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## Human Trafficking from an International Protection Perspective: Probing the Meaning of Anti-Trafficking Measures for the Protection of Trafficking Victims, with Special Regard to the United Kingdom

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# Human Trafficking from an International Protection Perspective: Probing the Meaning of Anti-Trafficking Measures for the Protection of Trafficking Victims, with Special Regard to the United Kingdom

Hannah Simon\*

## Abstract

The *Council of Europe Convention on Action against Trafficking in Human Beings* (ECAT) entered into force in the U.K. on the 1 April 2009. This event led to the belief that Britain's adherence will considerably improve the protection of trafficking victims in the country. In light of such expectations, this study examines which implications anti-trafficking measures may have on the legal protection of trafficking victims, while concentrating on new legal developments in the U.K. The paper analyses first the response of the anti-trafficking framework to international protection needs, and second, considers the scope of an alternative protection regime, namely, of international refugee law. It finally addresses the necessity to view the interaction between both regimes, and assesses how the implementation of the ECAT is likely to affect the right of victims to seek asylum.

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## INTRODUCTION

At the intersection of contemporary anxieties regarding transnational organized crimes (“TOCs”), illegal migration and human rights protection, transnational human trafficking has generated a long persisting concern in the international community. There is not only universal agreement that this ever growing phenomenon must be eradicated; it is also acknowledged that its transnational nature requires global common action. Accordingly, international efforts to fight trafficking have been gaining increasing momentum in parallel with recent developments in international law. This mobilization eventually led to the adoption in 2000 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*<sup>1</sup> (the “*Protocol*”), supplementing the *United Nations Convention Against Transnational Organised Crime*.<sup>2</sup> Although anti-trafficking laws are by no means new,<sup>3</sup> the *Protocol* constitutes a significant step forward in this field, for it lays down the first agreed upon, internationally binding definition of the phenomenon.<sup>4</sup> This definition reads as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>5</sup>

In addition, the *Protocol* specifies that “[t]he consent of a victim of trafficking in persons to the intended exploitation [. . .] shall be irrelevant where any of the means set forth [above] have been used.”<sup>6</sup> Furthermore, a substantial contribution to the anti-trafficking regime has

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1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II (Nov. 15, 2000) [hereinafter Protocol].

2. *Id.*

3. Explanatory Report of the Council of European Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197 ¶ 8 [hereinafter Explanatory Report].

4. *Id.* ¶ 7.

5. Protocol, *supra* note 1, art. 3(a).

6. *Id.* art.3(b).

been made at the regional level. In particular, as a result of the growing problem of human trafficking in Europe, the Council of Europe formulated a *Convention on Action Against Trafficking in Human Beings* ("ECAT").<sup>7</sup> The definition of trafficking contained in this latter treaty is essentially identical with the one laid down in the *Protocol*.<sup>8</sup>

In view of the widespread ratification of these two primary instruments, it can safely be stated that trafficking in human beings is seen today as a priority issue by the international community. Moreover, it is generally recognized that the phenomenon does not only constitute a matter of criminal justice, but is also considered to be a serious human rights violation, which asks for appropriate preventive and *protective* measures.

Trafficking in human beings has evolved as both a consequence and a cause of international protection needs. First, while they are increasingly confronted with closed avenues of legal immigration, *bona fide* refugees routinely have to rely on traffickers to flee their country of origin.<sup>9</sup> Second, when trafficking victims are likely to face a threat upon return to their country of habitual residence, they may well have an entitlement to international protection, namely a right not to be returned to any country where they could face persecution, other ill-treatment or torture (the so called *non-refoulement* principle).<sup>10</sup>

In relation to that, the UNHCR has observed that in their aim to guide states as to how best to combat these criminal activities, anti-trafficking measures "provide helpful guidance on some aspects of victim protection and therefore constitute a useful starting point for any analysis of international protection needs arising as a result of trafficking."<sup>11</sup>

The aim of the present study is to put under scrutiny the meaning of anti-trafficking measures for the international protection of human trafficking victims. The inquiry is especially pertinent in the context of

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7. Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197 [hereinafter ECAT]. It is worth mentioning that the Convention is open for ratification to non-member States of the Council of Europe. *Id.*

8. *See id.*

9. James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1, 6 (2008).

10. GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 201 (3d ed. 2007).

11. U.N. High Comm'r for Refugees, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 ¶ 7 (April 2006) [hereinafter UNHCR Trafficking Guidelines].

the ECAT's recent entry into force in the United Kingdom.<sup>12</sup> In response to growing criticism about its lack of a victim-centred approach to trafficking, the British Government ratified the Convention. Although the enactment of domestic laws since 2002 on the prohibition of trafficking placed British legislation in line with international standards in this respect;<sup>13</sup> anti-trafficking legislation was disapproved by a number of quarters for failing to incorporate provisions addressing victims' needs and rights.<sup>14</sup> It is now expected that this adherence will "greatly strengthen the framework of anti-trafficking in the UK, notably in relation to the core matter of the *protection of victims*."<sup>15</sup> This assumption needs to be carefully put under scrutiny.

First and foremost, however, it should be borne in mind that the object of this analysis is international protection. Hence, general human rights issues resulting from trafficking, such as the protection of witnesses or the access of victims to medical treatment, will not be taken into consideration. What is more, although children are primary targets of trafficking, their case will not be specifically addressed here, as their special legal rights would require a different form of protection and therefore go beyond the scope of this analysis.<sup>16</sup>

The study is divided into three parts. In order to meaningfully assess the impact of anti-trafficking initiatives on the protection of victims, it is indispensable to consider first the transnational criminal law ("TCL") approach and the extent to which the ECAT adds international protection safeguards to the already existing international anti-trafficking framework—in particular the UN Protocol (Part I). Observing that the anti-trafficking regime lacks a sufficient human rights perspective which is needed in order to offer comprehensive protection to trafficking victims, the paper pursues with an examination of an alternative protection system, namely the refugee protection regime. The second part looks at the scope and limitations of the Convention Relating to the

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12. The ECAT entered into force in the U.K. on the April 1, 2009. See Action Against Trafficking in Human Beings, Council of Europe, [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Profiles/UKProfile\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Profiles/UKProfile_en.asp) (last visited April 3, 2010).

13. Jo Goodey, *Human Trafficking: Sketchy Data and Policy Responses*, 8 CRIMINOLOGY & CRIM. JUST. 421, 424 (2008).

14. *Id.*

15. House of Lords and House of Commons, Joint Committee on Human Rights, Twenty-Sixth Report, *Human Trafficking* (2005-06), at 66 [hereinafter Joint Committee], available at <http://www.official-documents.gov.uk/document/cm69/6996/6996.pdf> (emphasis added).

16. Olivera Simic, *Victims of Trafficking for Forced Prostitution: Protection Mechanisms and the Right to Remain in Destination Countries*, GLOBAL MIGRATION PERSPECTIVES No. 2, 8 (July 2004), available at <http://www.gcim.org>.

Status of Refugees<sup>17</sup> (“Refugee Convention”) within the U.K. jurisprudence, and at its potential to fill the protection gaps identified in anti-trafficking law (Part II). After having assessed the potential and limitations of two possible protection frameworks, solely analysing these regimes separately would leave the study unaccomplished. The last part, therefore, attempts to see how the implementation of the ECAT in general can affect the right to seek asylum in the U.K., and so the protection of trafficking victims under the Refugee Convention (Part III).

## I. INTERNATIONAL PROTECTION WITHIN THE TRANSNATIONAL CRIMINAL LAW FRAMEWORK

Anti-trafficking instruments reaffirm the duty of State parties to prevent and suppress trafficking in human beings, to protect those who have been trafficked and promote the cooperation of States in order to meet these objectives.<sup>18</sup> This part will look at the response offered by anti-trafficking measures to the need of international protection. In order to have a map of the terrain, it is necessary to begin by briefly clarifying the meaning of human trafficking within TCL, its distinction from migrant smuggling, and the implications of this differentiation. Following this, after having sketched the law enforcement context of anti-trafficking, the study will continue with a comparison of the Protocol and the ECAT, assess the advantages the latter proffers for the protection of trafficking victims, as well as the specific implications this carries for the legal framework of the United Kingdom.

### A. *The Blurred Line Between Trafficking and Smuggling*

With the Protocol against trafficking, the UN Crime Commission not only provided the international community with a definition of human trafficking, but it also marked out the difference between this act and the phenomenon of migrant smuggling, which is covered by its own Protocol and defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”<sup>19</sup> Yet, it has been correctly observed that although

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17. Convention Relating to the Status of Refugees art 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention], as amended by Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

18. Protocol, *supra* note 1, art.2, ECAT, *supra* note 7, art.2.

19. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, G.A. Res. 55/25, Nov. 15, 2000, available at <http://www2.ohchr.org/english/law/organizedcrime.htm>.

there exists a very fine line between trafficking and smuggling, the interchangeable use of these words in different contexts and by various actors has contributed to a “conceptual morass,” which deserves to be clarified.<sup>20</sup>

### 1. Trafficking: The Act, the Means and the Purpose

While the notion of smuggling is generally related to the manner in which a person has crossed the border of a country, trafficking does not only relate to the act of border crossing, but also to the treatment of the migrant after the entry in the destination country.<sup>21</sup> Indeed, human trafficking contains three core elements: the *act* (i.e., recruitment, transfer and receipt of the person), the *means* (i.e., threat, use of force and other forms of coercion), and the *purpose* (i.e., exploitation).<sup>22</sup>

First, the border crossing in transnational human trafficking can be both, legal as well as illegal. Smuggling, by contrast, contains *per se* the element of an illegal entry; thus, it is the very transport of the migrant, which constitutes the criminal act.<sup>23</sup> Second, unlike trafficking, the smuggling of people is commonly considered as “a *voluntary* arrangement made between the illegal migrant and the organiser or facilitator,”<sup>24</sup> and therefore, lacks an element of coercion. Third, it is assumed that the very purpose of smuggling is the route itself, and that the relationship between the migrant and the smuggler ends once the migrant has reached his destination.<sup>25</sup> What trafficking victims have in common, however, is that they are owned by the trafficker and remain in his hands after having entered the country.<sup>26</sup>

In short, the difference between trafficking and smuggling is characterized by a central dichotomy: namely “between coerced and consenting illegal migrants, between victims and agents, between

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20. Joanna Apap et al., *Counteracting Human Trafficking—Protecting the Victims of Trafficking*, CENTRE FOR EUROPEAN STUDIES, 14 (2002); see also Tom Obokata, *Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights or States' Interests?*, 5 WEB J. CURRENT LEGAL ISSUES (2001).

21. *Id.* at 18

22. UNHCR Trafficking Guidelines, *supra* note 11, at ¶ II.10.

23. Tom Obokata, *Trafficking and Smuggling of Refugees from a Human Rights Perspective*, University of Oxford International Conference of Refugees and International Law: The Challenge of Protection (2006), available at <http://repository.forcedmigration.org/pdf/?pid=fmo:5372>.

24. Regina E. Rauxloh, *No Air to Breathe: Victims of Sex Slavery in the U.K.*, 13 TEX. WESLEYAN L. REV. 749, 764 (2007) (emphasis added).

25. UNHCR Trafficking Guidelines, *supra* note 11, at ¶ I.4.

26. HOME AFFAIRS COMMITTEE, THE TRADE IN HUMAN BEINGS: HUMAN TRAFFICKING IN THE UK, Sixth Report, 2008-9, at 8.

innocence and guilt.”<sup>27</sup> Yet, this distinction implies more than a mere conceptual demarcation. The very fact that smuggled people are viewed as complicit in the act of illegal migration implies that the Smuggling Protocol contains only minimal references to protection. In other words, “identifying an individual as a trafficked person carries different responsibilities for the State Party concerned than in the case when that same person is identified as a smuggled migrant.”<sup>28</sup> Moreover, such classification implies a greater financial and administrative burden.<sup>29</sup> As a result, it has been observed that authorities are more likely to identify irregular migrants as smuggled rather than as trafficked.<sup>30</sup> While sometimes the distinctive element between both acts is obvious, most of the time, the difference is not clear. Since there exists an overlapping between the two categories, it is worth reconsidering the suitability of this classification.<sup>31</sup>

## 2. Trafficking vs. Smuggling: An Artificial Distinction?

The critical distinctive elements distinguishing trafficking from smuggling are deemed to be the former’s coercive and exploitative dimensions. However, Skleldon’s statement that “violence, *coercion* and *exploitation* are as much an integral part of smuggling as they are of trafficking”<sup>32</sup> opens a door for a critical reappraisal of the dividing line between these two acts.

First, the distinction between consent and coercion is not clear-cut. The Protocol does not confine the notion of coercion to a mere use of force, but also relates it to “the abuse of power” or to “a position of vulnerability”<sup>33</sup> Some authors have therefore argued that in theory, poverty or illness could invite for an abuse of a vulnerable position, and as a result, could lead to a treatment amounting to a form of coercion.<sup>34</sup> In fact, economic and social insecurity forcing people to leave their country through the avenue of smuggling may result in limiting the

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27. Jacqueline Bhabha et al., *Smuggled or Trafficked*, 25 FORCED MIGRATION REV. 6, 6 (2006).

28. Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 1000 (2001).

29. *Id.* at 994.

30. *Id.* at 1001.

31. *See id.* at 1000.

32. Apap, *supra* note 20, at 31 (emphasis added).

33. Protocol, *supra* note 1, art.3.

34. Mary A. Young, *The Smuggling and Trafficking of Refugees and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted in the Pursuit of Combating Transnational Organized Crimes?*, 27 SUFFOLK TRANSNAT’L L. 101, 109 (2003); Bhabha, *supra* note 27, at 7.

migrants' power of decision over the travelling routes, the potential destination countries, or the means of transport.<sup>35</sup>

Second, while exploitation is considered as a core element of human trafficking, this notion remains very difficult to measure. Notwithstanding the fact that the term is left undefined in the anti-trafficking instruments (and, for that matter, anywhere else in international law),<sup>36</sup> it is nevertheless specified that exploitation "shall include, at 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 removal of organs."<sup>37</sup> Adding the notion of "servitude" to a list of relatively narrow forms of abuse such as "sexual exploitation" or "the removal of organs" expands the notion of exploitation to conditions in which an individual lacks liberty to determine his course of action.<sup>38</sup> Accordingly, it has been suggested that large smuggling fees, sometimes leading to debt bondage, could be considered as exploitative in themselves, although the migrant had once accepted to pay them.<sup>39</sup> Similarly, employment opportunities offered to migrants may be exploitative in nature, notwithstanding the fact that the later have originally consented to them.<sup>40</sup>

In short, the purpose of this first section is to highlight that pure situations of trafficking and smuggling are rare. The narrow view that trafficked persons are victims of an odious business, whereas those who are smuggled simply seek to violate the law in order to improve their economic well-being<sup>41</sup> fails to acknowledge that in most cases, individuals who seek to leave their country through the assistance of a

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35. Report, *Transatlantic Workshop on Human Smuggling*, 15 GEO. IMMIGR. L.J. 167, 174 (2000).

36. In order to allow all states to ratify the Protocol irrespectively of whether prostitution is legal under domestic law, both 'exploitation' and 'prostitution' remain intentionally undefined terms. United Nations Global Initiative to Fight Human Trafficking, Background Report, *Workshop 023: The Effectiveness of Legal Frameworks and Anti-Trafficking Legislation*, The Vienna Forum to Fight Human Trafficking 6 (2008), available at <http://www.unodc.org/documents/human-trafficking/Marika-Misc/BP023TheEffectivenessofLegalFrameworks.pdf>.

37. Protocol, *supra* note 1, art.3; ECAT, *supra* note 7, art.4 (emphasis added).

38. It should be mentioned that the term "servitude" is not defined in International Law. See GLOBAL RIGHTS, ANNOTATED GUIDE TO COMPLETE THE UN TRAFFICKING PROTOCOL 6 (2002). The word is commonly defined as "the state of being a slave or of being under the complete control of someone more powerful." OXFORD ENGLISH DICTIONARY, <http://www.askoxford.com>.

39. Bhabha, *supra* note 27, at 8

40. *Id.*

41. Raimo Väyrynen, *Illegal Immigration, Human Trafficking, and Organized Crime* (United Nations/World Institute for Development Economics, Research Discussion Paper No. 2003/72, 2003), available at [http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en\\_GB/dp2003-072/](http://www.wider.unu.edu/publications/working-papers/discussion-papers/2003/en_GB/dp2003-072/).

third person, lose the control over their fate.<sup>42</sup> Hence, keeping in mind that trafficking in human beings is a complex phenomenon, from an international protection point of view, emphasis should be laid on the distinction between those who are vulnerable and those who are not, whether at the point of departure, during the journey or after reaching the destination country. In any case, everything else left aside, looking at who cannot be returned safely to his country of origin requires considering human trafficking as a crime against a person and not against the state. It should, therefore, be questioned, whether such a victim-centred approach is at the core of a TCL response to human trafficking.

*B. Balancing Objectives: Law Enforcement and International Protection*

As it appears from both the Protocol and the ECAT, the TCL framework of anti-trafficking imposes a dual duty on states. On the one hand, it contains a punitive aspect by obliging states to prevent and to suppress the crime; on the other hand, it entails a protective element by requiring the parties to address human rights issues, in particular to protect victims against reprisals and the risk of being re-trafficked.<sup>43</sup> This suggests that anti-trafficking measures can be effective only by balancing between a penal approach and a human rights protection perspective.<sup>44</sup> Nevertheless, it appears that the TOC discourse has traditionally been dominated by a law enforcement approach. This section will discuss this trend and its implications for international protection within the anti-trafficking instruments.

1. Setting the Context: The Dominant Prism of Criminal and Immigration Law

Discussing the TCL approach to human trafficking, commentators have generally pointed out that states have responded to trafficking by focusing first on the punishment of traffickers, and second on the illegal border crossing, which is often involved in the trafficking act.

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42. Obokata, *supra* note 20, at 174; Young, *supra* note 34, at 108.

43. Protocol, *supra* note 1, art.2; ECAT, *supra* note 7, art.2.

44. See, e.g., Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFF. HUM. RTS. L. REV. 5 (2006); Dina F. Haynes, *Used, Abused, Arrested and Deported: Extending the Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221 (2004); Anne Gallagher, *Triply Exploited: Female Victims of Trafficking Networks—Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 GEO. IMMIGR. L.J. 99 (2004); Rauxloh, *supra* note 24.

First, it is frequently argued that, closely interlinked with other TOCs such as money laundering or drug trafficking,<sup>45</sup> human trafficking has traditionally been defined as a problem pertaining to the realm of criminal law.<sup>46</sup> While the criminalization approach to trafficking is essential, it is not without limitations. By focusing on the criminal offence, anti-trafficking law becomes not only associated with, but sometimes also limited to, deterrence and punishment strategies.<sup>47</sup> In fact, by nature, the criminal justice system focuses on the prosecution of a perpetrator rather than on the needs of the victim. The “value” of the victim is therefore limited to the prosecutorial aim of “evidence,” necessary for a successful conviction.<sup>48</sup> Put differently, emphasis is laid on victims of crimes, rather than on victims of crimes.

Second, efforts to fight trafficking can also get confused with other strategies aimed at suppressing immigration and controlling borders.<sup>49</sup> Discussing the connotative meaning of TOCs, Sheptyvki underlines that trafficking is often understood to be closely associated to illegal immigration, and “[o]nce immigration is construed as a crime problem, there is only one possible response: law enforcement.”<sup>50</sup> Hence, attention has been drawn to the fact that TCL has provided a framework for states to pursue a border control agenda, resulting in the prioritization of removing illegal migrants, thereby brushing aside the safeguard of the victims’ rights.<sup>51</sup>

In Sheptyvki’s words, “because the transnational organized crime discourse largely eschews the language of human rights, it cannot but fail to uphold human rights.”<sup>52</sup> It remains to be seen whether, and if so, how this trend rubs off on anti-trafficking instruments.

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45. Claire Brolan, *An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective*, 14 I.J.R.L. 578 (2003).

46. Amiel, *supra* note 44, at 12; Bhabha, *supra* note 27, at 6; Marjan Wijer & Marjan Wijers, Only Rights Can Stop Wrongs: a Critical Assessment of Anti-Trafficking Strategies (paper presented at EU/IOM STOP European Conference on Preventing and Combating Trafficking in Human Beings—A Global Challenge for the 21st Century) (Sept. 18-20, 2002), available at <http://www.walnet.org/csis/papers/wijers-rights.html>; WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, THE STRUGGLE BETWEEN MIGRATION CONTROL AND VICTIM PROTECTION: THE UK APPROACH TO HUMAN TRAFFICKING 30 (2005), available at [http://www.issuelab.org/research/struggle\\_between\\_migration\\_control\\_and\\_victim\\_protection\\_the\\_uk\\_approach\\_to\\_human\\_trafficking](http://www.issuelab.org/research/struggle_between_migration_control_and_victim_protection_the_uk_approach_to_human_trafficking).

47. See Amiel, *supra* note 44; Bhabha, *supra* note 27, at 6.

48. See Wijer, *supra* note 46.

49. See Amiel, *supra* note 44, at 27.

50. James Sheptyvki, *Against Transnational Organized Crime*, in CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, CORRUPTION 120, 128-129 (Margaret E. Beare ed., 2003).

51. See Gallagher, *supra* note 28, at 994; see also Hathaway, *supra* note 9.

52. Sheptyvki, *supra* note 50.

2. From the *Protocol* to the ECAT: Towards a Human Rights Approach?

Although they present a certain number of similarities, the Protocol and the ECAT are essentially different in that they were developed within distinct contexts and institutions.<sup>53</sup> Focusing on crimes against state parties rather than against individuals,<sup>54</sup> the UN Convention Against Transnational Organised Crime and its Protocols were created within the UN Crime Commission, a body whose mandate is grounded in law enforcement.<sup>55</sup> The ECAT on the other hand, is a product of a human rights body,<sup>56</sup> and seeks to “strike a balance between human rights and prosecution.”<sup>57</sup> While concerns have been raised that the Protocol does not adequately protect victims of trafficking, the Convention has generally been welcomed by the human rights community.<sup>58</sup> Two sets of measures need to be considered in order to assess the protection potential of these instruments: (a) those which provide for the return of the victim, and (b) those aimed at its protection.

a. Repatriation of the Victim

The right to reside in a destination country may not be a viable solution for all victims of trafficking who have very diverse needs or wants, and have gone through different experiences. By engaging victim assistance by the destination country, as well as cooperation between the host and the home country, repatriation measures could well meet the needs of the trafficked person, and are more closely related to a right to freely return to one’s state of origin.<sup>59</sup> Article 8 of the Protocol states that:

When a State Party returns a victim of trafficking in persons to a State Party [. . .], such return shall be *with due regard for the safety* of that person and for the status of any legal proceedings related to

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53. The ECAT has reproduced the trafficking definition laid down in the *Protocol*.

54. See Goodey, *supra* note 13, at 424.

55. See GLOBAL RIGHTS, *supra* note 39; see also Haynes, *supra* note 44, at 240.

56. The Council of Europe is a regional inter-governmental organization, which oversees the protection and the promotion of human rights within the European system.

57. Explanatory Report, *supra* note 3, at 31.

58. The Future Group praised the Convention as “an excellent model of global best practices for the treatment of trafficking victims.” THE FUTURE GROUP, FAILING SHORT OF THE MARK: AN INTERNATIONAL STUDY OF THE TREATMENT OF TRAFFICKING VICTIMS 6 (2006), available at <http://www.oas.org/atip/canada/Fallingshortofthemark.pdf>.

59. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art.12, U.N. GAOR, 21th Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

the fact that the person is a victim of trafficking and shall preferably be voluntary.<sup>60</sup>

Although it does not exclude involuntary return, this provision imposes a positive obligation upon states to ensure that once returned, the victim will not face harm such as retaliation or re-trafficking.<sup>61</sup> Yet, lacking a related clause setting out guarantees for safe return, repatriation within the Protocol fails to meet the protection standard.<sup>62</sup>

This protection gap was recognized by the drafters of the ECAT who went a step further than the Protocol. In fact, by referring to the jurisprudence of the European Court of Human Rights and its principle of *non-refoulement*,<sup>63</sup> the Convention obliges state parties to cooperate with national and international institutions in order to adopt repatriation programmes geared towards avoiding re-victimization.<sup>64</sup> Notwithstanding that this poses an additional protection safeguard, repatriation measures are not free from shortcomings.

In order to meet its obligations within the ECAT, the U.K. Border Agency has introduced a repatriation scheme, known as the Assisted Voluntary Return for Irregular Migrants (“AVRIM”), and run by the International Organisation for Migration.<sup>65</sup> The AVRIM is available to migrants who are in the U.K. without legal documentation, including persons who have been trafficked.<sup>66</sup> Its main added value is to provide for a “careful evaluation of the individual circumstances” of the victim as well as for its safe reintegration into its home country.<sup>67</sup> Nevertheless, although it targets vulnerable groups, including trafficking victims, the AVRIM is not specifically designed for this particular category of persons, and therefore, fails to sufficiently take their specific protection needs into consideration. Indeed, the repatriation scheme excludes individuals who have previously participated in an assisted voluntary

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60. Protocol, *supra* note 1, art.8, ¶ 2 (emphasis added). See ECAT, *supra* note 7, art. 16.2 for similar language.

61. See generally Protocol, *supra* note 1, art. 8, ¶ 2.

62. See Amnesty International and Anti-Slavery International (AI/ASI), *Memorandum on the Draft European Convention on Action Against Trafficking in Human Beings: Protection of the Rights of Trafficked Persons*, Apr. 30, 2004, <http://www.amnesty.org/en/library/info/IO61/011/2004/en>.

63. Explanatory Report, *supra* note 3, at 55.

64. See ECAT, *supra* note 7, art.16, ¶ 2.

65. See Home Office, UK Action Plan on Tackling Human Trafficking, <http://www.homeoffice.gov.uk/documents/human-traffick-action-plan> (last visited June 20, 2009).

66. *Id.*

67. *Id.*

return programme.<sup>68</sup> This exemption ignores the fact that trafficking victims are routinely re-trafficked, and may therefore, re-enter the country in repeated exploitative circumstances after having been returned a first time to their country.<sup>69</sup> Furthermore, the system has been criticized as failing to provide for a risk assessment evaluating existing assistance structures in countries of return.<sup>70</sup> Indeed, while support organisations may have been created to help returned victims, evidence shows that in some cases, they are under-resourced with the result that within a few months of their return, victims are re-trafficked, sometimes through the support organisations themselves.<sup>71</sup> Thus, if the repatriation procedures are not trafficking-specific, and if they lack in-depth national or even regional assessments regarding the appropriateness of return, repatriation procedures may leave space for forced return to a place which could present further risks of abuse, stigmatisation or re-trafficking.

b. Protection of the Victim and the Right to Remain

Despite the recognition of victims' needs to be protected in both the Protocol and the ECAT, it is noteworthy that while the Protocol's enforcement provisions contain a mandatory language, its protection provisions entail much weaker terms, enjoining states to assist and protect the victims "in appropriate cases" and "to the extent possible."<sup>72</sup> In particular, relating to the status of victims in receiving states, the Protocol says that "[e]ach State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, *in appropriate cases*."<sup>73</sup>

The optional tone of this provision gave rise to vehement criticism,<sup>74</sup> not only because its phrasing leaves a wide discretion to state parties regarding the right of the victim to remain, but also because its

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68. See UK Border Agency, Assisted Voluntary Return for Irregular Migrants, <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/workingwithasylum/assistedvoluntaryreturn/avrim/> (last visited July 3, 2009).

69. See *id.*

70. HOME AFFAIRS COMMITTEE, *supra* note 26, at 43.

71. See *id.*

72. Protocol, *supra* note 1, art. 6. Nevertheless, it should be kept in mind that the Protocol is subordinate to the main Convention whose protection provisions are not identical. Indeed, article 25 of the Convention provides that each state party "shall take appropriate measures within its means to provide assistance and protection to victims of offences [. . .]." It follows that governments must provide some level of protection according to the commitment they have made by ratifying the Convention.

73. Protocol, *supra* note 1, art. 7 (emphasis added).

74. See Gallagher, *supra* note 28, at 990.

non-binding nature risks undermining the very effectiveness of the Protocol as a law enforcement instrument.<sup>75</sup> As a matter of fact, the identification and prosecution of traffickers is strongly determined by the cooperation of victims.<sup>76</sup> The investigation process, therefore, relies on their willingness to participate, which in turn heavily depends on their protection against retribution of traffickers.<sup>77</sup>

In its aim to complement the Protocol, the ECAT intends to address these flaws while exceeding the pre-existing protection standards.<sup>78</sup> In fact, the recognition of the nexus between protection and successful conviction of traffickers materialized in the creation of two provisions, which are said to be the main progress of the Convention, namely: the right to a reflection period and a conditional residence permit.<sup>79</sup> Acknowledging that providing a period of reflection is more likely to ensure cooperation of victims with law enforcement authorities, the ECAT urges states to afford a period of thirty days—“when there are reasonable grounds to believe that the person concerned is a victim”—during which they shall authorise the identified victim to remain in their territory.<sup>80</sup> This provision has been welcomed, for it allows trafficked persons to make informed decisions about their future, while increasing the ability of the police to gather evidence in investigations.<sup>81</sup> Nonetheless, although this reflection period is granted to all identified victims, its application remains temporary. It is limited to a short period of time,<sup>82</sup> and therefore, does not offer any guarantee that once it has expired the victim will not be returned to its country of origin. Accordingly, the major “added value” of the Convention resides within article 14, which reads as follows:

Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

- a. the competent authority considers that their stay is necessary *owing to their personal situation*;

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75. *Id.*

76. *See id.*

77. *See Rauxloh, supra* note 24, at 765.

78. Explanatory Report, *supra* note 3, at 27.

79. *See id.*

80. ECAT, *supra* note 7, art.13.

81. *See generally* United Nations Office on Drugs and Crimes, Toolkit to Combat Trafficking in Persons, Global Programme against Trafficking in Human Beings 304 (2008).

82. It should be noted that this period is considered as too short by a number of commentators. *See, e.g.,* Amnesty International and Anti-Slavery International, *supra* note 62, at 4.

- b. the competent authority considers that their stay is *necessary for the purpose of their co-operation* with the competent authorities in investigation or criminal proceedings<sup>83</sup>

Arguably, this type of permit represents an important option for victims who fear to return to their country of origin.<sup>84</sup> It is an essential component of their protection, because it reduces their fear of deportation, and thus it encourages them to come forward to the authorities. However, the conditions upon which such a residence permit can be afforded present notable shortcomings.

First, paragraph 14(a) of the Convention, by mandating that the first precondition for eligibility depends upon a “personal situation,” is a vague provision which falls short in specifying what exact circumstances should exist in order to qualify for residency.<sup>85</sup> Hence, by failing to clarify the nature of this first requirement, the drafters of the Convention left the determination of the “personal situation” threshold at the discretion of state parties, and missed an opportunity to include an obligation to accord a right to remain if a trafficking victim is at risk of further human rights abuses.<sup>86</sup>

The second scenario upon which residency is conditioned, is the cooperation of the victim with law enforcement authorities, provided that it is deemed to be “necessary.” As exposed above, the cooperation of the victim is important from a criminal justice point of view. On the one hand, it facilitates investigation, prosecution and punishment. On the other, participation in the investigations can also have a “therapeutic value,” allowing for redress and the restoration of the victim’s dignity.<sup>87</sup> From an international protection point of view, however, article 14(b) does not constitute a satisfactory safeguard. As a matter of fact, in this conditional provision, victim protection schemes are a means to an aim, namely, securing justice. The main objective of article 14(b) is to minimize the risk of retribution to those who give evidence against traffickers, but not to ensure the safety of the victim in the first place. This conditional approach to protection excludes trafficked individuals who do not have the information required for a successful conviction, as well as those who are unwilling to cooperate with officials. In relation to

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83. ECAT, *supra* note 7, art.14.1 (emphasis added).

84. *See id.*

85. *See id.*

86. The Explanatory Report merely states that personal situation requirements can depend on a range of situations including the victim’s safety, health or family situation, or “some other factor which has to be taken in to account.” Explanatory Report, *supra* note 3, at 52.

87. *See* Tom Obokata, *Human Trafficking, Human Rights and the Nationality, Immigration and Asylum Act 2002*, 4 EUR. HUM. RTS. L. REV. 410 (2003).

the latter case, Pearson notes that “hostility” towards enforcement authorities is “a direct result of the situation of abuse [victims] have suffered.”<sup>88</sup> Yet the protection of “hostile” victims should be addressed as much as the protection of “gentle” ones.<sup>89</sup> In international law, a person may be considered as a victim, regardless of whether her perpetrator is identified, and convicted.<sup>90</sup> Their protection should thus be ensured because they are a victim, and not because they are a witness.

Moreover, not only is the residence permit conditioned by the victim’s willingness to participate in investigations, the stay of the person must also be considered as necessary for the aim of cooperation with authorities. It follows that the distinction between those who deserve protection and those who do not, is made according to the usefulness or the “value” of the information provided by the victim.

It is not to be argued that anti-trafficking instruments should not furnish protection for victims who participate in prosecutorial processes. Indeed, participation which might eventually lead to the conviction of trafficker, could imply grave risks, and therefore, substantial protection requirements for the witness. Nevertheless, without an additional obligation to offer an unconditional protection according to the risk faced upon return for reason of the person’s status — i.e., an identified trafficking victim — it seems that trafficked persons are moved from one system of control (the trafficker), to another (enforcement authorities).<sup>91</sup>

In sum, the TCL framework of anti-trafficking has given more weight to the prosecution and immigration aspects of trafficking, than to the protection of victims. Yet, unlike the Protocol, the ECAT is a human rights instrument, and as such presents some notable progress in the realm of international protection: it sets a higher — albeit imperfect — repatriation standard, lays down the right to a reflection period for potential trafficking victims and in some specific cases a possible right to remain. Before ratifying the Convention, U.K. law was strongly criticized for not containing any specific legislation granting protection to trafficking victims.<sup>92</sup> While victims could ask to remain in the

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88. Elaine Pearson, *Human Traffic, Human Rights: Redefining Witness Protection* 33 (2002), available at [http://antislavery.org.uk/includes/documents/cm\\_docs/2009/h/hum\\_traff\\_hum\\_rights\\_redef\\_vic\\_protec\\_final\\_full.pdf](http://antislavery.org.uk/includes/documents/cm_docs/2009/h/hum_traff_hum_rights_redef_vic_protec_final_full.pdf).

89. *Id.*

90. Victims of crime are defined as: “Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.” See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc A/RES/40/34/Annex (Nov. 29, 1985).

91. See Pearson, *supra* note 88, at 34.

92. See, e.g., Joint Committee, *supra* note 15, at 58.

country, protection was given on a discretionary case-by-case basis: some particular cases of women participating in a rehabilitating project and willing to cooperate with authorities were allowed to remain, as long as they provided relevant information for prosecution.<sup>93</sup> Other cases needed to apply via a normal procedure, which did not contain any automatic right to obtain short-term residence.<sup>94</sup> Hence, the introduction of the twine concept of reflection period and residence permit within the ECAT was welcomed by the human rights community. Nevertheless, in order to provide a protection guarantee, granting a right to remain should be a decision based solely on whether the victim risks serious abuse in the prospective country of return. So long as the Convention leaves this assessment at the discretion of state parties, it appears that adopting the ECAT does not offer sufficient protection safeguards for trafficking victims. In short, a protection gap exists in the anti-trafficking framework and needs to be filled. When victims cannot comply with the above-discussed requirements, asylum may well be the only option available to them. The following part will examine the extent to which refugee law offers a response to these protection needs.

## II. INTERNATIONAL PROTECTION OF TRAFFICKING VICTIMS UNDER THE REFUGEE CONVENTION

The relevance of the Refugee Convention for trafficking victims, or persons at risk of being trafficked, became explicit when the UNHCR issued its Guidelines on International Protection relating to human trafficking (trafficking “Guidelines”).<sup>95</sup> The provision of asylum to trafficking victims, and its effect on the integrity of the international refugee regime, has nevertheless consumed much ink. A legitimate concern emerged that the asylum system might be abused by traffickers who could exploit asylum loopholes, and circumvent normal immigration procedures in order to ensure that their victims would remain in the destination country.<sup>96</sup> Given this risk of abuse, it has been argued that asylum is not an appropriate response to the protection needs of trafficking victims.<sup>97</sup> This reasoning ignores that one does not become a refugee through recognition, but is a refugee for reasons independent of such a recognition. That is to say that the primary

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93. *See id.* at 58-64.

94. *See id.*; *see also* THE FUTURE GROUP, *supra* note 57, at 26.

95. *See* UNHCR Trafficking Guidelines, *supra* note 8.

96. *See* Laura Schlapkohl, *Human Trafficking and the Common European Asylum System*, 58 (Apr. 21, 2006) (unpublished MA Thesis, Tufts University 2006), available at <http://fletcher.tufts.edu/research/2006/SCHLAPKOHL.pdf>; WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 46, at 39.

97. *See* Schlapkohl, *supra* note 96, at 58.

questions that need to be addressed are, whether a refugee has been trafficked, and whether a trafficked person is a refugee.<sup>98</sup>

Part II focuses on the second line of inquiry by examining the leading U.K. jurisprudence on the matter. It will assess the scope of the Refugee Convention in situations where an involvement in trafficking can give rise to an asylum claim. This Convention is not the only instrument containing a prohibition of return. While human rights law provisions are important tools to address protection needs, they also give rise to a variety of statuses, which bring into play different, sometimes lower,<sup>99</sup> levels of protection.<sup>100</sup> Thus, for reasons of space, we will concentrate on the highest protection standard contained in the Refugee Convention.

### A. *The Scope for Refugee Protection of Trafficking Victims*

#### 1. The Convention as a Protection Safeguard

The Refugee Convention is the only instrument with global scope, which essentially protects individuals who have been compelled to leave their home and are seeking safety outside of their country of origin. Within the context of ever varying factual circumstances, it has shown to be an adaptable tool for changing international protection needs, and has therefore demonstrated a certain potential to respond to the major challenge of irregular migration, in particular in the form of trafficking.<sup>101</sup>

Unlike the previously examined instruments, the basis for protection within the *Refugee Convention* is first and foremost, the defence of fundamental human rights.<sup>102</sup> Indeed, its purpose is to provide a surrogate protection to individuals whose state has failed to fulfil its fundamental obligations, provided that this failure has a discriminatory impact.<sup>103</sup> Consequently, the Convention imposes a certain number of legal duties upon states, the most important of which is the obligation to

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98. See Kaori Saito, *International Protection for Trafficked Persons and Those Who Fear Being Trafficked*, 9 (United Nations High Comm'r for Refugees, Research Paper No. 149, 2007), available at <http://www.unhcr.org/research/RESEARCH/476652742.pdf>.

99. For a critique of the E.U. subsidiary protection regime, which also applies in the U.K., see Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime* 17 I.J.R.L. 465 (2005).

100. See Volker Turk, *Refugee protection in International Law: An Overall Perspective*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 5 (Erika Feller et al. ed. 2003).

101. See *id.* at 3.

102. See *Canada v. Ward* [1998] 2 S.C.R. 689 (Can.).

103. See *id.*

respect the principle of non-return of refugees and asylum seekers.<sup>104</sup> Once granted refugee status, a victim will be eligible to stay in the U.K. for an initial period of five years, as opposed to the permit granted by the ECAT which provides for a renewable one-year residence. In addition, the victim will benefit from a number of other entitlements, such as family reunion with dependants or free education.<sup>105</sup> Most of all, however, the right to remain afforded by the Refugee Convention is not contingent on the willingness of the victim to co-operate with a police investigation, but is purely based on the person's protection needs.

Being a victim of trafficking does, however, not necessarily entitle a person to refugee protection. In order to fulfil the legal criteria of refugee status it must, first, have "a well founded fear of being persecuted."<sup>106</sup> Second, such fear must be "*for reasons of race, religion, nationality, membership of a particular social group or political opinion.*"<sup>107</sup> Further, the person must be "outside the country of his [or her] nationality and [be] unable or, owing to such fear, unwilling to avail him- [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."<sup>108</sup>

## 2. Human Trafficking and Persecution

A claim for international protection submitted by a victim or potential victim of trafficking can arise in the three following circumstances. First, a person may have been trafficked from its country of origin to another state, may have succeeded to escape its trafficker and may then seek the protection of the state where it has been trafficked.<sup>109</sup> Second, the person may have been trafficked in its home country and after escaping, may have fled abroad in search of international protection.<sup>110</sup> Finally, a third possible scenario arises when the person who is seeking protection has not been trafficked but may fear to become a victim of trafficking.<sup>111</sup>

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104. Convention Relating to the Status of Refugees, *supra* note 16, art.33.1.

105. See Raggi Kotak, *Trafficking Convention—Meaningful Protection or Rhetoric?*, 82 WOMEN'S ASYLUM NEWS 1, 3 (2009), available at [http://www.asylumaid.org.uk/data/files/publications/96/final\\_issue\\_82\\_for\\_pdf\\_final.pdf](http://www.asylumaid.org.uk/data/files/publications/96/final_issue_82_for_pdf_final.pdf).

106. Refugee Convention, *supra* note 17, art.1.A.

107. *Id.* (emphasis added).

108. *Id.*

109. UNHCR Trafficking Guidelines, *supra* note 11, ¶ 13.

110. *Id.*

111. *Id.*

While the refugee definition states that the person must be outside its country of nationality or habitual residence, this requirement does not mean that the refugee must have left the country because of the very fear of persecution, and does therefore not exclude persons who seek asylum because they were trafficked after having left their country.<sup>112</sup>

Although the Convention lacks a definition of “persecution,” Commonwealth courts in particular have interpreted the term as “the sustained or systematic violation of basic human rights demonstrative of a failure of state protection.”<sup>113</sup> It is generally recognized that trafficking is a violation of basic human rights, and that it is constituted by persecutory acts such as rape, removal of organs or starvation.<sup>114</sup> Apart from the violations inherent to the act of trafficking itself, persecution feared by trafficking victims can take various forms. First, even when the act of trafficking is not likely to happen again, it might be appropriate to grant refugee status to an individual “if there are compelling reasons arising out of previous persecution.”<sup>115</sup> Persecution of former trafficking victims may not necessarily be caused by the traffickers themselves. Rather, victims may be at risk from their family or from their community, fearing ostracism, discrimination or traumatisation. Second, trafficking victims may face reprisals and/or possible re-trafficking, in which case, they should not be returned to their country of origin.<sup>116</sup> In *Dzhygun*, for example, a woman who had escaped her traffickers was recognized to have a well-founded fear of persecution in form of reprisals, if she was returned to the Ukraine, where her traffickers were looking for her.<sup>117</sup> Similarly, in the case concerning an Albanian woman who had been sold by her family to a criminal who planned to exploit her as a prostitute, the Tribunal accepted that there was “plainly a real risk (indeed more than a real risk)” that if the Appellant was returned, she would be subjected to violence and/or sale into prostitution.<sup>118</sup> In several other cases, however, convincing the competent tribunal that such risks to face persecution were serious and real appeared to be more difficult.

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112. *Id.* at ¶ 25.

113. JAMES C. HATHAWAY, *LAW OF REFUGEE STATUS* 104-105 (1991).

114. *See Saito, supra* note 98, at 11; *see also* UNHCR Trafficking Guidelines, *supra* note 11, ¶ 15.

115. *Id.*, ¶ 16.

116. *Id.*

117. *Dzhygun* [2000] UKIAT 50627, ¶ 22.

118. *SK* [2003] UKIAT 00023, ¶ 9.

## B. Showing a “Well-founded Fear of Being Persecuted”

### 1. The Reasonable Likelihood to be Persecuted

While a person who has not been trafficked may have a well-founded fear of eventually falling into the hands of traffickers, most of the protection claims related to trafficking emerge when a person has already been the object of trafficking. Yet, having been persecuted *per se* is not a ground for protection under the Convention.<sup>119</sup> Rather, protection is afforded when there are substantial grounds for thinking that the person will be persecuted upon return.<sup>120</sup> Notwithstanding the fact that past events can help to assess the future, a major problem of these claimants has been to show that they were reasonably likely to be persecuted in the future. A particular difficulty to demonstrate a “well-founded fear” arose in demonstrating that the former act of trafficking did not merely constitute a random misfortune, but that the claimants could again be individually targeted by criminals wishing to re-traffick them or to seek revenge after their escape.

For example, the likelihood of re-trafficking has been viewed as minimal, when the victim was deemed to be “aware” of the trafficking risk after having experienced it a first time.<sup>121</sup> In *MP*,<sup>122</sup> it was pointed out that in Romania, most of those who are trafficked leave the country willingly, hoping for a better life abroad, and are deceived as to what will happen to them. Hence, in spite of the fact that the appellant was kidnapped twice in the past,—first as “a random target of opportunity,”<sup>123</sup> and second, as a victim of “pure mischance,”<sup>124</sup>—it was decided that “because of her experiences she [was] more likely to be risk conscious,”<sup>125</sup> and that it was therefore “inconceivable that she could be duped in the same way as most victims of traffickers.”<sup>126</sup>

Furthermore, re-trafficking was deemed to be particularly unlikely, when women were considered to be beyond the age of normally targeted victims. This argument was raised in both the cases of *VD* and of *MP*. Despite the fact that in these cases, the appellants had been trafficked at an age which was considered to be beyond the high risk age-group

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119. See generally Refugee Convention, *supra* note 17.

120. See *id.*

121. See JO Nigeria [2004] UKIAT 00251, ¶ 13.

122. MP Romania [2005] UKIAT 00086.

123. *Id.*, ¶ 98.

124. *Id.*, ¶ 99.

125. *Id.*, ¶ 104.

126. *Id.*, ¶ 98.

profile, this was interpreted as an “unusual occurrence” and unlikely to happen again.<sup>127</sup>

In summary, the successful demonstration that the act of trafficking to which the person had been subjected in the past has a persecutory nature does not constitute a major hurdle for claims brought forward by trafficking victims. However, one can conclude from the analysed jurisprudence that a difficulty to show a well founded fear of persecution arises when the former victim of trafficking finds itself in such particular circumstances, that it is not deemed likely to be re-targeted by traffickers. Having said that, in order to meet the persecution criteria, showing that one is reasonably likely to face serious human rights violations upon return is a necessary, though not a sufficient condition. Another obstacle for trafficking-related claims is caused by the fact that human trafficking is a crime which tends to be committed by non-state actors.

## 2. The Agent of Persecution

As mentioned in the previous section, the meaning of “persecution” within the refugee definition pre-supposes an involvement of the state in the persecutory act.<sup>128</sup> Nevertheless, in view of the Refugee Convention’s role to protect fundamental human rights, and given the varying nature of potential persecutors, which is not limited to states and their representatives, this gives rise to a wide interpretation of what constitutes persecution. Consequently, the UNHCR Handbook recalls that if persecutory actions “are normally related to actions by the authorities of the country[. . .], [w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, *to offer effective protection*.”<sup>129</sup> Put differently, as recognized in the leading case of *Horvath*,<sup>130</sup> persecution is an act composed of two core elements, namely, serious harm and failure of the state to protect.<sup>131</sup>

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127. *Id.* at 100; VD Albania CG [2004] UKIAT 00115, ¶ 18; *see also* NA Takijistan CG [2004] UKIAT 00133, ¶ 25. Interestingly enough, this reasoning was not applied in the United States, where a similar case of a 28 year old Albanian woman had been granted asylum on ground of fear of future persecution, despite her age. *See Saito, supra* note 85, at 14.

128. *See* HATHAWAY, *supra* note 113.

129. *See* U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV (1992) (emphasis added).

130. *Horvath v. SSHD* [2001] AC 489 (HL).

131. *See id.*

Thus, trafficking victims must be able to show that the state has failed to protect them, but not that it is directly responsible for the harm they fear. As pointed out by Demir, in countries where trafficking flourishes, there is usually little incentive to protect those who are subject to the violations it involves.<sup>132</sup> In fact, those who are targeted usually belong to a poor section of the population, have little political power, and are thus “frequently seen as more of a burden than a benefit to the national economy.”<sup>133</sup> Accordingly, it is essential that the duty of the state to protect does not only carry the existence of legislative and administrative mechanism, such as the legal recourse to prevent, investigate or punish the act, but also their effective implementation.<sup>134</sup> Indeed, while situations exist, where the state’s institutions are directly supporting the act,<sup>135</sup> most of the time, the existence of trafficking reveals a gap between efforts by states to tackle the crime and the actual effectiveness of these measures.<sup>136</sup>

The question remains, whether protection by the state must be actively sought by the victim. Does the claimant need to demonstrate that he has sought protection to show that the state has failed to grant it? This question needs to be answered in light of article 1A(2) which requires that a refugee shall be “unable or, owing to [his] fear, *unwilling* to avail himself of the protection of [his] country.”<sup>137</sup> One could ask, however, when such an unwillingness to avail oneself to protection can be considered as appropriate. This question came up in the Canadian case of *Ward*,<sup>138</sup> in which, after recognizing that not all states are able to protect their citizens effectively, the Supreme Court held that a claimant might only be expected to seek the protection of his home authorities, when such a protection “might reasonably have been forthcoming.”<sup>139</sup> It follows that in situations where the state agents are suspected to be involved in, or at least condone, the act of trafficking, refusal to seek

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132. Jenna S. Demir, *Trafficking of Women for Sexual Exploitation: A Gender-based Well-founded Fear?*, 36 (Jan. 2003) (unpublished MA Thesis, University of Pavia), available at <http://www.jha.ac/articles/a115.pdf>.

133. *Id.*

134. UNHCR Trafficking Guidelines, *supra* note 11, ¶ 22; Home Office, *Asylum Process Guidance for Victims of Trafficking*, 6 (2009), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary>.

135. For example, because of laws and penalties administered in discriminatory fashion. UNHCR Trafficking Guidelines, *supra* note 11, ¶ 24.

136. Saito, *supra* note 98, at 18.

137. Protocol, *supra* note 1 (emphasis added.)

138. *Canada v. Ward* [1998] 2 S.C.R. 689 (Can.). *Canada v. Ward* is a leading immigration case for Commonwealth courts.

139. *Id.*

protection should be considered as reasonable. Indeed, “it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.”<sup>140</sup> Such a situation arose in *SK*, where it was acknowledged that, given the corrupted nature of Albanian authorities, these would not be of any help to the Appellant, who could therefore not be reasonably expected to seek their assistance.<sup>141</sup>

Thus, it is by establishing a link between the feared persecution and the state’s positive obligation to protect against human rights violations, that the nexus between abuses by traffickers and state persecution within the Refugee Convention can be made. Having said that, it is worth noting that a majority of trafficking victims are refused asylum at the initial stage, partly with the argument that they could enjoy sufficient protection by their state.<sup>142</sup> In other words, demonstrating a failure of state protection remains a major challenge for those claiming asylum as a result of trafficking.

### C. *Conventional Grounds and the Extension of the “Particular Social Group”*

Once victims or potential victims of trafficking are able to show a well-founded fear of persecution, the applicability of the Convention remains problematic, because victims and potential victims do not easily fit into the categories required for an entitlement to refugee status. Most frequently, people are at risk of being trafficked because they are vulnerable. Yet, “[s]imply being vulnerable to being trafficked will not entitle one to refugee status.”<sup>143</sup> Furthermore, trafficking victims are mostly targeted by criminals motivated by economic interests.<sup>144</sup> Nonetheless, the UNHCR trafficking Guidelines acknowledge that the belonging to one of the protected groups is likely to put one into a position of vulnerability, which might lead to trafficking. Hence, even if the overriding motivation of the trafficker appears to be financial, this does not exclude that the victim might be partly targeted for its race, religion, nationality or political opinion. Nevertheless, exploiting the so-called elastic or ‘open-ended’<sup>145</sup> category of membership to particular

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140. *Id.*

141. *SK* [2003] UKIAT 00023, ¶ 7.

142. SARAH RICHARDS, *HOPE BETRAYED: AN ANALYSIS OF WOMEN VICTIMS OF TRAFFICKING AND THEIR CLAIMS FOR ASYLUM* 14 (Feb. 2006), available at <http://www.humantrafficking.org/publications/427>.

143. UNHCR Trafficking Guidelines, *supra* note 11, ¶ 32.

144. *See id.*

145. Goodwin-Gill, *supra* note 10, at 76.

social group (“PSG”) appears to be the most successful way to demonstrate a causal link. Indeed, if the Convention is often described as a “living instrument,” its malleability partly lies in a protection ground which “has to be left to evolve in line with society’s understanding of groups within it.”<sup>146</sup> So that a PSG can be recognized, its members must meet two requirements: (i) they must possess an immutable, linking characteristic, i.e. a factor which is beyond the power to change it, or so fundamental to their identity that they should not be required to change it; and (ii) the group needs to exist in a social reality, namely circumstances external to the group that have put it apart from the rest of society.<sup>147</sup> In order to understand how trafficking victims can satisfy these conditions, it is necessary to comprehend the major jurisprudential developments pertaining to this protection ground, among which, the case of *Shah and Islam*<sup>148</sup> constitutes a significant precedent.

#### 1. The *Shah and Islam* Precedent and its Implications for Trafficking Victims

In the joint case of *Shah and Islam* (“*S&I*”), the House of Lords evaluated the position of two married Pakistani women claiming refugee status.<sup>149</sup> Both had been accused of adultery and feared to be subjected to criminal proceedings for sexual immorality.<sup>150</sup> If found guilty, their punishment would be likely to include flogging or stoning to death.<sup>151</sup> The Lordships held that the applicants belonged to a PSG determined by the suspicion of adultery, gender and their unprotected status.<sup>152</sup>

This case constitutes a precedential decision especially for women fearing persecution, and therefore, also creates a framework upon which trafficked women’s membership to a PSG can be considered. Bearing in mind that not all, albeit a majority, of trafficking victims are women, we will first examine the implications of this case for trafficked women. This will lead us to a second sub-section, which will consider more recent case law suggesting a possible application of the PSG ground to trafficking victims in general.

In *S&I*, it was held that in order to be identified as a PSG, members of that group must “have been set apart by the norms of customs of that society, so that all people who have their particular characteristic are *recognised* as being different from all the others in that society” and that

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146. Simic, *supra* note 16, at 22.

147. Goodwin-Gill, *supra* note 10, at 75.

148. *Islam v. SSHD, Ex Parte Shah, R v.*, [1999] UKHL 20.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

the social group exists independently *of the persecution*.<sup>153</sup> First, it is clear from this statement that women are not a PSG in all societies, but constitute such a group *in Pakistan*. To identify a social group, one needs first to identify the society of which it is part, and find that the group has a distinct identity in this surrounding society.<sup>154</sup> Considering the case of trafficking, this suggests that one needs to look at the vulnerability of women in a certain social setting.<sup>155</sup> As an example, it was by examining the conditions of women in the north eastern part of Albania, that the Tribunal in *SK* found the existence of a PSG defined as “women from the north east of Albania.”<sup>156</sup>

Second, members of a PSG must be “recognised” in their social context. Indeed, an external perception is inherent to the existence of a PSG. When this external defining factor needs to take the form of recognition, however, it might impose an additional challenge for claims brought by trafficking victims. As a matter of fact, human trafficking remains a largely hidden phenomenon. Victims are rarely seen in public places, but are restricted to sweatshops, brothels, farms or private homes. They remain invisible as they often work in unregulated sectors, such as the sex industry, agriculture or domestic services. Additionally, victims trafficked for non-sexual forms of forced labour, whose work is not considered as criminal and therefore escapes regimes of social controls (such as the spatial segregation of prostitutes into the “red light district”) are usually particularly invisible.<sup>157</sup> Hence, while it is important to adopt a ‘social view of the social group,’<sup>158</sup> expecting trafficking victims to be subjectively recognized in their society would raise the threshold of the external perception requirement to a level hardly reachable for those who have been trafficked. These considerations were notably taken into account in *Dzhygun*, where it was stated that no evidence existed that the group of “women in the Ukraine who are forced into prostitution against their will”<sup>159</sup> was recognized in their country. Quoting various international reports, the Tribunal nevertheless noted that the phenomenon was internationally recognized, and that this was “likely to be mirrored by societal recognition within the Ukraine.”<sup>160</sup> It follows from this judgment that recognition by the society under examination

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153. *Islam v. SSHD, Ex Parte Shah, R v.*, [1999] UKHL 20 (emphasis added)

154. *Id.*

155. UNHCR Trafficking Guidelines, *supra* note 11, ¶ 38.

156. *SK* [2003] UKIAT 00023, ¶ 14.

157. Fatma Marouf, *The Emerging Importance of ‘Social Visibility’ in defining a ‘Particular Social Group’ and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *YALE L. & POL’Y REV.* 47, 98-100 (2008).

158. Goodwin-Gill, *supra* note 10, at 84.

159. *Dzhygun* [2000] UKIAT 50627, ¶ 34

160. *Id.*, ¶ 22.

might demonstrate the cognition of a PSG, that however, if this is not the case, third actors need to be considered in order to assess the public perception of the group. Third, the existence of a PSG must be independent of the very persecution of its members. This poses a major challenge for trafficking victims, who need to show that they are a PSG because of what they *are*, and not because of what one *does* to them. This obstacle occurred in *JO*, where the Tribunal declared that “trafficked women do not qualify as a PSG, since what defines them is essentially the fact of persecution.”<sup>161</sup>

## 2. *SB*: Overcoming the Dilemma of the Persecutory Element

The case of *SB* concerned a Moldovan woman who had been trafficked into the U.K. for the purpose of sexual exploitation, and later gave evidence against her trafficker, which resulted in his successful prosecution. Fearing that she would be mistreated by him and his powerful family upon return to Moldova, she applied for asylum on the ground of membership to the PSG of “victims of trafficking for the purposes of sexual exploitation.”<sup>162</sup>

The major difficulty for the appellant was to show that the group she claimed to be part of, was not solely defined by the feared persecution. Indeed, the Refugee Convention does not aim to afford protection against all persecution, but is only concerned by persecution based on discrimination. Hence, the PSG category must be defined by a discriminatory treatment against its members, a treatment, what is more, which needs to be based on a common immutable characteristic.<sup>163</sup> Having said that, the Tribunal recognized that this requirement does not exclude that the act of persecution can reflect the existence of discrimination.<sup>164</sup> Thus, a PSG can be partly defined by persecution, “or accurately (but just as fatally) by the discrimination which founds the persecution.”<sup>165</sup> Additionally, slightly altering the ground on which the appellant initially claimed asylum, the Tribunal highlighted that she belonged to a group of “former victims of trafficking for sexual exploitation.”<sup>166</sup> With this formulation it put the emphasis on a historical fact, which constituted an immutable characteristic. In other words, the defining characteristic of this PSG’s members was not that they were former victims, but that they were former victims, a past experience,

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161. *JO Nigeria* [2004] UKIAT 00251, ¶ 18.

162. *SB* [2008] UKAIT 00002, ¶ 12.

163. Goodwin-Gill, *supra* note 10, at 75.

164. *SB* [2008] UKAIT 00002, ¶ 25.

165. *Id.*, ¶ 25.

166. *Id.*

which is independent of and the cause of their feared ill-treatment.<sup>167</sup> Hence, the relevance of this case first lies in that the Tribunal rejected the argument following, which defining a PSG according to a common experience of trafficking, would amount to define the group by reference to its members' feared persecution.

Second, given that the group under consideration was found to have a distinct identity in its society independently of the fear of persecution, the Tribunal upheld that no general discrimination (as opposed to the existing discrimination inherent in the persecution) was needed in order to show an identifying characteristic of the group.<sup>168</sup> This reasoning constitutes a core aspect of the case. Indeed, acknowledging that discrimination in the wider sense is not a necessary identifying characteristic for this PSG implicitly recognizes that human trafficking, in particular trafficking for sexual exploitation, is not a gender specific violence. Indeed, it would be difficult to show that men who have been subjected to trafficking are generally discriminated in their society.<sup>169</sup> Imposing such a condition would suggest that only women would fall into that group. This decision has raised some concern, in particular among the women's rights community, which has deplored the lack of emphasis on gender based violence in form of sexual exploitation.<sup>170</sup> Yet, the very interest of this case is that, detaching the group from a gender-based characteristic, it allows for men to be included into a group determined by a common past experience of trafficking, and thus to claim asylum for reason of membership to a PSG.

In short, Part II has highlighted a number of obstacles faced by trafficking victims claiming asylum. However, recent jurisprudence, in particular the case of *SB*, may give an impetus to the positive development of U.K. case law towards the protection of trafficking victims under the *Refugee Convention* which could therefore be seen as a palliative to protection lacunae in the TOC framework. Having said that, these two regimes cannot be weighed separately. In order to complete our analysis, Part III will look at their interaction and at the impact it has on the protection of trafficking victims.

### III. SAFEGUARDING THE RIGHT TO SEEK ASYLUM

At this point, it has been argued that when trafficking victims do not meet the high threshold of protection safeguards found in the anti-

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167. *Id.*, ¶ 52.

168. *Id.*, ¶ 49.

169. *Id.*, ¶ 55.

170. Women's Rights, *Protection of Victims of Trafficking under the 1951 Convention*, 8 FOCUS ON WOMEN 5, 7 (2008).

trafficking framework, in particular within the ECAT, demonstrating a well founded fear of persecution especially for reason of a membership to a PSG may offer a last recourse to ensure that they will not be returned to a country where they risk serious harm. In its trafficking Guidelines, the UNHCR states that “the evolution of international law in criminalizing trafficking can help decision-makers determine the persecutory nature of the various acts associated with trafficking.”<sup>171</sup> Indeed, as discussed above, fear of persecution and lack of protection are closely interlinked. The protection afforded by a country of origin, in turn, needs to be determined through an assessment of the legislative and administrative means put in place in order to prevent and combat trafficking. In other words, the determination of whether someone should be granted refugee status is closely linked to how anti-trafficking measures are applied in the state of origin. If this is true for the latter, however, it is also the case for the country of refuge. That is to say that, in order to reach the stage where it can show a well founded fear of persecution, a trafficking victim must first find access to the jurisdiction of the destination country and benefit from a right to *non-refoulement*. It also must enjoy immunity from criminal prosecution for having breached the law in order to enter the country in question. What is more, to submit an asylum claim as a victim of human trafficking, the person needs to be identified as such in the first place. Without being able to make these critical steps, a trafficking victim will not be able to reach the ultimate goal of being entitled to international protection under the Refugee Convention. Anti-trafficking laws, and in particular the ECAT, contain a number of key provisions to ensure that victims are able to benefit from these rights. Yet, assessing the implementation of these, as well as other pertinent provisions of the ECAT should allow us to obtain a more comprehensive picture of the trafficking victims’ ability to benefit from their right to seek asylum.

After a vigorous campaign fought by the human rights community, the ECAT has been ratified by the U.K. in December 2008.<sup>172</sup> In order to meet its terms, the U.K. has taken a number of new measures, which were added to an already existing national anti-trafficking framework. In particular, the Home Office issued in 2007 a UK Action Plan on Tackling Human Trafficking (“UK Action Plan”)<sup>173</sup> revised in 2008,<sup>174</sup>

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171. UNHCR Trafficking Guidelines, *supra* note 11, ¶ II.15.

172. R. Gupta, *The Truth of Trafficking*, GUARDIAN, <http://www.guardian.co.uk/commentisfree/2009/apr/02/women-sex-industry-trafficking-prostitution> (last visited April 18, 2010).

173. Home Office, *supra* note 65.

which sets out the Government's strategy in fighting human trafficking and contains deliverable measures with regard to prevention, enforcement, prosecution and protection of victims.<sup>175</sup> As discussed above, a major change since the ratification of the ECAT has been the insertion of a reflection and recovery period of 45 days, which applies to all victims of all forms of human trafficking and is not dependent on the victim's co-operation with enforcement authorities. Additionally, in accordance with article 14 of the Convention, a possibility of a one-year residence permit for identified victims has been introduced.<sup>176</sup> These modifications have been welcomed and viewed as a major progress in the realm of victims' protection.<sup>177</sup> Nevertheless, forasmuch as these provisions do not constitute sufficient protection safeguards for individuals who have been trafficked, it shall now be examined how other measures taken in the context of the ECAT are likely to influence the exercise of a right to seek asylum.

*A. Guarantying the Access to the Asylum System*

The fact that anti-trafficking measures can have an impact on the refugee protection regime is expressly acknowledged by the ECAT, whose article 40.4 reiterates the state parties' obligations under the Refugee Convention. In particular, this article underscores that no provision in the ECAT should affect the exercise of the fundamental right to *non-refoulement*, and that states shall ensure the access to fair and efficient asylum procedures by trafficking victims.<sup>178</sup> The principle of *non-refoulement* connotes, first, the right of an individual to enter a country of destination, and, second, the renouncement of returning that individual to its country of origin.<sup>179</sup> It applies to genuine refugees, as well as to asylum seekers who have a presumed refugee status. The implications of this principle for trafficking victims are twofold. On the one hand, as mentioned earlier, persons who have fallen into the hands of traffickers may have a genuine claim for refugee status independently of their subjection to trafficking. Moreover, trafficking victims may have escaped their traffickers in their country of origin, fled and claimed

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174. Home Office, Update to the UK Action Plan on Tackling Human Trafficking, <http://www.crimereduction.homeoffice.gov.uk/humantrafficking004.pdf> (last visited, June 20, 2009)

175. Home Office, *supra* note 65, at 3.

176. HOME AFFAIRS COMMITTEE, *supra* note 26, at 42. It should be recalled that the U.K. is not bound by the EU Directive which calls on states to give reflection period and residence permit to witnesses for at least six months.

177. Gupta, *supra* note 172.

178. Explanatory Report, *supra* note 3, at 79.

179. Refugee Convention, *supra* note 17, art.33.

asylum in another state. In both cases, the persons need to reach the state's jurisdictions in order to have access to its asylum system. On the other hand, trafficking victims who find themselves in the destination country should be able to remain in that state as long as they have an asylum claim in process. Enjoying this right becomes however increasingly difficult, with strengthening immigration controls entailing first, the capacity to block the entry of individuals to a state, and second the ability to secure the return of those who have entered the country.<sup>180</sup>

As argued at the beginning of our analysis, one of the main focuses of anti-trafficking initiatives has been on the trans-border movements of unauthorized non-citizens. Echoing the Trafficking Protocol, the ECAT provides that its member Parties "shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings."<sup>181</sup> In particular, it requires the Parties to first ensure that transportation companies ascertain that the carried persons hold correct travel documents, and second, to take sanctions against the carriers in case of the violation of their obligations.<sup>182</sup> Third, the ECAT takes steps to strengthen the cooperation among border control agencies.<sup>183</sup> In fact, the screening of borders is a primary way for a prompt and accurate identification of victims and traffickers. Measures such as, for instance, the training of visa officers, in order to ensure their awareness of trafficking risks, appear to be legitimate efforts towards the avoidance of visa abuses by traffickers, and by implication towards the prevention of trafficking.<sup>184</sup> Such border measures are, undoubtedly, an essential means for the fight against trafficking. However, if these become an aim in themselves — moreover, by possibly blurring the line between the fight against organized crimes, illegal migration and terrorism — they may have dangerous implications for those persons who are legally entitled to enter the state's territory.<sup>185</sup>

It appears from the language employed by the UK Action Plan, that the recently outlined anti-trafficking initiatives were to a large extent elaborated with a view to Britain's national security needs, thus aiming at responding to "the main threats and challenges to [the United Kingdom's] borders;" a strategy directed towards the "increase [of] knowledge and *control* over those who enter the U.K."<sup>186</sup> This heavy emphasis laid, within the anti-trafficking context, on the strengthening of

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180. Hathaway, *supra* note 9, at 6.

181. ECAT, *supra* note 7, art.7.

182. *Id.*

183. *Id.*

184. Home Office, *supra* note 174, at 29.

185. *Id.* at 30.

186. *Id.* at 7 (emphasis added).

border controls, risks to overshadow humanitarian goals, to exacerbate the difficulties already faced by refugees in search of protection, and is likely to brush aside in practice much of the theoretical value of the legal duty of *non-refoulement*.

In the U.K., border control efforts to prevent trafficking are established within the framework of a Government's five-year immigration and asylum strategy.<sup>187</sup> This strategy contains far-reaching measures to toughen the country's borders, to detain asylum seekers as well as to use fast-track procedures. The latter constitutes one of the major components of the U.K. border control strategy. The detained fast track processing applies to asylum claims which are considered to be straightforward cases, often "prejudged as unfounded," and capable of being decided quickly, usually within a week of the claim.<sup>188</sup> Evidence shows that among the claims, which are put on the fast track process, only one percent is granted refugee status, as opposed to the 22% of success rate in the non-detained system.<sup>189</sup> This represents a very low success rate, partly to be explained by the lack of time given to asylum seekers in order to prepare and to gather evidence for their claims.<sup>190</sup> Furthermore, applicants whose claims have been refused at the initial stage are likely to be deported shortly, and are then expected to lodge their appeal from the country to which they have been returned.<sup>191</sup>

Detention rules provide for a number of exemptions to be applied in exceptional cases, among which situations where there is "independent evidence" that the claimant has been a victim of trafficking.<sup>192</sup> Nonetheless, trafficking victims routinely see their asylum claims being treated under the fast-track system, and therefore face a serious risk of being returned to the country from which they were trafficked in the first place.<sup>193</sup> A first reason for this is that the "independent evidence"

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187. *Id.* at 30.

188. Refugee Council, *The Government's Five-year Immigration and Asylum Strategy*, Briefing 1 (2005), <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/briefings/ResponsetofiveyearstrategyFebruary2005.pdf>.

189. *Id.*

190. BAIL FOR IMMIGRATION DETAINEES (BID), *WORKING AGAINST THE CLOCK: INADEQUACY AND INJUSTICE IN THE FAST TRACK SYSTEM* (2006), available at <http://www.biduk.org/pdf/Fast%20track/BIDFasttrackReportFINAL.pdf>.

191. Asylum Aid, *Safe for Whom?*, REFUGEE WOMEN'S RESOURCES PROJECT, 9 <http://www.icar.org.uk/2611/research-directory/safe-for-whom-womens-human-rights-abuses-and-protection-in-safe-list-countries-albania-jamaica-and-ukraine.html> (last visited Apr. 7, 2010).

192. *See id.*

193. *See* Sarah Stephen-Smith, *Detained—Prisoners with No Crime*, EAVES PUBLICATIONS, [http://www.eaves4women.co.uk/POPPY\\_Project/Documents/Recent\\_Reports/Detained.pdf](http://www.eaves4women.co.uk/POPPY_Project/Documents/Recent_Reports/Detained.pdf) (last visited Apr. 7, 2010); WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 46, at 22.

required to find an exceptional case is often given by expert bodies which focus on women who have been trafficked into prostitution,<sup>194</sup> and whose scope does not necessarily cover victims of trafficking for other purposes (e.g. forced labour).<sup>195</sup> Moreover, asylum claims dealt with on an accelerated schedule particularly depend on a list of countries in which, as the Government pretends, exists little or no threat of persecution.<sup>196</sup> However, several studies have pointed out that a number of these so-called "safe" countries have shown to be source countries for human trafficking.<sup>197</sup> It is striking that, by looking at the U.S. Department of State's ranking of states' performance in combating trafficking, a majority of the listed countries are deemed to be under-performing in this area (e.g. Albania, Romania or the Ukraine).<sup>198</sup>

It must be conceded that the fast-track procedure does not solely apply to trafficking victims, since this system has been established within a strategy, which is not directly linked to anti-trafficking. Yet, what the above discussion attempts to highlight, is that the border control emphasis inherent in the anti-trafficking regime risks to give momentum to broadened non-entrée policies against unwanted migrants policies, which first aim to avoid the arrival of asylum seekers, and second, risk to lead to the return of genuine refugees, at least partly because of accelerating procedures which fail to accurately assess claims to protection.<sup>199</sup>

### B. *The Non-penalization for Illegal Entry*

Besides the principle of *non-refoulement*, an additional core provision of the Refugee Convention is a formal guarantee that refugees and asylum seekers are entitled immunity from immigration penalties consequent to their search for protection.<sup>200</sup> In other words, the Convention provides that the way and means employed by asylum seekers in order to reach the state of destination is irrelevant and therefore also precludes states from criminalizing individuals for having been involved in illegal methods of entry such as trafficking. This

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194. See, e.g. Minister for Criminal Justice Reform, The Poppy Project, [http://www.eaves4women.co.uk/POPPY\\_Project/POPPY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php) (last visited Apr. 2, 2009).

195. HOME AFFAIRS COMMITTEE, *supra* note 26, at 40.

196. BAIL FOR IMMIGRATION DETAINEES, *supra* note 190, at 1; Asylum Aid, *supra* note 191, 9-13.

197. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 46, at 21; Asylum Aid, *supra* note 191, at 9.

198. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 46, at 22.

199. Hathaway, *supra* note 9, at 36.

200. Refugee Convention, *supra* note 17, art.31.

provision is mirrored in article 26 of the ECAT which, in order to avoid re-victimization, obliges state parties to adopt legislative measures prohibiting the punishment of trafficking victims for their participation in unlawful acts which the trafficker has compelled them to do (such as, for instance, the use of false documentation at the port of entry).<sup>201</sup> It is indeed widely recognized that the protection of trafficking victims would be significantly compromised if they were punished as illegal aliens in the first place.<sup>202</sup>

Accordingly, while previous U.K. law did not provide a waiver exempting trafficked persons from document fraud charges;<sup>203</sup> the Crown Prosecution Service (CPS) has now developed Guidance in order to ensure that trafficking victims are not prosecuted for immigration offences.<sup>204</sup> These instructions provide that in circumstances where the suspected offender is a “credible trafficked victim,” the prosecutor shall “consider whether the public interest is best served in continuing the prosecution in respect of the immigration offence.”<sup>205</sup>

This wording, however, raises a number of concerns. In order to apply the exemptions laid down in article 26 of the ECAT, a reasonable likelihood that the person has been trafficked will suffice.<sup>206</sup> It follows that the requirements imposed by the CPS Guidance should not go beyond, first the Convention’s identification conditions, and second, the terms defining a trafficking victim (and implicitly, the definition of trafficking). First, in order to be exempted from prosecution as a trafficking victim, a person must meet the subjective test of “credibility,” i.e., “that the investigating officers have reasons to believe that the person has been trafficked.”<sup>207</sup> This requirement raises the identification threshold beyond the level of “reasonable grounds” entailed in the ECAT and corresponding to a simple belief that goes beyond mere suspicion.<sup>208</sup> Second, once a person has been recognized as a “credible” victim of trafficking, the prosecutor shall decide whether pursuing the prosecution would meet the public interest.<sup>209</sup> In order to evaluate the public interest,

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201. ECAT, *supra* note 7, art.26.

202. United Nations Office on Drugs and Crimes, *supra* note 81, at 253; United Nations Global Initiative to Fight Human Trafficking, *supra* note 36, at 29.

203. WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 46, at 23.

204. CROWN PROSECUTION SERVICE, GUIDANCE ON PROSECUTION OF DEFENDANTS CHARGE WITH IMMIGRATION OFFENCE WHO MAY BE TRAFFICKED VICTIMS (2008), available at [http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/#Trafficking\\_and\\_Smuggling\\_1](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#Trafficking_and_Smuggling_1).

205. *Id.*

206. See CROWN PROSECUTION SERVICE, *supra* note 204.

207. *Id.*

208. ECAT, *supra* note 7, art. 9.

209. CROWN PROSECUTION SERVICE, *supra* note 204.

the Guidance states that the following factors need to be taken into account:

- (a) whether the person is a credible trafficked victim;
- (b) which role the suspect plays in the immigration offence;
- (c) whether the immigration offence was a direct consequence of its trafficked situation;
- (d) whether violence, threats or coercion were used on the trafficked victim to procure the commission of the offence;
- (e) whether the victim was vulnerable or put in considerable fear.<sup>210</sup>

To begin with, the definition of trafficking requires a coercive dimension, but the notion of coercion within the ECAT is not limited to a mere use of force.<sup>211</sup> While point (d) listed above does not expressly require “violence” and “threats,” it nevertheless fails to clearly establish that coercion can take various forms, such as an abuse of power or deception.<sup>212</sup> Most importantly, point (d) fails to specify that the consent of the person in question should not be taken into account when determining whether trafficking has occurred. Further, with regard to point (e), by referring to an element of “considerable fear,” the Guidance adds a dimension to the notion of trafficking.<sup>213</sup> Indeed, the definition of trafficking contains three components, which are the act of recruitment, transfer and receipt of a person; coercive means; and an exploitative purpose, of which none implies a notion of “considerable fear.” Consequently, one could imagine a situation where a person may not be considered as a “credible” victim by the investigating officers and may not demonstrate any particular or “considerable” fear. Moreover, there might be no reason to believe that the victim could have been threatened by violent means by a third person while it was committing the immigration offence. It may even have consented to enter the country illegally, having been deceived with regard to the conditions, which it would have to face subsequently. Although there might still be reasonable grounds to believe that it has been trafficked, this person nevertheless risks to be criminalized for an act, which it has committed during the time it was under the control of a trafficker. This is all the more worrying as once it has been charged with an immigration offence, the victim will be exposed to a risk of detention and subsequent deportation.<sup>214</sup> In short, if there exists a belief beyond mere suspicion

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210. *Id.*

211. *Id.*

212. ECAT, *supra* note 7, art.4.

213. *See* CROWN PROSECUTION SERVICES, *supra* note 204.

214. Stephen-Smith, *supra* note 193.

that a person may have been trafficked, failing to immunize it against prosecution for immigration offences represents a significant protection gap. It follows from the above discussion that the very identification of victims plays a critical role in the successful implementation of the non-penalization clause.

*C. Identification: Sine Qua Non Condition for Protection*

In order to fully benefit from any protection provision, persons who have been trafficked must first and foremost be accorded their paramount status of victim. Identification, after all, is not only a prerequisite to produce efficient intelligence and ensure the prosecution of traffickers; it is also the first step towards securing that the human rights of victims are protected.<sup>215</sup>

Identification is, however, all the more complex since the affected persons often do not consider themselves as trafficking victims.<sup>216</sup> Many migrants view a period of servitude as an acceptable cost to bear if it allows them to leave their country of origin.<sup>217</sup> Additionally, fear of reprisals, distrust towards police officers, apprehension of deportation, or the situation of dependency in which they might find themselves often put barriers for victims to come forward.<sup>218</sup> Given this possible lack of self-identification, a pro-active approach to identification by external actors becomes even more essential. Therefore, according to the UNHCR, “States are [. . .] under an obligation to ensure that such identification can and does take place.”<sup>219</sup>

Such a positive obligation is contained in article 10 of the ECAT, which calls on states to provide the “competent authorities” with trained professionals who are able to correctly identify and assist trafficking victims.<sup>220</sup> In addition, states are obliged not to remove a potential victim from their territory until the identification process is complete, if there are reasonable grounds to believe that an individual has been trafficked.<sup>221</sup>

To ensure its compliance with this provision, the United Kingdom has developed “a framework within which public bodies [. . .] and third

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215. Joint Committee, *supra* note 15, at 47.

216. See Pearson, *supra* note 88, 31-34.

217. *Id.* at 31-32.

218. See COUNCIL OF EUROPE, RECOMMENDATIONS ON IDENTIFICATION AND REFERRAL TO SERVICES OF VICTIMS OF TRAFFICKING IN HUMAN BEINGS 1 (2008), available at [http://www.humantrafficking.org/uploads/publications/council\\_eur\\_08\\_rec\\_identi\\_0408.pdf](http://www.humantrafficking.org/uploads/publications/council_eur_08_rec_identi_0408.pdf).

219. UNHCR, *supra* note 11, ¶ 6.

220. ECAT, *supra* note 7, art 10.

221. *Id.*

sector partners can work together to identify individuals who may be victims of trafficking and provide appropriate protection and support.”<sup>222</sup> This national referral mechanism<sup>223</sup> first contains identification guidance for ‘front-line’ responders, considered as essential sources of information—such as for instance sexual health services, a potential key location for engaging with victims, in particular women who are trafficked into prostitution.<sup>224</sup> Second, the model provides that these front-line professionals shall refer individuals of concern to designated “Competent Authorities”—i.e. the UK Human Trafficking Centre (“UKHTC”), and the UK Border Agency (“UKBA”) if the case is raised in connection with an immigration process (such as an asylum claim).<sup>225</sup> The referral then leads to a formal identification procedure deemed to be “necessary to ensure the protection of real victims and safeguard against possible abuse and infiltration by criminal networks.”<sup>226</sup>

This model is a response to a previous lack of a standardised identification process, characterized by an ineffective cooperation between agencies, and by the failure to encompass all authorities likely to come in contact with victims once they are in the country.<sup>227</sup> Indeed, the national referral mechanism establishes a system of interconnected stakeholders involved in identifying presumed trafficked persons.<sup>228</sup> It nevertheless contains a number of flaws, which need to be emphasised. First of all, as pointed out in a parliamentary debate early this year,<sup>229</sup> the ECAT provides that “competent authorities” shall include a range of actors which may be in contact with trafficking victims at the national, regional and local level.<sup>230</sup> This is to ensure that the decision-making process regarding the identification of the person’s status is made closest to the location of the victim and that support services are provided more efficiently. According to the referral model put in place in the U.K., however, the UKHTC and the UKBA constitute the only competent authorities responsible for a decision- making which remains within the

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222. Home Office, *Overview of the Implementation of the National Referral Model* (2009), available at <http://www.crimereduction.homeoffice.gov.uk/humantrafficking005/overview.pdf> (last visited June 19, 2009).

223. This model was established in line with OSCE Recommendations. See OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, NATIONAL REFERRAL MECHANISMS: A PRACTICAL HANDBOOK (2004), available at [http://www.osce.org/publications/odihr/2004/05/12351\\_131\\_en.pdf](http://www.osce.org/publications/odihr/2004/05/12351_131_en.pdf).

224. Home Office, *supra* note 222, at 26.

225. *Id.*

226. *Id.* at 27.

227. See Joint Committee, *supra* note 15, 48-50.

228. *Id.*

229. Hansard HC col.157W (Feb. 3 2009).

230. This includes for instance, the police, the labour inspectorate, customs and the immigration authorities. See Explanatory Report, *supra* note 3, at 45.

police and immigration authorities, and what is more, does not offer any appeal system to challenge negative decisions.<sup>231</sup> This may result in a lack of transparency in the identification process which risks being affected by law enforcement goals. In 2006, the Report of the Joint Committee on Human Rights exposed evidence according to which, among the 387 women who were referred to the POPPY Project to that date, only 16 were identified by the immigration agency.<sup>232</sup> This suggests that there exist notable obstacles to identification “within governmental agencies whose guiding imperatives tend not to revolve around victim protection.”<sup>233</sup>

Second, the ECAT calls on states to ensure that the authorities involved in the identification of potential victims are adequately trained and qualified for this task. While the Home Office has initiated an upgrading of training towards the improvement of identification capacities of front line agents,<sup>234</sup> concerns have been raised that these efforts are not sufficient. For instance, it has been observed that, among the police force of the counties of Devon and Cornwall (which amounts to a total of 3,500 police officers), in 2008 only two were trained on the matter of trafficking.<sup>235</sup> This very specific but alarming example demonstrates that the availability of qualified personnel involved in the identification of victims remains a key objective to be achieved in order to successfully implement article 10 of the ECAT. This consideration brings us back to the starting point of our analysis which began with a reminder that the loose dividing line between trafficking and smuggling leaves an opportunity for destination countries to identify migrants as being part of a voluntary and mutually interested border crossing arrangement. Once one has been categorized as an undeserving accomplice in illegal immigration, the exercise of one’s theoretical right to seek asylum may well be seriously jeopardized in practice.

To summarise, a particular attention has been paid to the three conditions which are required in order to ensure a person’s right to seek asylum and for which safeguards are included in the ECAT. Notwithstanding notable steps taken towards Britain’s compliance with these provisions, this part had to emphasise that there lurk serious implementation flaws which may hide risks for the trafficking victims who wish to claim asylum in that country.

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231. Hansard, *supra* note 229.

232. *Cf.* note 227.

233. Joint Committee, *supra* note 15, at 49.

234. Home Office, *supra* note 222, at 11.

235. Hansard, *supra* note 229.

## CONCLUSION

The positive public response to the entry into force of the ECAT in the U.K. led us to ask how this set of anti-trafficking provisions in actual reality affects the international protection of trafficking victims. The reason for welcoming the ECAT lies in the fact that this instrument's general approach tends to lean more favourably towards the protection of victims than does its counterpart, the UN Protocol. In the U.K. this resulted in the introduction of a specific legislation and a clear-cut procedure for the protection granted to trafficking victims, in contrast to the previous system, which afforded protection only on a discretionary basis. Yet, however progressive they may be in the realm of anti-trafficking, these measures continue to contain a predominant law enforcement approach, where repatriation and the right to remain are still influenced by immigration and criminal law objectives. The ECAT's provisions for a reflection period and for a short-term residence permit should therefore be viewed as complementary to, but not as a substitute for the broader asylum framework.

The Refugee Convention, by concentrating on protection needs, offers a substantial tool for trafficking victims. Its application nevertheless depends on preconditions, which may be hard to fill. Any person claiming protection under this instrument needs to show a well-founded fear of persecution, which what is more, has to be for at least one of the five conventional reasons. These obstacles need to be taken into account and remind us that not every trafficking victim can be entitled refugee status. Nonetheless, recent U.K. jurisprudence suggests that the Refugee Convention is an instrument, which has the potential to adapt to current protection needs.

In order for trafficking victims to exploit this potential to the fullest extent possible, however, they first and foremost must be in a position, which allows them to exercise their right to seek asylum. Hence, this analysis has attempted to show that, in order to assess the meaning of anti-trafficking measures for the protection of victims, it is not sufficient to examine the scope of protection provisions contained in the anti-trafficking regime, and to observe that they do not constitute satisfactory guarantees. It is also essential to ensure that measures taken within the TOC framework do not affect the rights provided by international refugee law. The fact that the ECAT contains such safeguards shows that the goals of both counter-trafficking and refugee protection can be brought into harmony with one another. Yet, a close examination of the application of these safeguarding provisions in the U.K. reveals that this recent implementation is not protection-sensitive enough to secure the

right of victims to seek asylum, and is therefore likely to affect protection guarantees existing in the parallel refugee protection regime.

Finally, one should bear in mind that the anti-trafficking and the refugee protection frameworks are not irreconcilable regimes. They have to be viewed in tandem and be considered as interdependent. Ironically, a growing tendency to restrict access to the asylum system may well substantially obstruct the efforts of those who fight against TOCs. Indeed, the more states close the avenues to asylum, the more likely it is that vulnerable individuals who are forced to leave their home will fall into the hands of traffickers, thereby exacerbating “the crime that shames us all.”<sup>236</sup>

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236. United Nations Office on Drugs and Crimes, *supra* note 81, at 6.

