.

9.2.3 Sentencing

In 2010, unconditional prison sentences of longer than four years were the exception. That seems to be changing. In the last few years, relatively heavier sentences have been imposed in first instance in a number of human trafficking cases. The PPS's Instructions on Human Trafficking, concerning the sentences to be demanded, are not incorporated in this analysis because they only entered into force recently (2010 and 2012). Nevertheless, this study did review the extent to which the Instructions have influenced the decisions of the courts and these Instructions may in the future lead to higher sentences. In light of the increase of the statutory maximum sentences in 2009 and the bill that has since been tabled to increase sentences further, the difference between the sentences actually imposed and the statutory maximum sentences does, in any case, seem to be widening. Naturally, the increase in the statutory maximum sentences in 2009 is barely reflected in the sentences in 2010 because in many cases the convictions related to offences committed during periods still covered by the previous maximum sentences.

Factors that influence sentencing

The law specifically mentions a number of aggravating circumstances that lead to higher sentences, including acting in concert, the fact that a victim is younger than 16 and serious physical injury resulting from the offence. One would expect that these circumstances would actually lead to heavier sentences, but this is certainly not always the case. For example, two or more people acting in concert is seldom mentioned as an aggravating factor and is sometimes even regarded as a *mitigating* factor. The aggravating factor that human trafficking is committed against a victim younger than 16 is also not always mentioned in the grounds for the sentence imposed.

There is also a lack of uniformity in the application of other factors that can influence sentencing. For example, the number of victims of the offences for which convictions were handed down was decisive for the sentencing in the *Sneep* cases, but in another judgment this aspect was ignored when it came to sentencing. The duration of the offence in human trafficking cases is treated relatively consistently in the grounds for sentencing, but it is, naturally, also important for the duration of the human trafficking offence to be established in a consistent manner. The average duration of the longest-lasting human trafficking offence in each conviction, in cases of both sexual and other forms of exploitation, was roughly a year in 2010. The longest-lasting human trafficking offence in relation to sexual exploitation was almost 5½ years and with other forms of exploitation just over three years. As regards the duration of the offence as a contributing factor in determining the sentence, the courts sometimes only consider the period during which a victim was actually exploited in prostitution and leave aside the period of recruitment and transport. However, human trafficking starts with the recruitment of the victims. It is therefore also important to carefully review the period during which the offence is committed.

Sometimes, circumstances are regarded as mitigating factors when in fact they should not play any such role. This is the case, for example, in cases involving minors or offences under Article 273f (1)(3) DCC, where coercion is not a requirement but the court nevertheless treats the absence of coercion as a factor favouring the defendant. The absence of violence is also sometimes taken into account, which is inconsistent with a conviction for a violent crime of intent. Another factor that is also irrelevant but is nevertheless sometimes taken into account in sentencing is the fact that the victim was already working in prostitution.

The most important conclusion on the issue of sentencing, however, is that there are major disparities and that the courts have little to guide them when determining sentences. Orientation points could provide guidance in that regard.

9.2.4 Compensation

Claim by aggrieved party

Victims of human trafficking still rarely join the criminal proceedings as an aggrieved party. When victims have submitted a claim as an injured party, their claims have often been declared inadmissible. The new statutory criterion for admissibility - that the aggrieved party's claim must not unreasonably burden the trial - should lead to an earlier handling of the claim during the criminal proceedings. This is also confirmed in the internal working agreements of the LOVS (Recommendations). In that context, it is disappointing that the Supreme Court, in its judgment of 3 July 2012, allowed judges a lot of discretion to rule that a claim is disproportionately burdensome. Accordingly, even fewer victims will receive any compensation for the damages they have sustained. Apart from emotional injury, the claims are mainly for material damages, particularly for earnings that have been confiscated or withheld from them. The courts make little or no use of the possibility to make an order to pay compensation *ex officio*, although it would sometimes be reasonable to do so.

Reasoning

Another noteworthy aspect in the jurisprudence is that there is considerable discrepancy in the manner in which claims by aggrieved parties are assessed and in the methods used to calculate damages. Different methods are used to calculate the earnings that have been confiscated (material damages) in particular. In addition, reasons are seldom given when claims are awarded, making it difficult to discover what considerations led to the decision and what factors were taken into account in the calculation. In determining the amount to be awarded for *emotional injury*, some obvious factors, such as the period a person was a victim, the nature and degree of violence and the ages of the victims, are often not considered at all. It is noteworthy that the internal agreements drawn up by the LOVS for handling these claims, such as the application of the rules of civil law, the possibility of making an estimate of the amount to be awarded and the method of dividing the claim in human trafficking cases, are not widely applied.

Compensation and confiscation

No consistent link seems to be made in human trafficking cases in the Netherlands between confiscation and compensation. Money seized in human trafficking cases often represents the earnings confiscated or withheld from the victim. If a victim has not made a claim or the claim is not awarded, it is questionable whether it is currently possible for the victim to make a direct request to the PPS (naturally with supporting arguments) for at least a share of the confiscated money, so that the money goes to the person most entitled to it. *A single judgment indicates a realisation that it is not right for the State to profit from the exploitation.*

9.3 Recommendations

The key message from this study is that specialisation and training are necessary to enable the criminal justice system to handle human trafficking cases in a manner befitting the seriousness of the offence and the concern about human trafficking at national and international level. In that respect, it is also important to pursue consistency in sentencing. This key message is reflected in the recommendations.

The first recommendation refers to specialisation and the training of judges and public prosecutors who handle human trafficking cases. The need to safeguard knowledge and expertise is recognised within the PPS and the judiciary and has led to agreements to organise training to ensure the existence of sufficient knowledge to handle human trafficking cases competently.

But effective training alone is not enough. It is important for both judges and public prosecutors to be able to specialise in human trafficking cases. Human trafficking cases have been handled by specialists within the PPS for some time now, but that is not yet the case with the judiciary. To allow specialisation and build up expertise, concentration *within* the courts is also necessary. Agreement has now been reached within the LOVS that human trafficking cases will be heard by a limited number of judges in each court. It is very important that this intention is carried out.

This leads to the following recommendation:

Recommendation 1 ARRANGE SPECIALISATION AND PROVIDE TRAINING IN HUMAN TRAFFICKING CASES

Human trafficking cases are complex. The PPS and judiciary must ensure that public prosecutors and judges who handle these cases can specialise in them and receive proper training.

The second recommendation relates to the drafting of orientation points. This study has shown that the sentencing in human trafficking cases varies. The judgments do not reflect a clear framework of assessment. In 2010 and 2012, the PPS formulated Instructions on the sentences to be demanded in human trafficking cases, for both sexual exploitation and other forms of exploitation. These Instructions are not necessarily decisive for the judiciary and the LOVS has not formulated any sentencing guidelines of its own. While the discussion on this subject within the judiciary is currently stalled over the question of whether it is actually possible to develop such guidelines or orientation points, the PPS has already answered that question with the help of numerous external experts. For consistency in sentencing in human trafficking cases, it is important for the judiciary not to wait any longer and to proceed with the formulation of orientation points.

There is another important point in relation to the development of orientation points. The development of sentencing in human trafficking cases can be identified by analysing earlier published judgments. However, using that analysis to develop orientation points would mean that the process is confined to a review of the past, without taking account of the fact that the maximum statutory sentences have been increased several times in recent years and the reasons why that has been done. It is also relevant in that context that a bill was recently sent to parliament providing for a further increase in the maximum sentences. These developments are dictated mainly by the seriousness of the crime of human trafficking, which usually represents a very serious infringement of the victim's human dignity and integrity over a lengthy period, often with permanent psychological and other con-

sequences. For the development of orientation points, therefore, it is relevant to enquire how these developments should be addressed and how the seriousness of the offence of human trafficking should be perceived.

This leads to the following recommendation:

Recommendation 2 DEVELOP ORIENTATION POINTS

The judiciary should develop orientation points in the interests of consistent sentencing in human trafficking cases.

The third and final recommendation relates to compensation. The right to compensation for victims in general, and hence also victims of human trafficking, is evolving. The new criterion for admissibility of claims by an aggrieved party should also lead to more claims by victims of human trafficking being declared admissible in practice. The recommendations made by the LOVS to this effect should be generally applied by the judiciary. The PPS should also take a more active approach in this regard by arranging for a financial report to be drawn up in every human trafficking case.

The methods employed to calculate damages vary greatly, which is undesirable from the perspective of legal equality and certainty, which should be the main principles in formulating points of departure. If the judge awards a claim by an aggrieved party, the decision should be accompanied by an explanation of the reasons why the particular method of calculating the damages was chosen so that it is clear from the judgment what factors guided the court in its calculations.

The court should, in any case, take account of the possibility of making an order to pay compensation *ex officio*. Human trafficking is an offence where the offender enjoys often substantial economic benefit at the expense of another person. By definition, the victim suffers damages, material or emotional. For the PPS, this should mean that money that is confiscated, quite apart from the question of whether a claim by an aggrieved party is awarded, should go to the victim if that money comprised earnings that had been confiscated or withheld.

The absence of an adequate basis, statutory or otherwise, for claiming confiscated money, even if a claim is not awarded, means that victims depend for compensation on the personal views of magistrates, which is contrary to the idea that victims have a right to compensation for damages they have suffered. The connection between the confiscation of illegally obtained profits and compensation is clearly laid down at international level, most recently in the EU Directive on Human Trafficking, which has still to be implemented. A greater effort is also needed in the Netherlands with regard to the appropriation of money confiscated in human trafficking cases.

This leads to the following recommendation:

Recommendation 3 GIVE EFFECT TO THE RIGHT OF A VICTIM OF HUMAN TRAFFICKING TO COMPENSATION FOR DAMAGES SUFFERED

The PPS should actively endeavour to ensure that the victim receives compensation for material damages in the form of earnings confiscated or withheld. The courts should implement the new criterion for admissibility of claims and formulate principles for awarding compensation in human trafficking cases.

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Appendices

A1: Article 273f DCC

A2: Research methodology

A3: Additional tables

A1 Article 273f DCC

1. Any person who:
 - 1°. by force, violence or other act, by the threat of violence or other act, by extortion, fraud, deception or the misuse of authority arising from the actual state of affairs, by the misuse of a vulnerable position or by giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person recruits, transports, moves, accommodates or shelters another person, with the intention of exploiting this other person or removing his or her organs;
 - 2°. recruits, transports, moves, accommodates or shelters a person with the intention of exploiting that other person or removing his or her organs, when that person has not yet reached the age of eighteen years;
 - 3°. recruits, takes with him or abducts a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country;
 - 4°. forces or induces another person by the means referred to under (a) to make himself/ herself available for performing work or services or making his/her organs available or takes any action in the circumstances referred to under (a) which he knows or may reasonably be expected to know will result in that other person making himself/herself available for performing labour or services or making his/her organs available;
 - 5°. induces another person to make himself/herself available for performing sexual acts with or for a third party for remuneration or to make his/her organs available for remuneration or takes any action towards another person which he knows or may reasonably be expected to know that this will result in that other person making himself/ herself available for performing these acts or making his/her organs available for remuneration, when that other person has not yet reached the age of eighteen years;
 - 6°. wilfully profits from the exploitation of another person;

- 7°. wilfully profits from the removal of organs from another person, while he knows or may reasonably be expected to know that the organs of that person have been removed under the circumstances referred to under (a);
 - 8°. wilfully profits from the sexual acts of another person with or for a third party for remuneration or the removal of that person's organs for remuneration, when this other person has not yet reached the age of eighteen years;
 - 9°. forces or induces another person by the means referred to under (a) to provide him with the proceeds of that person's sexual acts with or for a third party or of the removal of that person's organs; shall be guilty of trafficking in human beings and as such liable to a term of imprisonment not exceeding eight years and a fifth category fine*, or either of these penalties:
2. Exploitation comprises at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery like practices or servitude.
 3. The following offences shall be punishable with a term of imprisonment not exceeding twelve years and a fifth category fine*, or either of these penalties:
 - 1°. offences as described in the first paragraph if they are committed by two or more persons acting in concert;
 - 2°. offences as described in the first paragraph if such offences are committed in respect of a person who is under the age of sixteen.
 4. If one of the offences described in the first paragraph results in serious physical injury or threatens the life of another person, it shall be punishable with a term of imprisonment not exceeding fifteen years and a fifth category fine*, or either of these penalties.
 5. If one of the offences referred to in the first paragraph results in death, it shall be punishable with a term of imprisonment not exceeding eighteen years and a fifth category fine, or either of these penalties.
 6. Article 251 is applicable *mutatis mutandis*.

A2 Research methodology

Objective and research questions

The aim of this study of the case law was to analyse the recent case law in the Netherlands relating to human trafficking in the sex industry and other forms of exploitation.

Special attention was devoted to a number of issues, including the application of Article 273f DCC, the formulation of indictments and some of the issues and pitfalls that emerged from the previous study of case law (see NRM7, Chapter 11). The latter included the subjects of coercion and free will, attempt and the application of subsections 3 and 4 of Article 273f (1) DCC. This study also covers the grounds for sentencing adopted by courts in their judgments, the sentences imposed and compensation claimed by and awarded to victims.

The research questions were formulated as follows:

- How is Article 273f DCC applied and what problems have emerged in relation to its application?
- What sentences are demanded for human trafficking, how is human trafficking punished and what reasons are given for the sentences imposed?
- How are claims by aggrieved parties dealt with in the criminal process?

Research methods

To answer these questions, BNRM performed a qualitative, and partial quantitative, analysis of all the judgments rendered since the publication of NRM7 in October 2009 up to 1 August 2012 that were published on www.rechtspraak.nl or were otherwise notified to BNRM. The total number of judgments came to over 400 – including judgments of courts of appeal and the Supreme Court. Through the cooperation of LOVS, BNRM received all of the judgments (in anonymous form) from 2010, which represent 138 of the more than 400 judgments studied. Whenever judgments that were rendered orally were also published on www.rechtspraak.nl, the LJN number of the case is given.

The quantitative part of the study relates exclusively to judgments in human trafficking cases in first instance in 2010 (N: 138, of which 109 related solely to sexual exploitation, two to both sexual and other forms of exploitation and 27 only to other forms of exploitation). Because BNRM had access to all of the judgments rendered in first instance in 2010,¹ some comparisons could be made with the previous study of the case law. The judgments were all subjected to systematic analysis, resulting in a data set that could be used to reach conclusions with respect to cases of both sexual and other forms of exploitation in 2010.

We also received statistics from the Central Fine Collection Agency (CJIB) about compensation orders imposed in human trafficking cases in the period 2007-2011 and from the Violent Offences Compensation Fund with respect to financial compensation paid to victims of human trafficking in the same period.

Notes on the quantitative analysis of the 138 judgements in 2010

Most of the human trafficking cases heard in first instance in 2010 were defended; only a small percentage were tried *in absentia*.² Most of the judgments in 2010 were abridged, usually containing the reasons for a conviction or acquittal. The decisions of the courts in 2010 were more extensively reasoned than the judgments in the previous study (see Appendix 3, Table A1.3). As a result, it was possible to retrieve more information from the judgments in 2010, which must be taken into account in relation to the comparability of the findings in some respects.

Since the quantitative analyses were performed on all judgments in 2010, the study covered the entire population. Significance tests are therefore irrelevant, since they are designed to show whether the results for a sample are valid for the population from which the sample is taken. At the same time, however, the judgments in 2010 can be regarded as a representative sample of human trafficking judgments in general (in other words, also in years other than 2010). Accordingly, the significance of some differences that were observed in 2010 was tested and reported in the footnotes, indicating whether the differences found in 2010 can be applied to human trafficking judgments in general.

Finally, it is important to stress that this study of case law is not a study of the phenomenon of human trafficking. With respect to Chapter 5 (Suspects and perpetrators) and Chapter 7 (Victims), in particular, it would be easy to make errors of interpretation in the sense of applying the characteristics of offenders and victims described in those chapters to all offenders and victims of human trafficking as it occurs in the Netherlands. The offenders and victims who appear in the study cannot be regarded as a representative sample of the offenders and victims of human trafficking in general, since there are many steps to go through before a case ultimately appears before the courts (the detection of an offence by an investigating body, the start of an investigation, the successful completion of the investigation, the decision

1 This emerged from a comparison with the PPS's national database, which contains information about the prosecution of suspects from the nineteen regional offices.

2 In human trafficking cases in the sex industry, 106 cases (95%) involving individual suspects were defended – with the suspect failing to appear on three occasions – and the cases against five suspects (5%) were heard *in absentia*. Outside the sex industry, 28 judgments (97%) involving individual suspects were rendered in cases that were defended – with the defendant failing to appear in three cases – and the case of one suspect (3%) was heard *in absentia*.

to prosecute and bring charges for at least the offence of human trafficking). Consequently, only a select group of offenders and victims are ultimately involved in human trafficking cases that go to trial.³ The characteristics of the offenders and victims reported in this study therefore only say something about the offenders and victims who appeared in a human trafficking case at trial. Even then, it has to be noted that because of the relatively small number of cases, some major cases involving a large number of offenders and victims, often with the same personal characteristics, can have a significant influence on the data concerning the characteristics of offenders and victims. This is particularly true in cases of other forms of exploitation.

Notes on the data acquired from the CJIB

The data concerning compensation orders imposed in human trafficking cases provided by the CJIB at the request of BNRM are anonymous data at case level. In other words, they represent compensation orders that were imposed on individuals who had been irrevocably convicted of at least human trafficking. Data selection was based on the article number under which the offenders were convicted (Articles 250ter, 250a, 273a and 273f DCC). It also needs to be stressed that the cases that emerged from the selection involved at least human trafficking, but not, by definition, only human trafficking. Some of the compensation orders reported were imposed for human trafficking in combination with other offences.

Notes on the data acquired from the Violent Offences Compensation Fund

The Violent Offences Compensation Fund records applications for financial compensation on the basis of the article of the law governing the relevant violent crime. The Compensation Fund only records the principal article that it considers should be decisive in deciding whether or not to pay compensation.^{4,5} The Compensation Fund decides on the principal article itself, so it does not necessarily correspond with the legal classification that the police and/or PPS have assigned to the situation. BNRM received the data for the files for which Article 250a or 273f were noted as the principal article for the application for compensation from the Fund. There might have been more than one violent offence, but because only the principal article is recorded, it is impossible to say whether a victim applied for compensation from the Fund on the basis of violent offences other than human trafficking.

Notes on the tables, figures and statistics applied

1. Notes on the tables

The individual percentages in the tables do not always add up to 100% because figures are rounded off to 100% (or to the relevant percentage in the case of subtotals). Naturally, the total is 100% (or the relevant percentage for the subtotal). This is noted accordingly. If a column or row in a table contains numbers, the letter N is used at the start of the column or row to denote the word 'number'. In the tables, a

3 It is therefore not a random sample of all suspects and victims who enter the criminal justice system.

4 Verbal information from the Violent Offences Compensation Fund, 30 August 2012.

5 This does not automatically mean that these are all human trafficking cases. To illustrate, in response to the request for human trafficking files, BNRM also received data from the Violent Offences Compensation Fund about files in which offences were registered under articles other than 250a or 273f. These may also have involved human trafficking, but there was no way of telling whether the application was from a victim of human trafficking. These files were therefore not included in the analyses.

dash (-) is used to represent a zero and to indicate that the associated percentage is 0%. If the number is higher than zero but the percentage comes to 0% after rounding off, 0% is used rather than a dash.

2. Notes to the figures

This report contains numerous figures that are based on some of the additional tables in Appendix 3 (Tables A2.1-A2.4 and A3.1-A3.6). These notes contain some remarks that are important for the interpretation of these figures. If the figure shows a trend (differences across periods) in an absolute sense (numbers), a line diagram is used. If the figure shows a trend in a relative sense (percentages), a bar chart is used. If the figure provides a total overview of a particular period, a pie chart is used. There are occasional exceptions to this rule where the alternative made the meaning clearer (Figures 7 and 8).

3. Notes on the statistics used

Index figure

Some tables contain an index figure. The index figure shows by how many the number of compensation orders imposed, for example, has changed in a particular year in relation to a reference year. The year chosen as the reference is shown at the top of the table. The figure for that year is 1.0. An index figure higher than 1.0 represents an increase compared with the reference year and an index figure lower than 1.0 indicates a decline.

Standard deviation

Some tables and text refer to averages, such as the average length of the unconditional prison sentences imposed. When this is done, both the number of units (in this example, the number of unconditional prison sentences imposed) on which the average is based (N) and the standard deviation (SD) are given. The SD expresses the range of the values of the units for which the average is calculated. The higher the SD, the greater the range.

Significance

As already explained under 'Notes to the quantitative analysis of the 138 judgments' from 2010, significance is only relevant if the judgments in 2010 are regarded as a representative sample of human trafficking judgments in general. If the differences that are shown are significant (valid for human trafficking judgments in general), a footnote always gives the probability (p) value. A p-value of 0.05 means that the probability of a difference being a coincidence is 5%. A difference is described as significant if the probability that the difference is not based on coincidence (and is therefore a genuine difference) is greater than 95% ($p < 0.05$). If the probability is greater than 99% ($p < 0.01$), it represents a very significant difference. Depending on the measurement levels of the relevant variable, we used the following measures to determine significance in this study; the chi-squared test (X^2) (and if the assumptions⁶ were not

6 All expected cell frequencies ≥ 1 and up to a maximum of 20% of the expected cell frequencies lie between one and five.

met, the Fisher's exact test⁷) and the Student's t test (and if the assumptions⁸ were not met, the non-parametric Mann-Whitney test (U)). These results are also shown in the footnotes.

Correlations

Occasionally, when the X^2 or Fisher's exact test showed a significant difference, this was reviewed according to the strength of the correlation. Cramer's V was used for this, a value that always lies between 0 and 1 and shows the extent to which the observed differences are determined by the relevant variables (in other words, the strength of the correlation between the relevant variables). A Cramer's V value of more than 0.0-0.10 is regarded as very weak, from 0.10-0.25 as weak, from 0.25-0.35 as moderate, from 0.35-0.45 as strong and 0.45 and higher as a very strong correlation.

7 In the case of a 2x2 table. When the Fisher's Exact test was used, the results of the X^2 test are shown with the level of significance shown by the Fisher's Exact test.

8 The dependent variable is divided and/or the N of the two groups to be compared is greater than 30 (central limit).

A3 Additional tables

This appendix contains tables with additional or more detailed information about the subjects discussed in the various chapters. In order, they are:

- 1) tables based on the quantitative study of some or all of the 138 human trafficking judgments that were rendered in 2010 (Tables A1.1 to A1.10);
- 2) tables based on the data that BNRM received from the Central Fine Collection Agency (Tables A2.1 to A2.4;
- 3) tables based on the data that BNRM received from the Violent Offences Compensation Fund (Tables A3.1 to A3.6).

1 Tables based on the quantitative study of human trafficking judgments rendered in 2010

Study of case law versus PPS data

Table A1.1 shows the extent to which the figures from BNRM's study of the judgments rendered in 2010 correspond with the figures from the analysis of the PPS data that BNRM published at the beginning of 2012.¹ Because the PPS data do not make a distinction between cases of sexual exploitation and of exploitation outside the sex industry, the comparison covers all cases in the two categories.

Table A1.1 Study of case law versus PPS data (2010)

	Study of case law		PPS data	
	N	%	N	%
Conviction (full or partial) for human trafficking	83	62%	80	63%
Acquittal for human trafficking (regardless of whether other offences were declared proven)	51	38%	47	37%
Total	134	100%	127	100%

The study of case law: $N: 138 - 4^2 = 134$

PPS data (reference date 1 September 2011): $N: 135 - 8^2 = 127$

¹ See NRM 2012a.

² In three judgments, the indictment was declared entirely null and void (Alkmaar District Court 15 April 2010, 14-018035-03; 14-018036-03; 14-018037-03 (not published)). In one judgment, all of the charges for human trafficking were dismissed (Zwolle-Lelystad District Court 27 December 2010, LJN: BO9988).

³ In eight judgments, the indictment was either declared null and void or indictments were joined during the hearing.

As the table shows, the figures correspond fairly closely. The very minor differences are due to the fact that the PPS maintains a living database, so that minor changes occur with each successive reference date. In addition, the PPS data may include minor errors in registration.

Human trafficking judgments rendered by each district court

Table A1.2 shows the number of judgments rendered in first instance by the various district courts in human trafficking cases in 2010, broken down by cases of sexual and other forms of exploitation. The second number in each row (between brackets) represents the number/percentage of human trafficking investigations covered by the specified judgments.

Table A1.2 Human trafficking judgments rendered by each district court (2010)⁴

District Court	Sexual exploitation		Other forms of exploitation		Totaal	
	N	%	N	%	N	%
Den Bosch	9 (2)	8% (3%)	-	-	9 (2)	7% (3%)
Breda	-	-	-	-	-	-
Maastricht	-	-	-	-	-	-
Roermond	2 (2)	2% (3%)	2 (1)	7% (8%)	4 (3)	3% (4%)
Arnhem	10 (6)	9% (10%)	(1) ⁵ ((1))	3% (8%)	10 (6)	7% (8%)
Zutphen	-	-	-	-	-	-
Zwolle-Lelystad	7 (3)	6% (5%)	2 (1)	7% (8%)	9 (4)	7% (6%)
Almelo	1 (1)	1% (2%)	-	-	1 (1)	1% (1%)
Den Haag	16 (7)	14% (12%)	15 (5)	52% (38%)	31 (12)	22% (17%)
Rotterdam	20 (9)	18% (15%)	-	-	20 (9)	14% (13%)

4 Based on the district court that heard the case, even when the hearing was held at another location.

5 This judgment/investigation by Arnhem District Court (17 November 2010, 05-702246-10 (not published)) concerned sexual exploitation as well as other forms of exploitation and is included in the column on sexual exploitation, in both the judgments and in the investigations.

District Court	Sexual exploitation		Other forms of exploitation		Totaal	
	N	%	N	%	N	%
Dordrecht	-	-	3 (1)	10% (8%)	3 (1)	2% (1%)
Middelburg	-	-	-	-	-	-
Amsterdam	22 (13)	20% (22%)	-	-	22 (13)	16% (18%)
Alkmaar	9 (6)	8% (10%)	-	-	9 (6)	7% (8%)
Haarlem	1 (1)	1% (2%)	1 (1)	3% (8%)	2 (2)	1% (3%)
Utrecht	3 (2)	3% (3%)	2 (2)	7% (15%)	5 (4)	4% (6%)
Leeuwarden	4 (3)	4% (5%)	2 (+1) ⁶ ((1))	10% (8%)	6 (3)	4% (4%)
Groningen	6 (4)	5% (7%)	-	-	6 (4)	4% (6%)
Assen	1 (1)	1% (2%)	-	-	1 (1)	1% (1%)
Total judgment	111	100%	27 (+2)	100%	138	100%
Total number of investigations	(60)	(100%)	(11 (+2))	(100%)	(71)	(100%)

Types of judgements in human trafficking cases

Table A1.3 presents a breakdown of the 138 judgments in human trafficking cases in 2010 that were analysed – by type of judgment – broken down between cases of sexual and other forms of exploitation.

6 One judgment/investigation by the Leeuwarden District Court (13 July 2010, LJN: BN1233) involved sexual exploitation as well as other forms of exploitation and is included in the column on sexual exploitation, in both the judgments and the investigations.

Table A1.3 Types of human trafficking judgments (2010)

Type of judgement	Sexual exploitation		Other forms of exploitation	
	N	%	N	%
Abridged judgments with reasons for conviction or acquittal and description of the evidence⁷ or description of the facts/circumstances (in the case of acquittal)	63	57%	18	62%
Abridged judgments with reasons for conviction or acquittal without detailed evidence	38	34%	10	34%
Abridged judgments without reasons for conviction or acquittal and without detailed evidence	8 ⁸	7%	1	3%
Note of verbal judgment	2	2%	-	-
Total	111	100%	29	100%

In 91% of the cases of sexual exploitation and 97% of the cases of other forms of exploitations, the judgments included a statement of the reasons for conviction or acquittal. In a large majority of the judgments (57% of the cases of sexual exploitation and 62% of the cases of other forms of exploitation), there was a description of the evidence or – in the case of acquittal for human trafficking – of the facts and circumstances that the court found to have been established (mainly in cases of other forms of exploitation). By comparison with the 2007 study of the case law study⁹, in which only 30% of the judgments further described the evidence, the judgments in 2010 provided more information.

Preliminary issues

Table A1.4 shows how the courts ruled on the preliminary issues that they are required to assess pursuant to Article 348 of the Code of Criminal Procedure.¹⁰

7 In these cases, the evidence was presented in detail either in judgments falling under the Project to Improve Reasoning in Criminal Judgments (Promis) or for the purpose of an appeal.

8 Three of these cases concerned a judgment in which the indictment was declared entirely null and void (Alkmaar District Court, 15 April 2010, 14-018035-03; 14-018036-03; 14-018037-03 (not published)) and one was a judgment in which all the charges relating to human trafficking were dismissed (Zwolle-Lelystad District Court 27 December 2010, LJN: BO9988).

9 NRM7, p. 441.

10 Excluding the reasons for suspending prosecution, since this was never the case in any of the judgements analysed.

Table A1.4 Preliminary issues (2010)

Preliminary questions		Sexual exploitation		Other forms of exploitation	
		N	%	N	%
Validity of the indictment	Not null and void	96	86%	29	100%
	Partially null and void ¹¹	10	9%	-	-
	Entirely null and void with respect to at least one human trafficking offence ¹²	2	2%	-	-
	Entirely null and void	3 ¹³	3%	-	-
Jurisdiction of the court	Competent	107	96%	29	100%
	Partially incompetent	1 ¹⁴	1%	-	-
	Not applicable ¹⁵	3	3%	-	-
Is prosecution barred?	Prosecution was not barred	105	95%	29	100%
	Prosecution was partially barred	2 ¹⁶	2%	-	-
	Prosecution was barred	1 ¹⁷	1%	-	-
	Not applicable ¹⁸	3	3%	-	-

Sexual exploitation: N: 111

Other forms of exploitation: N: 29

Subsections under which charges were brought and declared proven

Table A1.5 shows how often charges were brought and declared proven under the various subsections of Article 273a/f(1) DCC in 2010, broken down between cases of sexual and other forms of exploitation. The subsections are not mutually exclusive, since indictments and judgments regularly encompass offences under more than one subsection.

- 11 On specific elements. This can mean, for example, that there was an acquittal on charges relating to part of the duration of the period of exploitation, some means of coercion or some victims, but that the human trafficking offence was otherwise declared proven.
- 12 But not all human trafficking offences.
- 13 In three judgments, the indictment was declared entirely null and void (Alkmaar District Court 15 April 2010, 14-018035-03; 14-018036-03; 14-018037-03 (not published)).
- 14 Amsterdam District Court 9 March 2010, 13-529038-09 (not published).
- 15 The judgments in which the indictment was declared entirely null and void.
- 16 Utrecht District Court 14 July 2010, LJN: BN5110 and Amsterdam District Court 30 December 2010, 13-529122-09 (not published).
- 17 With respect to all human trafficking offences charged. In this case, the prosecution was not barred with respect to one of the offences other than human trafficking that was charged (Zwolle-Lelystad District Court 27 December 2010, LJN: BO9988).
- 18 The indictment was declared entirely null and void.

Table A1.5 Subsections under which charges were brought and declared proven (2010)

Article number	Sexual exploitation				Other forms of exploitation			
	Indictment		Judgment		Indictment		Judgment	
	N	%	N	%	N	%	N	%
273a/f (1) (1)	68	61%	37	54%	27	93%	11	79%
273a/f (1) (2)	13	12%	7	10%	4	14%	-	-
273a/f (1) (3)	51	46%	34	49%	-	-	-	-
273a/f (1) (4)	60	54%	29	42%	25 ¹⁹	86%	9	64%
273a/f (1) (5)	18	16%	13	19%	-	-	-	-
273a/f (1) (6)	54	49%	33	48%	14	48%	6	43%
273a/f (1) (8)	10	9%	5	7%	-	-	-	-
273a/f (1) (9)	59	53%	33	48%	1	3%	-	-
250a (1) (1)	8	7%	4	6%	-	-	-	-
250a (1) (2)	4	4%	3	4%	-	-	-	-
250a (1) (4)	4	4%	-	-	-	-	-	-
250a (1) (5)	3	3%	2	3%	-	-	-	-
250a (1) (6)	4	4%	2	3%	-	-	-	-

Sexual exploitation: indictments: N=111; judgments: N=69

Other forms of exploitation: indictments: N=29; judgments: N=14

In the judgments in cases of sexual exploitation, charges under subsections 1, 3, 4, 6 and/or 9 appeared most frequently in both the indictments and the judgments (between 42% and 61%). In the indictments, the most frequent combination was subsections 1, 4, 6 and 9 (in 21 indictments: 19%). The combination of subsections 1, 3, 4, 6 and 9 also occurred regularly – a total of 18 times (16%). The most frequent judgments were exclusively for offences under subsection 3: 12 convictions (17%), a combination of subsections 1, 3, 4, 6 and 9: a total of 10 times (14%) and a combination of subsections 1, 4, 6 and 9: a total of eight times (12%).

In cases involving other forms of exploitation, a combination of charges under subsections 1, 4 and/or 6 appeared most frequently in the indictments, and even exclusively in the judgments (between 43% and 93%). In the indictments, the combination of subsection 1 and 4, like the combination of subsections 1, 4 and 6, occurred most frequently – in nine indictments in all (31% for both combinations). In three judgments (21%) each, the combinations of subsections 1, 4 and 6, subsections 1 and 4 and subsections 1 and 6 and subsection 4 by itself were declared proven. In two judgments (14%), only subsection 1 appeared.

19 In four judgments, it is unclear whether an offence was charged under subsection 4 (The Hague District Court 17 February 2010, LJN: BL4279; BL4298; 09-754012-09; 09-754074-09 (not published)).

Convictions under different subsections in relation to the subsections charged

Table A1.6 shows the subsections of Article 273a/f DCC under which charges were declared proven most often and least often. The number of times that offences under a particular subsection were declared proven is also shown in relation to the number of times charges were brought under that subsection²⁰ and dealt with at a hearing²¹.

Table A1.6 Subsections under which charges were declared proven in relation to subsections under which charges were brought (2010)

Article number	Sexual exploitation						Other forms of exploitation					
	Number of times declared proven		Number of times declared not proven		Total ²²		Number of times declared proven		Number of times declared not proven		Total ²³	
	N	%	N	%	N	%	N	%	N	%	N	%
273a/f (1) (1)	37	55%	30	45%	67 ²⁴	100%	11	41%	16	59%	27	100%
273a/f (1) (2)	7	54%	6	46%	13	100%	-	-	4	100%	4	100%
273a/f (1) (3)	34	64%	19	36%	53 ²⁵	100%	-	-	-	-	-	-
273a/f (1) (4)	29	49%	30	51%	59 ²⁶	100%	9	36%	16	64%	25	100%
273a/f (1) (5)	13	72%	5	28%	18	100%	-	-	-	-	-	-
273a/f (1) (6)	33	62%	20	38%	53 ²⁷	100%	6	43%	8	57%	14	100%
273a/f (1) (8)	5	50%	5	50%	10	100%	-	-	-	-	-	-
273a/f (1) (9)	33	57%	25	43%	58 ²⁸	100%	-	-	1	100%	1	100%

20 Both the judgments and the indictments relating to each subsection were analysed at judgment level, not at offence level.

21 The three judgments in which the indictment was declared entirely null and void and the judgment in which all the charges for human trafficking were dismissed are therefore ignored here, see Table A1.4.

22 This is the total number of times that offences under the subsection concerned were charged and dealt with at trial.

23 This is the total number of times that offences under the subsection concerned were charged and dealt with at trial.

24 Sixty-eight judgments, according to Table A1.5, minus one judgment in which the charges for human trafficking were dismissed.

25 Fifty-one judgments, according to Table A1.5, plus two judgments in which only alternative charges were brought under subsection 3.

26 Sixty judgments, according to Table A1.5, minus one judgment in which the charges for human trafficking were dismissed.

27 Fifty-four judgments, according to Table A1.5, minus one judgment in which the charges for human trafficking were dismissed.

28 Fifty-nine judgments, according to Table A1.5, minus one judgment in which the charges for human trafficking were dismissed.

In cases of sexual exploitation, charges brought under subsection 5 (72%) and subsection 3 (64%) were declared proven most often in relative terms. Likewise, charges brought under subsection 4 and subsection 8 were declared proven least often (49% and 50%, respectively). As regards other forms of exploitation, offences under the most frequently applied subsections (subsections 1, 4 and 6) were also declared proven in around 40% of the cases in which they were charged in the indictment and dealt with at the hearing. Accordingly, there are no major discernible differences in the provability of offences under the various subsections in cases of other forms of exploitation.

Means of coercion as a necessary element of the offences in cases of sexual exploitation

Table A1.7 shows the number of cases in which means of coercion were charged or declared proven as an element of the offence of human trafficking in the judgments on sexual exploitation.²⁹ The table also shows the reasons why means of coercion was not a necessary element of the offence in the relevant cases.³⁰

Table A1.7 Means of coercion as a necessary element of the offence in cases of sexual exploitation (2010)

		Indictment		Conviction	
		N	%	N	%
Means of coercion not a necessary element of the offence	Victims were all minors / Article 273a/f (1)(3) / Article 250a (1)(2)	28	25%	24	22%
	Complete acquittal for human trafficking / indictment declared null and void / charges of human trafficking dismissed	n.a.	n.a.	42	38%
Means of coercion as a necessary element of the offence		83	75%	45	41%
Total		111	100%	111	100%

In three-quarters of the 111 indictments, means of coercion were a necessary element of the offence. In the other indictments, the human trafficking related solely to victims who were minors³¹ and/or Article 273a/f (1)(3) DCC, where coercion is not required. In roughly 40% of the 111 judgments, means of coercion that were declared proven were a necessary element of the offence. The reason for this is that almost 40% of the judgments led to acquittal for human trafficking and, in just over a fifth of the judgments, there were convictions only for offences against underage victims or offences under Article 273a/f (1)(3) DCC/Article 250a (1)(2) DCC.

As the above table shows, of the 69 convictions for human trafficking, there were 45 judgments (65%) in which means of coercion were a necessary element of the offence and 24 judgments (35%) in which means of coercion were not required for a conviction. It should be noted that the 45 cases in which means of co-

29 In all 29 judgments in cases of other forms of exploitation, coercion was an element of the offence since not one judgment exclusively involved victims who were minors.

30 The fact that means of coercion are not a necessary element of the offence does not mean that coercion was not referred to in the case (in the indictments and judgments).

31 Where victims did not reach adulthood during the period covered by the charges.

ercion were a necessary element of the offence and were declared proven represents a smaller proportion of the total than the 83 cases (75%) in which the means of coercion were mentioned in the indictment.

Offences other than human trafficking that were charged and declared proven

In 69 (62%) of the 111 judgments involving sexual exploitation and in 27 (93%) of the 29 judgments in cases of other forms of exploitation, other offences were charged in addition to human trafficking. In 43 (62%) of the judgments in cases of sexual exploitation, offences other than human trafficking were declared proven.³² The same applies for 25 (93%) of the 27 judgments on other forms of exploitation in which offences other than human trafficking were also charged.³³ The nature of those other offences is shown in Table A1.8. Since multiple other offences could have been charged in a single case, the different categories of offences are not mutually exclusive. The list does not include charges of attempt or forms of participation in an offence.

Table A1.8 Offences other than human trafficking that were charged and declared proven (2010)

Offences other than human trafficking	Sexual exploitation				Other forms of exploitation			
	Indictment		Judgment		Indictment		Judgment	
	N	%	N	%	N	%	N	%
Violent offences³⁴	33	30%	17	16%	4	14%	1	3%
Offences against public morals³⁵	25 ³⁶	23%	10 ³⁷	9%	-	-	-	-

32 Thirty times in addition to a conviction for human trafficking and 13 times in addition to an acquittal on charges of human trafficking.

33 Thirteen times in addition to a conviction for human trafficking and 12 times in addition to an acquittal on charges of human trafficking.

34 **Sexual exploitation:** rape – also classified under Offences against public morals (Article 242 DCC), unlawful deprivation of liberty (Article 282 DCC), uttering threats (Article 285 DCC), manslaughter (Article 287 DCC), assault (Article 300 DCC), aggravated assault (Article 302 DCC), premeditated aggravated assault (Article 303 DCC), theft with violence/threats – also classified under Offences against property (Article 312 DCC) and extortion – also classified under Offences against property (Article 317 DCC).

Other forms of exploitation: unlawful deprivation of liberty (Article 282 DCC), assault (Article 300 DCC) and extortion – also classified under offences against property (Article 317 DCC).

35 **Sexual exploitation:** child pornography (Article 240b DCC), rape – also classified under violent offences (Article 242 DCC), intercourse with a person who is unconscious or suffering from a mental defect (Article 243 DCC), intercourse with a person between the ages of 12 and 16 (Article 245 DCC), indecent assault (Article 246 DCC), performing indecent acts with a person who is unconscious, suffering from a mental defect or a child (Article 247 DCC) and enticing a minor to perform indecent acts (Article 248a DCC).

36 In 12 judgments (11%), rape (Article 242 DCC) was charged as a separate offence in addition to human trafficking. In some cases, this involved the same set of facts (see Amsterdam District Court 4 February 2010, 13-447383-08; 13-524224-08 (not published) and Amsterdam District Court 1 October 2010, 13-400354-09 (not published); the suspects were acquitted of these offences).

37 In three judgments (3%), rape (Article 242 DCC) was declared proven as a separate offence in addition to human trafficking. In none of these judgments did that offence arise from the same set of facts as the human trafficking offence that was charged.

Offences other than human trafficking	Sexual exploitation				Other forms of exploitation			
	Indictment		Judgment		Indictment		Judgment	
	N	%	N	%	N	%	N	%
Money laundering	18	16%	13	12%	3	10%	2	7%
Offences against property ³⁹	16	14%	10	9%	8	28%	5	17%
(Related to) people smuggling ⁴⁰	10	9%	8	7%	13	45%	11	38%
Violations of the Weapons and Ammunition Act	5	5%	4	4%	-	-	-	-
Violations of the Opium Act	5	5%	4	4%	6	21%	6	21%
Human trafficking (other forms of exploitation)	2	2%	-	-	n.a.	n.a.	n.a.	n.a.
Human trafficking (sexual exploitation)	n.a.	n.a.	n.a.	n.a.	1	3%	1	3%
Other offences ⁴¹	11	10%	7	6%	7	24%	6	21%

Sexual exploitation: indictments: N=111; convictions: N=111-3⁴²=108

Other forms of exploitation: indictments: N=29; convictions: N=29

38 **Sexual and other forms of exploitation:** money laundering (Article 420bis DCC) and habitual money laundering (Article 420ter DCC).

39 **Sexual exploitation:** theft (Article 310 DCC), theft under aggravating circumstances (Article 311 DCC), theft with violence/threats, also classified under violent offences (Article 312 DCC), extortion – also classified under violent offences (Article 317 DCC), embezzlement (Article 321 DCC), fraud (Article 326 DCC) and intentionally handling stolen property (Article 416 DCC).

Other forms of exploitation: theft (Article 310 DCC), extortion – also classified under violent offences (Article 317 DCC), embezzlement (Article 321 DCC) and fraud (Article 326 DCC).

40 **Sexual and other forms of exploitation:** people smuggling (Article 197a DCC), providing work for a person living illegally in the Netherlands (Articles 197b and 197c DCC) and falsifying a travel document (Article 231 DCC).

41 **Sexual exploitation:** resisting a public servant – in one indictment and one judgment (Article 180 DCC), failure to comply with an official order – in one indictment and one judgment (Article 184 DCC), illegally bringing money into circulation – in three indictments, but not in a judgment (Article 210 DCC), forgery – in five indictments and five judgments (Article 225 DCC), defamation – in one indictment and one judgment (Article 262 DCC), coercion – in one indictment, but not in any judgment (Article 284 DCC) and violation of the Medicines Act and the Economic Offences Act – in one indictment and one judgment.

Other forms of exploitation: making a false complaint – in two indictments and one judgment (Article 188 DCC), forgery – in four indictments and three judgments (Article 225 DCC), violation of the Housing Act and the Economic Offences Act – in two indictments and two judgments, and violation of the General Act on Government Taxes – in one indictment and one judgment.

42 In three judgments, the indictment was declared entirely null and void and, accordingly, no decision was made on either the human trafficking charges or the other charges (Alkmaar District Court 15 April 2010, 14-018035-03; 14-018036-03; 14-018037-03 (not published)).

Sectors other than the sex industry in which exploitation occurred

Table A1.9 shows indictments relating to the sectors in which the cases of other forms of exploitation in 2010 occurred. It also shows whether the judgments led to a conviction for human trafficking and, if so, in which sectors the exploitation was declared proven. Because some judgments related to more than one sector, the different sectors are not mutually exclusive and the percentages do not add up.

Table A1.9 Sectors outside the sex industry in which exploitation occurred (2010)

	Indictment		Judgment	
	N	%	N	%
Agriculture and horticulture	4 ⁴³ (2)	14% (15%)	2 (1)	14% (14%)
Forced drug smuggling	6 (3)	21% (23%)	1 (1)	7% (14%)
Domestic work	2 (2)	7% (15%)	-	-
Hospitality	1 (1)	3% (8%)	1 (1)	7% (14%)
Telephone subscriptions	6 (4)	21% (31%)	3 (2)	21% (29%)
Food industry	4 (1)	14% (8%)	4 (1)	29% (14%)
Market	4 ⁴⁴ (1)	14% (8%)	3 (1)	21% (14%)
Cleaning sector	2 (1)	7% (8%)	-	-
Construction	3 (1)	10% (8%)	-	-
Other	4 ⁴⁵ (2)	14% (15%)	3 ⁴⁶ (1)	21% (14%)

Indictment: N=29 (at level of human trafficking investigations: N: 13)

Judgments: N=14 (at level of human trafficking investigations: N: 7)

- 43 In two judgments, it is not clear in which sector the exploitation occurred. These are Zwolle-Lelystad District Court 30 November 2010, LJN: BP0010; BP0008. However, it became clear from background information about the case that it was the agriculture and horticulture sector.
- 44 In three of these judgments, the sector in which the individuals were exploited was not specified. It is apparent from the other related judgment, in which the evidence showed the offence of people smuggling, that these cases involved putting people to work in the 'market'.
- 45 In three cases relating to one and the same human trafficking investigation, this involved having to transfer money (commission) via the suspect and in one case, it was a human trafficking investigation involving leasing a car, taking out a loan and surrendering money.
- 46 In three cases relating to one and the same human trafficking investigation, this involved having to transfer money (commission) via the suspect.

(Intention of) exploiting in relation to other forms of exploitation

Table A1.10 shows the specific nature of the exploitation or the intention of exploiting as expressed in the indictments and the judgments with respect to other forms of exploitation in 2010. Because different circumstances indicating the exploitation or intention of exploiting can be charged and/or declared proven in the same judgment, the various categories are not mutually exclusive and the percentages do not add up. Furthermore, sometimes specific circumstances are not mentioned in an indictment but are referred to in the court's judgment. Judgments in which specific circumstances have been declared proven are therefore not, by definition, judgments in which they were charged.⁴⁷

Table A1.10 (Intention of) exploiting in relation to other forms of exploitation (2010)

	Indictment		Conviction	
	N	%	N	%
Long working days	13	45%	7	50%
Underpayment/no payment	17	59%	10	71%
Piece work	-	-	-	-
Accumulation of large debt	7	24%	3	21%
Little or no freedom of movement	6	21%	-	-
Paying a disproportionate amount for accommodation	4	14%	-	-
Compulsory purchase of goods	-	-	-	-
Having to commit a criminal offence	6	21%	1	7%
Poor living/working conditions ⁴⁸	11	38%	10	71%
Other	12 ⁴⁹	43%	6 ⁵⁰	43%

Indictments: N=29

Convictions: N=14

- 47 For example, the 10 indictments and 10 judgments relating to poor living/working conditions only include an overlap of seven judgments. In three judgments, poor living/working conditions were charged but not declared proven, and in three other judgments, poor living/working conditions were declared proven although they were not included in the indictment.
- 48 For example, conditions that are dangerous (fire hazard), 'dirty' (cockroaches) or 'uncomfortable' (cold/lack of proper sanitary facilities).
- 49 In six cases, this involved taking out telephone subscriptions, in three cases being fined (for example, for sleeping late) and having to continue working when injured/after an accident, and in three cases having to transfer money (commission) via the suspect.
- 50 Three of these cases involved taking out telephone subscriptions and three cases involved having to transfer money (commission) via the suspect.

2 Tables based on information from the Central Fine Collection Agency

Table A2.1 Number of compensation measures imposed (2007-2011)

	Number of irrevocable compensation orders imposed (N)	Index figure (2007: 1.0)	Percentage growth compared with previous year	Number of victims involved (N)	Index figure (2007: 1.0)	Percentage growth compared with previous year
2007	13	1.0	63% ⁵¹	18 ⁵²	1.0	100% ⁵³
2008	13	1.0	0%	16 ⁵⁴	0.9	-11%
2009	18	1.4	38%	29 ⁵⁵	1.6	81%
2010	16	1.2	-11%	18 ⁵⁶	1.0	-38%
2011	14	1.1	-13%	21 ⁵⁷	1.2	17%
Total	74	n.a.	n.a.	102 ⁵⁸	n.a.	n.a.

Source: CJIB (reference date: June 2012)

Table A2.2 Compensation orders, by amount imposed (2007-2011)

Amount imposed and to be collected (in €)	2007	2008	2009	2010	2011	Total	
	N	N	N	N	N	N	%
1-500	2	2	-	1	-	5	7%
501-5.000	9	6	11	11	6	43	58%
5.001-15.000	2	5	4	4	5	20	27%
15.001-25.000	-	-	2	-	2	4	5%
25.001-35.000	-	-	-	-	-	-	-
> 35.000	-	-	1	-	1	2	3%
Total	13	13	18	16	14	74	100%

Source: CJIB (reference date: June 2012)

51 In 2006, there were eight compensation orders (CJIB, reference date: 3 June 2012).

52 10 x 1 victim, 1 x 2 victims and 2 x 3 victims.

53 In 2006, there were nine victims (CJIB, reference date: 3 June 2012).

54 11 x 1 victim, 1 x 2 victims and 1 x 3 victims.

55 11 x 1 victim, 4 x 2 victims, 2 x 3 victims and 1 x 4 victims.

56 15 x 1 victim and 1 x 3 victims.

57 8 x 1 victim, 5 x 2 victims and 1 x 3 victims.

58 55 x 1 victim, 11 x 2 victims, 7 x 3 victims and 1 x 4 victims.

Table A2.3 Compensation orders, by disposition (2007-2011)

Disposition by CJIB	2007	2008	2009	2010	2011	Total	
	N	N	N	N	N	N	%
Payment in full	8	11	8	3	2	32	43%
Substitute detention	1	1	2	2	-	6	8%
Other ⁵⁹	-	-	1	-	-	1	1%
n.a. (outstanding)	4	1	7	11	12	35	47%
Total	13	13	18	16	14	74	100%

Source: CJIB (reference date: June 2012)

Table A2.4 Compensation orders, by amount paid (2007-2011)

Amount paid (in €)	2007	2008	2009	2010	2011	Total	
	N	N	N	N	N	N	%
0	3	1	4	3	5	16	22%
1-500	1	1	2	3	5	12	16%
501-5,000	8	4	9	9	3	33	45%
5,001-15,000	1	7	3	1	1	13	18%
15,001-25,000	-	-	-	-	-	-	-
25,001-35,000	-	-	-	-	-	-	-
>35,000	-	-	-	-	-	-	-
Total	13	13	18	16	14	74	100%

Source: CJIB (reference date: June 2012)

59 For example, a case is barred by time or a settlement has been reached between the offender and the victim.

3 Tables based on information from the Violent Offences Compensation Fund

Table A3.1 Number of applications for financial compensation (2007-2011)⁶⁰

	Number of applications (N)	Index figure (2007=1.0)	Percentage growth compared with previous year
2007	25	1.0	n.a.
2008	19	0.8	-24%
2009	45	1.8	137%
2010	51	2.0	13%
2011	42	1.7	-18%
Total	182	n.a.	n.a.

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

Table A3.2 Referrals by agencies to the Violent Offences Compensation Fund (2009-2011)⁶¹

	2009		2010		2011	
	N	%	N	%	N	%
Lawyer	18	40%	24	47%	12	29%
Victim Aid Netherlands	12	27%	8	16%	9	21%
Police	1	2%	1	2%	1	2%
Other	8	18%	11	22%	15	36%
No referral by an organisation	6	13%	5	10%	1	2%
Unknown	-	-	2	4%	4	10%
Total	45	100%	51	100%	42	100%

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

60 The Violent Offences Compensation Fund supplied 59, 74 and 51 files for 2009, 2010 and 2011, respectively, with data on applications by possible victims of human trafficking. Of these, at least 45, 51 and 42 files, respectively, related to human trafficking situations, since Article 250a or Article 273f was noted as the reason for reporting the violent offence. It was not possible to tell from the database whether the other files involved human trafficking situations because other articles of the law were noted. These files are therefore not covered in the tables.

61 BNRM has the usable data for this period.

Table A3.3 Decisions on applications for financial compensation (2007-2011)

	2007		2008		2009		2010		2011	
	N	%	N	%	N	%	N	%	N	%
Awarded	18	72%	18	95%	31	69%	26	51%	13	31%
Evidently awarded after objection	-	-	-	-	4	9%	1	2%	1	2%
Rejected	7	28%	1	5%	10	22%	21	41%	19	45%
Still being handled	-	-	-	-	-	-	3	6%	9	21%
Total	25	100%	19	100%	45	100%	51	100%	42	100%

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

Table A3.4 Scales applied for emotional injury (2009-2011)⁶²

Scales of financial awards for emotional injury	2009		2010		2011	
	N	%	N	%	N	%
Scale 1	2	6%	1	4%	-	-
Scale 2	7	20%	6	22%	4	31%
Scale 3	2	6%	-	-	-	-
Scale 4	23	66%	19	70%	9	69%
Scale 5	-	-	1	4%	-	-
Scale 6	1	3%	-	-	-	-
Scale 7	-	-	-	-	-	-
Scale 8	-	-	-	-	-	-
Total number of awards	35	100%	27	100%	13 ⁶³	100%

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

62 BNRM has the usable data for this period.

63 There were 14 awards, of which for one victim of human trafficking compensation was only awarded for material loss.

Table A3.5 Financial compensation for material loss (2009-2011)⁶⁴

	2009	2010	2011
Minimum amount	€ 0	€ 25	€ 28
Maximum amount	€ 7,725	€ 2,940	€ 7,114
Average amount	€ 866 ⁶⁵	€ 403 ⁶⁶	€ 1.366 ⁶⁷

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

Table A3.6 Financial compensation for material loss, divided into quartiles (2009-2011)

	2009	2010	2011
25% of the award	≤ € 50	≤ € 63	≤ € 114
50% of the award	≤ € 200	≤ € 220	≤ € 387
75% of the award	≤ € 951	≤ € 515	≤ € 2,110

Source: Data from the Violent Offences Compensation Fund (reference date: August 2012)

⁶⁴ BNRM has the usable data for this period.

⁶⁵ SD: 1,758.

⁶⁶ SD: 620.

⁶⁷ SD: 2,149



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