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Protection from refoulement for victims of human trafficking

*An analysis of the principle of non-refoulement under the
Refugee Convention and the ECHR*

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Summary

Being a victim of trafficking for sexual purposes could mean being subject to the most flagrant human rights violations there is, such as forced prostitution, rape, physical violence and sexual enslavement. After escaping captivity, the victim needs both social and medical assistance. Additionally, a victim could have a strong desire to reside in the country where the exploitation has taken place and not be returned to the country or origin where she was lured into exploitation. The risks of such repatriation could be re-trafficking and retaliation or rejection from family and/or community and social deprivation due to their engagement in sexual activities. Such protection from refoulement does not exist to any greater extent in the specific trafficking frameworks.

To enjoy such protection victims ought to rely on other international legislation, such as claiming their right to refugee status or adherence to the complementary protection under the ECHR. Thus, the purpose of this thesis is to test the boundaries of the refugee definition and the principle of non-refoulement under the ECHR, to examine to what extent they are appropriate mechanisms to secure the victims protection from refoulement. The purpose is furthermore to analyze the human rights perspective within the existing legal frameworks of human trafficking. This is done by examining existing laws, case-law and research by authoritative experts.

The thesis shows that the human rights perspective that is supposed to permeate the trafficking frameworks, in fact are highly unsatisfying. It also shows that challenges in recognizing victims as a refugee or as falling within the scope of the ECHR, largely is due to them often being at risk of socio-economic related harm. To reach the threshold of severity set in these frameworks is more challenging in such cases. The overarching barrier towards a satisfying protection scheme is the inability by states to fully understanding the concept of trafficking; how it at large is a part of a general discrimination in society, and that the traditional means of protection do not suit the specifics of how and why trafficking is in practice.

Sammanfattning

Att vara ett offer för människohandel (trafficking) genom prostitution eller annan sexuell exploatering innebär att offret utsätts för uppenbara kränkningar av sina mänskliga rättigheter i form av våldtäkt, fysiskt våld, tvångsprostitution och sexuellt slavarbete. Efter att ha undkommit sin fångenskap är offret i stort behov av socialt och medicinskt stöd. Utöver detta kan det finnas ett stort behov för offret att stanna i den stat där hen har blivit exploaterad och inte bli återsänd till sitt hemland. Vid ett återvändande riskerar offret att åter bli offer för trafficking, hämndaktioner från sina förövare och fränstötning av familj och samhälle på grund av att hen varit involverad i sexuell handel. Något sådant skydd mot återsändning saknas inom de trafficking-specifika internationella regelverken.

För att åtnjuta ett sådant skydd får offren istället förlita sig på annan internationell lag, såsom att bli förklarad som flykting eller att anses falla inom skyddet i EKMR. Därför är syftet med den här uppsatsen att utreda om dessa regelverk på ett tillfredställande sätt kan tillgodose ett traffickingoffers behov av att åtnjuta skyddet mot återsändande. Syftet är vidare att analysera människorätts-perspektivet inom trafficking-regelverken. Detta ska genomföras genom att undersöka aktuell lagstiftning, praxis samt forskning vidtagen av erkända forskare på området.

Uppsatsen visar på att det människorättsperspektiv som är tänkt att genomsyra traffickingreglverken i sin helhet, i stort visar på stora brister. Den visar även att de utmaningar som finns i erkännandet av traffickingoffer som flyktingar eller som att de faller inom ramen för skyddet i EKMR, är i stort att den fara som offren riskerar ofta är av socio-ekonomisk karaktär. Sådana människorättskränkningar har visat sig svårare att få erkända som att nå upp till den tröskel som ställs upp i respektive regelverk för hur allvarlig en kränkning måste vara. Det övergripande hindret mot ett tillfredställande skydd för traffickingoffer verkar vara staters oförmåga att förstå människohandel; hur det i stort är en del av en generell diskriminering i samhället, och att traditionella skyddsmedel inte är lämpliga för att passa anledningarna till *hur* och *varför* trafficking förekommer.

Contents

SUMMARY

SAMMANFATTNING

PREFACE 1

ABBREVIATIONS 2

1 INTRODUCTION 3

1.1 Purpose and research question 4

1.2 Method and material 5

1.3 Delimitations 6

1.4 Current State of Research 8

1.5 Structure of the Thesis 9

2 DEFINING HUMAN TRAFFICKING 10

2.1 The UN Trafficking Protocol 10

2.1.1 The Act 11

2.1.2 The Means 12

2.1.3 The Purpose 13

2.1.3.1 *For the Purpose of Prostitution* 14

2.1.3.2 *For the Purpose of Other Forms of Sexual Exploitation* 15

2.2 Perspectives on Human Trafficking 15

2.2.1 Human Trafficking as a Security Threat 16

2.2.2 The Human Rights of the Victims 16

3 PROTECTIVE NEEDS AND PROTECTION MECHANISMS 18

3.1 Victim Identification and Protection 19

3.1.1 Obligations to Identify Victims 19

3.1.2 Obligations to Protect Victims 20

3.2 Repatriation as the Standard Respons 21

4 THE REFUGEE DEFINITION AND VICTIMS OF TRAFFICKING 23

4.1	A Well-Founded Fear of Persecution	23
4.1.1	The risk of re-trafficking or retaliation	24
4.1.2	The Risk of Social Deprivation	27
4.2	Failure of State Protection	28
4.3	Establishing a Nexus to a Convention Ground	30
4.3.1	Grounds of Religion, Political Opinion, Nationality or Race	31
4.3.2	Victims of Sex Trafficking as Members of a Particular Social Group	32
4.3.2.1	<i>The Protected Characteristics Approach</i>	33
4.3.2.2	<i>The Social Perception Approach</i>	35
4.3.3	<i>The Nexus Requirement</i>	36
5	THE PRINCIPLE OF NON-REFOULEMENT IN THE ECHR	39
5.1	A Minimum Level of Serverity	40
5.1.1	The risk of Re-trafficking and Retaliation	41
5.1.2	Cases Relating to Socio-Economic Deprivation	43
5.1.2.1	<i>Lack of Social and Medical Assistance</i>	43
5.1.2.2	<i>The Risk of Ostracism and Subsequent Social Deprivation</i>	45
5.2	Failure of State Protection	47
6	FINAL CONCLUSIONS	49
6.1	A Lacking Human Rights Approach	49
6.2	The Protection from Refoulement	51
6.2.1	Recognition as a Refugee	51
6.2.2	Protection under Art. 3 of the ECHR	53
6.3	Conclusion	54
	BIBLIOGRAPHY	56
	TABLE OF CASES	61

Preface

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Abbreviations

CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRS	1951 UN Convention Relating to the Status of Refugees
CETS	Council of Europe Treaty Series
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICAT	The Inter-Agency Coordination Group against Trafficking in Persons
IOM	The International Organization for Migration
UN	The United Nations
UNHCR	United Nations High Commissioner for Refugees (UN Refugee Agency)
UNODC	United Nations Office on Drugs and Crime
UN Trafficking Protocol	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UNTS	United Nations Treaty Series

1 Introduction

In short, human trafficking could be framed as the act of by deceptive or forceful means leading individuals into exploitation. Human trafficking, often referred to as modern day slavery, is a world-wide industry with human beings as its commodity. It is a business rendering its perpetrators a yearly profit of around \$150 billion, \$99 billion in the commercial sex industry alone.¹ According to national statistics reported to the UNODC, the United Nations Office on Drug and Crime, most victims are women and girls that together account for 72% of the victims. Out of these, 49% are adult women and 23% are girls under the age of 18. These groups are also the main target of trafficking for the purpose of sexual exploitation and prostitution, representing around three quarters of the victims. While most victims are detected within their country of citizenship, the western and southern regions of Europe are the primary destination countries for cross-border trafficking.²

In international law, a nexus between transnational organized crime and human trafficking is established as the UN Trafficking Protocol is adopted as a supplement to the UN Convention against Transnational Organized Crime.³ Hence, trafficking is approached first and foremost as a security threat, endangering state sovereignty and border control. The Protocol revolves around these core values and primarily targets the criminalization of trafficking, security of travel and identification of persons, border control and repatriation of victims. This criminal-justice, border controlling approach is dominating the international discourse, many times on the expense of an adherence to the human rights and protection needs of the victims.⁴ This thesis till focus on the latter and shed light on the protective needs of victims and the corresponding protective obligations imposed on states through a *human rights-based approach*.

¹ Human Rights First, *Human Trafficking by the Numbers*, 07 January 2017, accessed: <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>, accessed 2019-04-05.

² UNODC, *Global Report on Trafficking in Persons 2018*, United Nations Publication, Sales No. E.19.IV.2, New York: December 2018, p. 9-10; Important to keep in mind when reading these statistics is that it only represents the detected victims reported to the UNODC, and the number of unreported or undetected victims most certainly is much higher.

³ See the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supplementing the United Nations Convention against Transnational Organized Crime*, 2237 UNTS 319, New York, 15 November 2000, (UN Trafficking Protocol/Trafficking Protocol/UN Protocol).

⁴ Lobasz K., Jennifer, *Constructing Human Trafficking; Evangelicals, Feminists, and an Unexpected Alliance*, Palgrave Macmillan: Switzerland, 2019, s. 33f.

The protective needs of a trafficking victim consist both of social and medical recovery and assistance, as well as a need to remain on the territory of the state where the exploitation has taken place. Upon return, many victims face the risk not only of re-trafficking or retaliation from traffickers, but also the risk of shunning from friends and family, severe ostracism and subsequent social deprivation. Many times, victims find themselves in an even more vulnerable position than before the trafficking experience.⁵

Despite this, states often respond with immediate repatriation of an identified victim. Victims of trafficking are frequently characterized as illegal immigrants following that they have entered state illegally or overstayed their legal right to reside, which render national alien laws to allow repatriation. Being allowed to remain on the territory of the receiving state is often determined by the victim's willingness to cooperate in the criminal proceedings.⁶ A victim that fear returning to his or her country of origin are instead forced to rely on other international legislation, such as claiming their right to refugee status or adherence to the complementary protection of the prohibition of refoulement.

Being a victim of trafficking does however not per se mean a qualification for refugee status or that one falls within the scope of the complementary protection. The assessment is highly dependent on the specifics of the individual case and even though recognition under both legal frameworks are possible, victims of trafficking often face both procedural and substantive challenges in their claims.⁷ This is what this thesis will examine.

1.1 Purpose and research question

With the given background, the question becomes to what extent the international legal framework of refugee law and complementary protection, specifically the principle of non-refoulement in the ECHR, prohibits the return to the country of origin against the victim's will. This requires an examination of both the legal concept of human trafficking, refugee law and the principle of non-refoulement. It also requires a critical analysis of what substantive challenges that transpire when the two latter frameworks are applied to victims of trafficking.

⁵ Stoyanova, Vladislava, *Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights*, Goettingen Journal of International Law 3, 2011, s. 779 (Stoyanova 2011)

⁶ Stoyanova 2011, p. 779.

⁷ ICAT, *Trafficking in Persons and Refugee Status*, issue 03/09/2017, 2017, p. 1.

Accessed: <http://icat.network/sites/default/files/publications/documents/ICAT-IB-03-V.2.pdf>, 2019-04-05.

The purpose of this thesis is therefore initially to examine if, and in that case how, the human rights perspective is permeating the specific trafficking frameworks. Furthermore, the purpose is to examine to what extent the refugee convention and ECHR are appropriate mechanisms to secure the victims protection from refoulement and what substantive challenges that transpire in their applications towards trafficking victims.

Conclusively, the following research questions arises;

1. How is human trafficking defined under international law and what obligations does the international legal framework impose on states regarding victim protection? To what extent do states protect the human rights of victims?
2. Under what circumstances could victims of human trafficking for sexual purposes be recognized as refugees in accordance with the the 1951 Refugee Convention?
3. Under what circumstances could victim of human trafficking for sexual purposes be eligible for complementary protection, specifically protection from non-refoulement under article 3 of the ECHR?

1.2 Method and material

In this thesis I aim to explain the concept of human trafficking and the consequences suffered by its victims, and further elaborate on the legal definition of the refugee definition and the protection of art 3 of the ECHR in light of the specific circumstances surrounding a trafficking victim. The purpose of this methodology is to examine how the relevant legal frameworks interact with each other in terms of providing sufficient protection from refoulement to victims of trafficking. A human rights-based approach will be the basis of the analysis conducted. This approach is embedded in the empiric part of the thesis by default, as it is the core value in both the refugee convention and the ECHR. Furthermore, it will permeate the analysis in its critique against the protective framework.

The method used in this thesis is a classic legal dogmatic method, where the relevant legal areas has been examined through the analysis of existing law and interpretive sources, *de lege lata*.⁸ Legal sources including case law,

⁸ Peczenik, Aleksander: "Juridikens allmänna läror" I: SvJT, Stockholm, 2005, p. 249-252.

interpretive guidelines from authoritative sources (Primarily UN bodies), and legal doctrine from experts on the relevant area have been used. As this is a thesis of international law, where travaux préparatoires are less commonly used as a source of interpretation and guidance, such sources have been used merely on one occasion throughout the work.

In particular, the great amount of research conducted by Vladislava Stoyanova, associate senior lecturer at Lund University, on the area and related issues of human trafficking have provided both empirical material and analytical inputs. On the law of trafficking and asylum, both in general and specifically relating to socio-economic rights, the classic works of Gallagher, Hathaway and Foster have been particularly helpful. In addition, much material is collected from academic reports and writings that have examined the similar or related legal issues as covered by this thesis. The interpretive guidelines and handbooks of the UNHCR and the UNODC have further on been of great help in understanding the interpretation of the core elements of the thesis. Although they are not binding upon states, they might serve as benchmarks on how to approach the legal definitions and several core issues.

1.3 Delimitations

Human trafficking and migration related legal issues raises numerous of subsequent questions and touches upon several related, complex areas of international and national law. The time and the scope of this thesis will, with due regard to the knowledge that important aspects of the issue will be left undiscussed, be delimited. Among these, the following are arguably the most critical cuts.

To start, the thesis will have a scope limited to *transnational* trafficking cases, excluding any discussion on trafficking that occur only within one state. This also affects the examination of the refugee definition and no far stretching examination of the criteria of “being outside of their country of origin” will be undertaken, as this will be fulfilled in all cases relevant to this scope.

Moreover, the definition of human trafficking contains a broad definition of what exploitative situations that might constitute trafficking. A non-exhaustive list of what at a minimum constitutes relevant are embedded in the definition of trafficking.”⁹ The thesis will however not discuss or examine all possible forms of exploitation but instead focus primarily on human trafficking for the purpose of prostitution or other forms of sexual

⁹ Art 3(1) of the UN Trafficking Protocol.

exploitation. This delimitation and choice of exploitation purpose is motivated first and foremost by time and space but is also by an ambition of keeping the examination stringent and clear. Further on, different forms of exploitation render different substantive challenges in refugee recognition or when applying the principle of non-refoulement. The risks that victims of sexual exploitation or prostitution face upon return are to a great extent anchored in a social context with risks of, e.g., ostracism and social deprivation. These differ from the more obvious risks of violence and physical danger that normally makes a claim for refugee status of protection from refoulement. Therefore, I personally find this exploitation purpose especially interesting to examine.

The concept of human trafficking in general and human trafficking for the purpose of sexual exploitation and prostitution especially, are also relevant to discuss related to other areas of international law, such as the prohibition on Slavery, Servitude and Forced labor¹⁰ and the Rights of Migrant Workers.¹¹ While the distinction between, the overlapping of and the impact they have on the framework of trafficking and its victims are interesting research question, these areas will be left outside the scope of this thesis. The closeness to the legal area of migrant smuggling¹² will however be relevant to elaborate on shortly as it creates relevant challenges in victim identification, which is crucial for the protective mechanisms to ever come into play.

Regarding the principle of non-refoulement, several international treaties contains such a prohibition such as the ICCPR and the CAT. Arguably the most comprehensive one is found in the ECHR and this thesis will therefore limit its examination to the protection under the ECHR art. 3.

Further on, challenges of both substantive and procedural character will arise in the application of protective frameworks to victims of trafficking, but this thesis will focus on the substantive once. Again, this is motivated by the special limitation and a desire to streamline the research. It is however unavoidable to completely exclude the procedural issues, and some will be mentioned briefly but not elaborated on.

¹⁰ As defined and regulated in the Slavery Convention, signed at Geneva on 25 September 1926 and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956.

¹¹ As defined and regulated in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990.

¹² As defined in art 3(a) of the UN *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 2241 UNTS 507, New York: 15 November 2000 (UN Smuggling Protocol).

Finally, many victims of trafficking are children which often renders the need to account for specific regulations that offer a more extensive protection, such as the Convention on the Rights of the Child. However, due to lack of space, these issues will not be addressed any further and when referring to *victims* throughout the text, it will be implied that they are adult victims if nothing is said to the contrary.

1.4 Current State of Research

The field of human trafficking, specifically its impact on states response to illegal immigration and organized international crime, has been studied from a variety of different ideological and academic angles, including international relations, peace- and conflict, criminology, security and migration. Migration and human trafficking and the nexus between them have also been subject to studies of sociology and political science. The first work fully encompassing the area of human trafficking within the field of international law is the work of Anne. Gallagher, *“The International Law of Human Trafficking”*.¹³ Since then, trafficking has been under great academic and international interest, however primarily in the context of criminal law and border control.

Vladislava Stoyanova have contributed extensively to the research on trafficking in the field of human rights and migration, and much of her academic research have provided formidable help in the writing of this thesis. Several of her publications have been used, including for example her book *“Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law”*¹⁴, and the article on *Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights*.¹⁵ This research also cover the applicability of art 3 ECHR to victims of human trafficking.

Research on the refugee convention and the non-refoulement protection in art 3 of the ECHR are quite detailed. Research on the application of refugee convention to victims of human trafficking, and in relation to socio-economic deprivation in general, have been conducted to some extent by for example

¹³ Åström, Karin, *Rättsliga Åtgärder mot Människohandel; Att Skydda Offer eller Möta Hot*, IUSTUS, Uppsala: 2014, p.14.

¹⁴ Stoyanova, Vladislava, *Human Trafficking and Slavery Reconsidered: Conceptual limits and States’ positive obligations in European Law*, Cambridge University Press, Cambridge: 2017 (Stoyanova 2017).

¹⁵ Stoyanova, 2011, supra note. 5.

Foster. Her book *International Refugee Law and Socio-economic rights*¹⁶, and her contribution to the Melbourne Journal of International Law together with Dorevitch, *Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australian's Migration and Refugee Law*,¹⁷ have contributed to this thesis.

The purpose of this thesis is to frame the substantive challenges face by trafficking victims specifically, both within the refugee convention and the ECHR and understand to what extent the ECHR is complementing the refugee convention.

1.5 Structure of the Thesis

The first chapter (*chapter 2*) outlines the fundamental definition of human trafficking. A brief history of the development of the concept of human trafficking will be given as well as some in-depth comments on the different elements of the definition. The *following chapter 3* develops what protective needs a victim of human trafficking have, and what corresponding protective mechanisms that are encompassed within the UN Trafficking Protocol and the relevant European legislative frameworks. This is done in order to clarify the lack of protection given by these frameworks and underpin the need for further analysis.

The *fourth* chapter shifts focus towards the Refugee Convention and the eligibility of a victim of human trafficking to be recognized as refugee, and shines light on the substantive challenges that transpire in this process. *Chapter five* will conduct the same examination regarding the principle of non-refoulement as enshrined in the ECHR. Finally, *chapter six* will entail the final conclusions and answers to the research questions.

¹⁶ Foster, Michelle, *International Refugee Law and Socio-economic Rights: Refuge from Deprivation*, Cambridge University Press, Cambridge: 2009.

¹⁷ Dorevitch, Anna, Michelle Foster, *Obstacles on the Road to Protection: Assessing The Treatment of Sex-Trafficking Victims Under Australia's Migration and Refugee Law*, in Melbourne Journal of International Law, 2008, accessed at: https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1683181/Dorevitch-and-Foster.pdf, 2019-05-22.

2 Defining Human Trafficking

Trafficking, as will be seen, is made up by a chain of events where an individual is lured into an exploitive situation of forced labor, sexual exploitation, begging etc., by promises of good job opportunities and a better life. Often, the chosen victim is living under vulnerable conditions seeking to improve their lives, escape poverty and support their family.¹⁸ The following chapter will outline the foundations of what constitutes human trafficking in legal terms within the UN and the EU legal frameworks, specifically relating to victims of sexual exploitation and/or prostitution. This is done to facilitate the understanding of the substantive challenges that transpire when seeking asylum of protection under the principle of non-refoulement.

2.1 The UN Trafficking Protocol

The concept of *human trafficking* has long-standing political and historical roots that trace back to the discourse of *white slavery* in the early 20th century. The term white slavery at the time comprised the involuntary prostitution of women and girls following force or deception by the perpetrator. The early legal framework, *The Convention against White Slavery*, was specifically referring to the crime of “trafficking women and girls into immoral purposes”.¹⁹ However, it took until the beginning of the 21st century for a general definition to be chiseled out and adopted by the UN.²⁰ That is:

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs”.*²¹

¹⁸Anti-Slavery, *What is Human Trafficking?*, accessed <https://www.antislavery.org/slavery-today/human-trafficking/> 2019-05-16.

¹⁹ Gallagher, Anne T., *The International Law of Human Trafficking*, Cambridge University Press, Cambridge: 2012, p. 13 (Gallagher 2012), with further reference to the International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, 4 May 1904, entered into force July 18 1905, amended by a Protocol approved by the UN General Assembly on 3 December 1984, 30 UNTS 23.

²⁰ Gallagher 2012, p. 18.

²¹ At 3(1) of the UN Trafficking Protocol.

An identical definition of is used within the legal framework of the European Union, the *CoE Convention on Actions against Trafficking in Human Being*, adopted in 2005.²² The crime of human trafficking thus contains three cumulative elements; 1) the action, 2) the means and the 3) purpose of exploitation. The key in understanding the what human trafficking is, is as said to look upon it as a chain of events starting with the initial recruitment of a victim to the final exploitation. In this way, all three elements of the definition are captured.

The following subchapters will provide a brief overview of the three elements of the definition to inaugurate the reader to the concept of trafficking. Some in-depth information on the specific purpose of prostitution and sexual exploitation will also be given.

2.1.1 The Act

Acts that with the right mean and for the right purpose might amount to trafficking is listed in the definition; *recruitment, transportation, transfer, harboring or receipting of persons*. The width of actions demonstrates that a perpetrator could operate in several different manners, more or less closely connected to the actual exploitation, and be fulfilling this criterion. The act do not need to be a physical movement of the victim from one place to another but might instead be any action taken along the way towards exploitation, such as harboring or receipting.²³

The listed actions are to be interpreted broadly, naturally effecting the scope of the definition. *Recruitment* encompass any activity that makes someone commit to their own exploitation, including the staging of the initial contact by way of internet marketing, marketing in newspapers or in any other way. The act of *transportation* is not limited to any specific type of transportation and entails both national and international trafficking as there is no requirement of crossing borders within the definition.²⁴ The acts of harboring and receipting also place responsibility on actors such as owners and supervisors of places where exploitation is taking place.²⁵

²² Art 4(a) of the Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197 (CoE Trafficking Convention/CoE Convention/Trafficking Convention).

²³ Stoyanova 2017, p. 34.

²⁴ UNODC, *Anti-human trafficking manual for criminal justice practitioners – Module 1*, Vienna, 2009, (UNODC Trafficking Manual) p. 5.

²⁵ Gallagher 2012, p. 30.

Important to understand is that the definition requires there to be a preceding process before the actual exploitation. This means that a victim must be trafficked *into* exploitation, and the definition does therefore not entail a situation where for example a working place that initially was acceptable turns exploitive.²⁶ Any other interpretation would render a full convergence between the concept of slavery/servitude/forced labor and the concept of trafficking, and it would undermine the action element completely as it would lose its function.²⁷

2.1.2 The Means

It is not enough to partake in any of the above stated acts, but the act must be undertaken with a specific mean; 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.*”²⁸ This element does not apply when the victim is a child.²⁹

The way the means criteria is formulated gives us that an individual can be a victim of exploitation through both deceptive and coercive methods as well as by force. Little definitional guidelines can be found on how to further interpret the enlisted *means*. Neither is it clarified whether there is a need for requisite seriousness or to what extent the means needs to be deceptive, fraudulent, abusive etc.³⁰ Once any of the means enlisted is utilized by the perpetrator, any consent given from an adult victim to partake in the exploitation from an adult victim is irrelevant.³¹ Consent of a child is under no circumstances altering the offender’s criminal liability.³² The same approach is taken by the regional legal framework of the EU.³³

The interpretation of the means criteria also affects the scope of what constitutes trafficking since it renders the inclusion of different behaviors.³⁴

²⁶ Compare to the argumentation by Gallagher 2012, p. 30–31.

²⁷ Stoyanova 2017, p. 40–42.

²⁸ Art 3(1) of the UN Trafficking Convention.

²⁹ Ibid.

³⁰ UNODC, Issue Paper: *The Role of “Consent” in the Trafficking in Persons Protocol*, Vienna: 2014 (Issue Paper 2014) p. 25.

³¹ See Art 3(b9) of the Trafficking Protocol

³² UNODC Issue Paper 2014, p. 27.

³³ European Union Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1, 15 April 2011 (EU Trafficking Directive), Art. 2(1).

³⁴ Stoyanova 2017, p. 30.

The enumerated *means* are not legally precise or internationally defined but are instead subject to national interpretation. The effect of the criteria is regardless of its interpretation that it renders the trafficking protocol to not deal with all sorts of exploitation, only those conducted in the “correct” way. Hathaway argues that this creates conceptual issues relating to the total ban on slavery, servitude and forced Labor as liability for those crimes are not depending on the perpetrator using any specific mean or undertaking the act with any specific purpose.³⁵ As framed by Stoyanova in regard to trafficking specifically, the critical issue to address is however not precisely defining the means criteria but to establish the distinction between those who have been deceived or forced into the exploitive situation they are in, and those who for other reasons find themselves in such situations. The trafficking protocol encompass the former group.³⁶

2.1.3 The Purpose

The final part of the definition adds a *mens rea* element, requiring the act to be undertaken not only with a certain mean but also for the specific purpose of exploitation. The definition provides a non-exhaustive list of what purposes that under all circumstances constitute exploitation; “[...] *the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery. servitude or the removal of organs*”.³⁷

The function of this element is not to require actual exploitation to take place, it is only a reflection of the mental state of the alleged perpetrator. If the purpose of the act was to exploit the victim in any relevant way, whether the process of trafficking finally emerges to the intended exploitation is not relevant for criminal liability.³⁸ It is characterized as a *dolus specialis* by the UNODC, and the level of intent necessary for criminal liability, such as recklessness or criminal negligence, is left to the states to decide on.³⁹ Next up, some elaborative words on the specific purposes relevant for the scope of this thesis, the purpose of prostitution and other forms of sexual exploitation, will be said.

³⁵ Hathaway, James C., *The Human Rights Quagmire of Human Trafficking*, Michigan: Va. J. Int'l L. 49, no. 1 (2008), p. 10-11; Any further development on this will not be done as it falls outside of the scope of the thesis. However, for further development on the issue, the reader is recommended to read the work of Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual limits and States' positive obligations in European Law*, supra note. 19.

³⁶ Stoyanova 2017, p. 36.

³⁷ Art 3(1) of the UN Trafficking Convention.

³⁸ UNODC Trafficking Manual, p. 5-6.

³⁹ UNODC Trafficking Manual, p. 6.

2.1.3.1 For the Purpose of Prostitution

The inclusion of prostitution as a specific purpose of trafficking sparked discussions in the drafting process of the Trafficking Protocol. As prostitution is addressed by complete opposite approaches in different countries, several states found it problematic to include such a provision. To the contrary, the opposition held by several states saw it as an opportunity to once and for all establish a *legal opposition* towards prostitution.⁴⁰ The same dissensus is seen today, following widely different moral approaches to prostitution; while most states combat prostitution by criminalization of any acts relating to it, some have decriminalized the acts completely and some states legalize the selling of sex but not the buying, known as the Nordic Model.⁴¹

However, it appears as if the approach taken in the drafting of the protocol emerged as a middle way. No international legal opposition was set up, and no specific definition was established neither. The Travaux Préparatoires explicitly states that as neither sexual exploitation nor prostitution are defined by the Protocol, they are “*without prejudice to how States parties address prostitution in their respective domestic laws*”.⁴² The same approach is seen in the Explanatory Report to the CoE Trafficking Convention.⁴³

In short, the act of prostitution in general terms occurs when one individual is paying another for sexual services. This set-up consists of two actors, the prostitute and the buyer. The act of *prostitution of others*, as outlined in the Trafficking Protocol, requires a third actor to be involved, the person who “facilitate” the prostitution. The relevant entrenchment to establish is between the situation where the prostitute personally benefits economically from their own prostitution, and where someone else, this third party, reaps the benefits from the prostitution of another person.⁴⁴ The trafficking definition refers to the latter and therefore establishes a view of the prostitute as the victim, and the facilitator as the perpetrator.⁴⁵

⁴⁰ Gallagher 2012, p. 14.

⁴¹ The Advocates for Human Rights, *Sex Trafficking and Prostitution; an overview of four legal response models*, 2015, Accessed; https://www.theadvocatesforhumanrights.org/uploads/sextrafficking_and_prostitution_10_15.pdf, 24 April 2019.

⁴² UNODC, *Travaux Préparatoires; of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Publications, Sales No E.06. V.5, New York: 2006 (UNODC Travaux Préparatoires) p. 347.

⁴³ CoE Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw 16.V.2005, CETS No. 197, para 58.

⁴⁴ UNODC Travaux Préparatoires, p. 344 note. 27.

⁴⁵ UNODC, Issue Paper: *The Concept of “Exploitation” in the Trafficking in Persons Protocol*, Vienna: 2015 (Issue Paper 2015) p. 27.

2.1.3.2 For the Purpose of Other Forms of Sexual Exploitation

Regarding other forms of sexual exploitation, the drafting parties of the protocol determined that any definition of “other forms of sexual exploitation” was unnecessary. Therefore, none was adopted.⁴⁶ The only other international treaty body regulating “sexual exploitation” is the Convention on the Rights of the Child, prohibiting sexual exploitation of children.⁴⁷ Due to the lack of conceptual use of *sexual exploitation* in international law, substantive interpretive guidance is hard to find.

The most comprehensive guidance is found in the UNODC Model Law suggesting the following formulation to be used in national law; “*the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials*”.⁴⁸ The Model Law is not an independent legal document and not meant to be directly incorporated into national law but it might still serve as an interpretive indicator.⁴⁹

Conclusively, neither prostitution of others nor other forms of sexual exploitation is framed by any specific definition. For the purpose of this thesis, no further elaboration or problematization on the issue are relevant to make. The follow chapter will instead provide the foundations of two perspectives on trafficking, the security approach and the human rights-based approach. This is done to demonstrate how the international community’s approach to trafficking impact its victims.

2.2 Perspectives on Human Trafficking

Human trafficking could be framed as and approached by several different perspectives, including international relations, migration, coerced or forced labor etc. The most relevant perspectives of this thesis are however the view of trafficking as a security threat and as a human rights issue and these perspectives will be elaborated on in the following subchapters.

⁴⁶ UNODC Travaux Préparatoires, p. 341 and p. 342, note 14.

⁴⁷ Art 34 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁴⁸ UNODC *Model Law against Trafficking in Persons*, 5 August 2009, available at: <https://www.refworld.org/docid/4a794e432.html> 2019-05-23, p. 19.

⁴⁹ *Ibid*, p. 1.

2.2.1 Human Trafficking as a Security Threat

As have been mentioned, human trafficking is mainly framed as a security threat to states as it poses as a threat to the control of state borders and the rule of law. The drafting of the UN Protocol springs from this conceptual approach. Framing trafficking as a migration issue, in terms of that many victims reside in countries as undocumented and irregular migrants and the impact that has on security and migration control, have further rendered discussions on the impact of changing and increasing global labor migration and pose as reason for tightening borders.⁵⁰

The security approach is relevant to adhere to, as it is an important mission to combat the ongoing trafficking business world-wide. However, it is important that the perspective of the victim and the adherence to their human rights is not overlooked in the ambition to combat trafficking and target the perpetrators. In the same time, the nexus between organized crime and trafficking could be questioned as recent studies have shown that the real enemy in the trafficking business are not large enterprises, but small-time operators, functioning in an individual capacity and targeting victims on personal or family related reasons.⁵¹ This must also change the way national authorities assess the protective needs of a victim, as the feared harm in many cases might emanate from individual actors rather than large enterprises.

2.2.2 The Human Rights of the Victims

Applying a human rights approach to trafficking means to shift focus towards the rights and security of the victim, instead of the security of the nation. This also means including the state of origin and its inability to provide sufficient protection as a relevant threat.⁵² Several rights of the UDHR are or could be violated by the practice of human trafficking, where Art 3; the right to be free from physical violence, including acts of rape, forced prostitution, trafficking etc., and Art 5; right not to be tortured or subject to cruel or degrading treatment are the most relevant for this thesis.⁵³

The critical opposition to the criminal-justice approach, firstly framed by feminist theory, is rooted in three argumentative notions; 1) Human Rights

⁵⁰ Lobasz, p. 31ff.

⁵¹ Ibid, p. 33.

⁵² Lobasz, p. 37.

⁵³ For further elaboration, see Pearson, Elaine, *Human Rights and Trafficking in Persons: A Handbook, Global Alliance Against Trafficking in Women*, Bangkok: 2000, p. 42-43.

is characterized by the violation of human rights of the victim, 2) international law obliges states to prevent such human rights abuses, 3) State practice in addressing trafficking does not provide satisfactory protection for human rights and may also contribute to the violation.⁵⁴ The UN Trafficking protocol stipulates that its purpose is to protect victims of human trafficking “*with full respect of their human rights*”.⁵⁵ However, no provisions relating to the protective needs of the victims are framed as rights of the victim, merely as *soft* obligations of the state.⁵⁶

In a situation of migration, it is especially important to consider the rights of the victim to ensure accessibility and effectiveness of the asylum system. Treating victims as criminals due to them being illegal immigrants are, according to human rights advocates, counterproductive as it does not assist in the ameliorating of the harms of trafficking, but instead contribute to the opposite. Tighter border controls lead to more migrants contacting smuggling services which is heightening the risk of trafficking. Further on, repatriation of victims always comes with a risk of re-trafficking. A clear victim perspective is therefore crucial be able to provide proper assistance directly.⁵⁷

To conclude, the approach towards trafficking could either focus on the perpetrator and the security threat that trafficking pose towards states, or the victim and their inherent human rights violated by the criminal act. Both are important aspects to adhere to, but the latter may not be overlooked in the international strive towards combatting trafficking.

⁵⁴ See argumentation by Lobasz 2019, p. 36.

⁵⁵ UN Trafficking Protocol, Art. 2.

⁵⁶ Compare art. 6 of the UN Trafficking Protocol.

⁵⁷ Lobasz 2019, p. 39.

3 Protective Needs and Protection Mechanisms

Under EU migration law, victims of human trafficking have been designated as a group of *vulnerable persons*, whose special situation should be taken into due consideration in the process of migrant reception.⁵⁸ This means that victims of human trafficking are determined to be applicants “with special reception needs”. Applicants with special reception needs, need special guarantees in order to benefit from the rights of the reception directive.⁵⁹ It is thus recognized that victims of trafficking are in need of assistance and protection. The question is what that protection should entail. To what extent does it, for example, include the right to remain on the territory of the state where the exploitation has taken place?⁶⁰

The risks faced by a victim upon return might be plentiful and emanate from several different sources, motivated by different interests. There is the danger of re-trafficking, the fear of retaliation due to not earning the targeted amount of money or due to leaving a testimony against the trafficker. It might also relate to socio-economic factors such as the lack of social and/or medical assistance, ostracism by family and/or community leading to socio-economic deprivation.⁶¹ In the following chapter the protective obligations within the UN Trafficking Protocol and the CoE Convention are described, as well as the problems and obligations relating to victim identification. Despite the latter being more of a procedural issue, it is relevant to mention due to the identification often creating the first barrier towards any protection mechanism for the victim.

⁵⁸ See art 21 of the Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013 (Recast Reception Directive).

⁵⁹ Art 2 Recast Reception Directive.

⁶⁰ Stoyanova 2011, p. 778.

⁶¹ Ibid p. 779.

3.1 Victim Identification and Protection

Someone who have been subject to trafficking in any form is a victim of a crime. For the victim to properly access the asylum system, it is important to identify the individual as a just that, a victim of a crime⁶² A victim of trafficking often resides within a state illegally, either by having entered illegally or by overstaying their legal right to reside. One of the main challenges in victim identification therefore is the distinction between an irregular migrant that according to national law have no right to be present on the territory, and a victim of trafficking that as a victim should be provided more extensive assistance.⁶³ However, national authorities and border controlling agents do have incentives to consider a person an illegal migrant rather than a victim of trafficking as the latter obliges states to act and protect in a more far-reaching manner.⁶⁴ In the same time, victims of trafficking do not always identify themselves as victims and lack knowledge of their legal rights as victims which might problematize the identification process.⁶⁵

3.1.1 Obligations to Identify Victims

The UN protocol do not regulate the identification process to any greater extent, and focus will therefore be turned to the CoE Convention. Article 10 of the Convention obliges *states to act and adopt measures* to enable identification of victims of trafficking. The provision requires both actual and legislative measures to be taken and states are required to provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking and in identifying and helping victims of trafficking. The state shall also ensure collaboration between relevant authorities and support organizations, and furthermore the state is obliged to adopt legislation necessary to identify victims.⁶⁶ The aim of these obligations is to secure proper identification of victims, and this should be done irrespective of the individuals nationality or immigration status.⁶⁷ These are all *hard* obligations, framed in terms of “shall”, requiring the state to act in a specific manner.

⁶² CoE, *Ten years of implementation of the Convention on Action against Trafficking in Human Beings: impact and challenges ahead* (CoE Implementation), Strasbourg: May 2018, p. 4.

⁶³ Stoyanova 2011, 781ff.

⁶⁴ Vladislava 2011, p. 781-782.

⁶⁵ CoE on Implementation, p. 4.

⁶⁶ Art 10(1) and (2) of the CoE Trafficking Convention.

⁶⁷ CoE Implementation p. 4.

The Convention hence impose obligations on states to more or less adopt a specific legal procedure, creating a clear and comprehensive infrastructure of the identification process. How the identification process is conducted more in detail in practice is left to the discretion of each state to regulate in a suitable manner. Differences in the practical implementation is seen both on how the regulation is implemented (through law, policy etc.) and by what authority the process is conducted (the police, the immigration authority, the prosecution body etc.), and could be presumed to be highly influenced by the approach towards trafficking of the specific state. At a minimum however, the receiving state is prohibited from removing the individual from the territory of the state until the identification process is over if there are reasonable grounds to believe that the individual is a victim.⁶⁸

3.1.2 Obligations to Protect Victims

Under the CoE Trafficking Convention, when there are reasonable grounds to believe a person is a victim, a reflection and recovery period of a minimum of thirty days must be granted the alleged victim. During this time, the victim should be authorized to stay on the territory of the state. The aim of this period is for the victim to recover and escape the influence of the traffickers and/or to consider and make an informed decision on whether to cooperate with the authorities.⁶⁹ The convention also stipulate that a renewable residence permit should be granted to victims under two circumstances according to art 14 of the CoE Convention; 1) when the competent authority considers that their stay is necessary owing to their personal situation or 2) if the competent authority considers that their (the victims)⁷⁰ stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.⁷¹

This provision is an extension of the regulation in the UN Protocol⁷², but is however still problematic as it leaves states with the discretion to condition the granting of a residence permit with the victim's cooperation in the criminal procedure. The non-renewal or withdrawal of a permit is also still subject to the national decision-making, leaving little insurance to the victim.⁷³ Any further right to remain on the territory of the receiving state

⁶⁸ Art 10(1) and (2) of the CoE Trafficking Convention.

⁶⁹ Ibid, Art 13.

⁷⁰ Authors clarification.

⁷¹ Art 14(1) of the CoE Trafficking Convention.

⁷² Compare to art 6 of the UN Protocol.

⁷³ Art 14(3) of the CoE Trafficking Convention.

does not emanate from the CoE Convention.⁷⁴ The UN Protocol do not offer any additional right.⁷⁵

Under the UN Trafficking Protocol, part II of the protocol covers questions regarding protection of identified victims. *In appropriate cases*, state parties shall ensure that its domestic legal or administrative system contains measures that provide information on relevant court and administrative proceedings.⁷⁶ State parties should further *consider* implementing measures to provide for the physical, psychological and social recovery of victims, in particular appropriate housing, medical, psychological and material assistance and education, employment and training.⁷⁷ Notably, the obligations on victim protection are framed as soft obligations.

The CoE Convention frames the protection obligation in a more distinct way. State *shall* aid identified victims with their physical, psychological and social recovery and states are obliged to adopt such legislative or other measures to facilitate this assistance. A minimum level of assistance should include, et. al., access to emergency medical treatment, standards of living capable of ensuring their subsistence and through such measures as appropriate and secure accommodation, psychological and material assistance. Additionally, each party shall take due account of the victim's safety and protection needs and shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help. Also relevant is that states shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.⁷⁸

3.2 Repatriation as the Standard Respons

As seen above, the regulation on victim identification and protection does not encompass a right to remain on the territory of the receiving state but under a few situations left to the discretion of the state to decide on. To the contrary, the framework on trafficking instead centers around the notion of repatriation of identified victims. Not surprisingly, following the criminal law rational surrounding the concept of trafficking. In addition to the lack of regulation on the right to reside on the territory of the receiving state, the CoE Trafficking

⁷⁴ Compare to art 6 and 7 of the UN Trafficking Protocol.

⁷⁵ Ibid, art 6 (6).

⁷⁶ Art 6 (2a) of the UN Trafficking Protocol.

⁷⁷ Ibid, Art 6 (3) (a, c and d).

⁷⁸ Art 12 (1, 3 and 6) of the CoE Trafficking Convention.

Convention emphasize the obligation on states to facilitate and accept the return of victims – with undue or unreasonable delay.⁷⁹ As framed by Gregor Noll; “*In all, the Trafficking Protocol will be read as a comprehensive multilateral readmission agreement, suggesting that return will be the standard response in handling trafficking*”.⁸⁰

As the authorization to stay on the territory is closely linked to the usefulness of the victim in criminal procedures, the issue of residence permits are particularly pressing regarding those victims who do not wish to cooperate or who are not useful in the process, or whose process is terminated due to reasons beyond the control of the victim, such as lack of evidence beyond reasonable doubts.⁸¹ Even for those victims who have contributed to the criminal procedures, once they have fulfilled their part in the investigation and/or prosecution, their stay could subsequently be terminated and they would too face repatriation as they are no longer necessary for the state.

Consequently, as have being said, the victim instead must rely on the protection given by either the Refugee Convention or the complementary protection framework, such as the principle of non-refoulement as enshrined in the ECHR. This is where the following chapters will take off and analyze their applicability to victims of trafficking.

⁷⁹ Art 16(1) of the CoE Trafficking Convention.

⁸⁰ Noll, Gregor, *The Insecurity of Trafficking in International Law*, in V. Chetail (ed), *Mondialisation, Migration et droits de l’homme: le droit international en question*, Bruylant: 2007, p. 356.

⁸¹ Stoyanova, Vladislava, *Victims of Human Trafficking A Legal Analysis of the Guarantees for ‘Vulnerable Persons’ under the Second Phase of the EU Asylum Legislation*, in Bauloz et. Al [ed], *International Refugee Law Series*, Vol 4, Brill Nijhoff, Leiden:2015, p. 59ff.

4 The Refugee Definition and Victims of Trafficking

Victims of trafficking often face challenges in the refugee recognition process. The reasons for this are plentiful, including lack of information on the ability to apply for asylum, illiteracy, language barriers and over all accessibility to the system. It might also be a result of poor legislative and regulatory systems or policies in the receiving country.⁸² The following chapter will examine the different prerequisites of the definition more in depth and apply them to victims of trafficking to show what substantive challenges that transpire when recognizing a trafficking victim as a refugee.

The substantive requirements to claim refugee status is that the applicant must show that she is 1) outside her country of nationality, 2) owing to a well-founded fear of being persecuted for a Convention reason, and 3) that she is unable or, owing to such fear, unwilling to avail herself of the protection of the country of origin.⁸³ The first requirement will not be addresses in depth, as the scope of the thesis is limited to cases of transnational trafficking where this criterion is self-evidently fulfilled. But, notably, the case of trafficking victims more often provides a solid claim for refugee recognition *sur place*. This is due to that the feared harm of a trafficking victim often arise after the victim has left her country with the aim to work abroad, in contrary to many other refugee claims where the applicant have *fled* due to the persecutory experience.⁸⁴

4.1 A Well-Founded Fear of Persecution

The term *persecution* has no set definition contained in the refugee convention. The principle of non-refoulement as enshrined in art 33 of the Refugee Convention gives us that *threat to life or freedom* on account of one of the conventional grounds always meets the threshold. For the same reasons, *serious violations* of human rights also constitute persecution.⁸⁵ In

⁸² ICAT, *Trafficking in Persons and Refugee Status*, p. 1.

⁸³ Art 1(A) of the Refugee Convention.

⁸⁴ Dorevitch, Foster 2008, p. 15.

⁸⁵ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status; under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva: December 2011, p. 12 (UNHCR Handbook).

1991, Hathaway developed the notion of a human rights-based approach to the persecution element and proposed that persecution should be understood as “*the sustained or systematic violation of basic human rights demonstrative of a failure of state protection*”.⁸⁶ This means that the UDHR, the ICCPR and the ICESCR etc. should constitute relevant sources in determining what is persecution.⁸⁷

The refugee convention is justified by the state consensus that there is a need to collectively protect refugees when the state of citizenship is unable or unwilling to do so. The international obligation is however secondary to the obligations of the own state. The primary agent of persecution referred to is therefore national authorities of the state in question. However, the general position of the UNHCR is that it would be contradictory to limit the international protection to persecution by government actors only, if national authorities do not offer sufficient protection from persecution conducted by non-governmental actors. Therefore, harm inflicted by private actors that are known, condoned, tolerated or left unaddressed by the state due to inability or unwillingness generally could be considered persecution.⁸⁸

The threat of persecution of victims of trafficking normally emanates from individual actors or criminal networks, or even family members or members of the community. Less commonly, the threat emanates from governmental actors directly. Therefore, one of the main issues in establishing persecution to be present is the assessment of state protection in the country of origin.⁸⁹ But, before we turn to the sufficiency of state protection, the requirement of *serious harm* in relation to risks faced by victims of trafficking will be examined first.

4.1.1 The risk of re-trafficking or retaliation

The situation a victim of sex trafficking is kept under do include such serious violations of human rights that is required to meet the threshold of persecution. The harm could include everything from sexual enslavement, physical beatings, abduction, being bought and sold for profit, rape and forced

⁸⁶ Hathaway, James C. *The Law of Refugee Status*, 2 ed, Butterworths, Toronto: 1991, p. 104f.

⁸⁷ Ibid.

⁸⁸ UNHCR, *Agents of Persecution – UNHCR Position*, 14 March 1995, accessed: <https://www.refworld.org/docid/3ae6b31da3.html>, 2019-04-25 (UNHCR Agents of Persecution).

⁸⁹ Dorevitch, Foster 2008, p. 19

prostitution⁹⁰ to exposure to HIV/AIDS or venereal diseases, starvation, induced drug-dependencies and denial of medical treatment.⁹¹ This perception is further concluded by the ruling in the case of *Rantsev v. Cyprus and Russia*, where the court established that the practice of trafficking itself fall within the scope of article 4 of the ECHR and is thus constitutes a practice similar to slavery, servitude and forced labor. These are rights at the core of the civil- and political human rights framework and are framed within a total ban of any practice of such kind.⁹² Trafficking for sexual purposes thus constitute flagrant violations of fundamental human rights.

Consequently, the risk of re-trafficking would generally render the element of persecution fulfilled.⁹³ The case of *Bian v. Canada* before the Federal Court of Canada could serve as an example of this. The Federal Court overturned the lower instance's judgement in which they had rejected the refugee applications of some 200 persons, mostly from the Fujian province in China, with the motivation that trafficking is only a "criminal act not amounting to persecution". Instead, the federal court concluded that the applicant held a well-founded fear of persecution, consisting of the risk of re-trafficking, due to "*reason of the debts incurred by their families in favor of the traffickers and the further debts that their families would likely incur as a result of fines imposed on the applicants and their families by reason of their illegal departure from China*".⁹⁴ However, reluctance in accepting re-trafficking as persecution do exist. As an example, in a case before a U.S immigration judge, the claim of a woman who had been kidnapped, raped and threatened to be trafficked was rejected as this was determined to be a "personal" and "criminal" act.⁹⁵

An even more persistent issue that arise is related to the establishment of a well-founded fear, since the victim must adduce evidence for a *future* harm related to their experienced harm. This is challenging, especially when the trafficking experience is thought to be a one-time happening.⁹⁶ To overcome this challenge, the individualization of the threat could be decisive in establishing such a risk to be present. This means, attributing a specific

⁹⁰ Foster 2012, p. 27.

⁹¹ Dorevitch, Foster 2008, p. 21.

⁹² *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, para 281-282.

⁹³ UNHCR, *Guidelines on International Protection No. 7: 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*, 7 April 2006, p. 7 (Guidelines No. 7)

⁹⁴ *Bian v. Canada* (Minister of Citizenship and Immigration) (2000) IMM-1640-00, 1 December 2000, Federal Court of Canada, para 46.

⁹⁵ Saito, Kaori, *Protection for trafficked persons and those who fear being trafficked* December 2007, p. 12, accessed at <http://www.unhcr.org/476652742.pdf>, 2019-05-22.

⁹⁶ Guidelines No. 7, p. 7.

characteristic to the individual case that sets it apart from the general risk of being victim of a crime, that generally do not meet the severity needed.⁹⁷

The individualization of a threat is easier to establish if the feared persecution emanates from the risk of retaliation from the trafficker. Such a risk might be present if the victim for example has not earned the targeted amount of money or has not paid a debt to the trafficker and are particularly present when the victim has been a part of a trafficking gang or organization. It is also relevant if the victim has partaken in the criminal investigations against her trafficker that would render them revengeful.⁹⁸ An example of such a situation is the case of *SB Moldova v. Secretary of State for the Home Department*.⁹⁹ The case concerned a woman who was trafficked from Moldova and during the criminal procedures of her case, she gave evidence against the perpetrator. The criminal procedures led to his imprisonment, but by the time the UK authorities decided to remove the woman from the country, her trafficker had already served his sentence. As the trafficker had a wide network in Moldova and through Eastern Europe, the risk of retaliation was determined sufficiently real and her claim to not be returned was accepted.¹⁰⁰

Furthermore, the UNHCR guidelines recognize situations where there might be compelling reasons to consider an individual a refugee, even if the trafficking experience is not likely to be repeated. This would be the case in a situation where the victim is still suffering the consequences of the trafficking, particularly when “[...] *the persecution suffered during the trafficking experience ... was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable.*”¹⁰¹ In the assessment of this situation, one must be aware of the impact the experienced harm has on the applicant regarding opinions, feelings and psychological behavior and how this might be affected by the nature of the harm.¹⁰² This possibility is particularly relevant to victims of trafficking for sexual purposes, as their experiences many times might lead to severe mental health consequences such as PTSD, depression and suicidal tendencies affecting their subsequent vulnerability upon return to their country of origin.¹⁰³

⁹⁷ Stoyanova 2011, p. 791.

⁹⁸ Ibid.

⁹⁹ *SB (PSG - Protection Regulations - Reg 6) Moldova v. Secretary of State for the Home Department*, CG [2008] UKAIT 00002, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007.

¹⁰⁰ Ibid.

¹⁰¹ International Guidelines No. 7, p. 6.

¹⁰² International Guidelines No. 7, p. 6.

¹⁰³ Stoyanova 2011, p. 798f.

4.1.2 The Risk of Social Deprivation

In addition to the threat of re-trafficking or retaliation of the trafficker or its network, there might be situations where the fear of persecution emanates from the victim's own community and/or family. Especially regarding victims of sex trade and prostitution, there might be a risk of stigmatization and rejection as a consequence of the involvement in such acts, regardless of how involuntary the victim's participation was.¹⁰⁴ A woman trafficked for sexual purposes might also face subsequent isolation from other forms of support networks, leaving her in an extremely vulnerable situation.¹⁰⁵ The UNHCR guidelines stipulate that severe ostracism, discrimination or punishment by the community or family might meet the threshold of persecution, especially if aggravated by the trauma suffered following the trafficking experience.¹⁰⁶ However, the issue needs to be further problematized.

The vulnerability a victim of trafficking might face following community and family rejection, puts her in an exploitive situation that is heightening the risk not only of re-trafficking but also of general social deprivation due to not being able to care for once basic needs such as food or housing. In this scenario, a violation of the victim's socio-economic rights is at risk.¹⁰⁷ In order to obtain refugee status on such grounds, the feared socio-economic deprivation must be considered to meet the threshold of persecution, meaning it must constitute a *serious violation* of human rights. Under international refugee law, this has been shown difficult to claim. The issue of seeking asylum due to socio-economic rights is relevant to victims of trafficking both in relation to what risks they face upon return, but also to what they have left behind. As Foster frames it; "*What about a woman who "voluntarily" agrees to be smuggled into a foreign country as a part of a prostitution trafficking operation, because it is the only option for her survival, and who risks serious harm from traffickers if returned to her home country*" – is she a political refugee, deserving the protection offered by the Refugee recognition, or is she merely an economic migrant seeking a better life for herself?¹⁰⁸

Flight from poverty and economic degradation creates problems under refugee law, rooted what Foster argues to be an established dichotomy

¹⁰⁴ Stoyanova 2011, 790.

¹⁰⁵ Dorevitch, Foster, 2008 p. 21.

¹⁰⁶ UNHCR Guidelines No. 7, p. 7.

¹⁰⁷ Ibid.

¹⁰⁸ UNHCR Guidelines No. 7, p. 2f.

between “economic migrants” and “political refugees”. The entrenchment impose that the Refugee Convention only cover the latter group. The notion of economic migrants has further on, for a long time, been used in the western discourse for justifying a tightening of refugee acceptance.¹⁰⁹ Considering the human rights approach to the refugee definition, it is however relevant to question how this distinction between civil-political and socio-economic rights are motivated. Why does violations of one category of human rights pose as stronger reason for protection than another? Both the UDHR and the ICESCR, core human rights treaties, encompass several human rights relating to socio-economic standards, which poses with persuasive authority for the inclusion of such rights as amounting to persecution.¹¹⁰

Hathaway and Foster further argue that contemporary refugee jurisprudence in general do recognize violations of socio-economic rights as persecution and serious harm in *certain situations*. It could be the case for example when the applicant is denied critical healthcare, deliberately being deprived of food, housing, employment or other core rights.¹¹¹ The underlying distinction between the two groups are, according to Foster, referable to the notion of *voluntarism*. By this she means that economic migrants are said to flee out of their own will in the search for improved quality of life, whilst political refugees are fleeing involuntary due other reasons. While this is a reasonable distinction to make in many situations, there are many complex situations generating grey areas where the notion of “voluntarism” could be problematized, trafficking for sexual purposes being one of them.¹¹²

4.2 Failure of State Protection

The international community has a responsibility to cater for the needs of the applicants, if the state of origin is failing in doing that themselves. This means that the international protection is secondary to the protection of the state. When the feared harm emanates from individual actors, as most often is the case of trafficking victims, it is only when the applicant is unable or unwilling to avail oneself of state protection that a receiving state have the obligation to recognize the victim as a refugee. This means that being unable or unwilling must be in relation to circumstances beyond the will of the individual applicant.¹¹³

¹⁰⁹ Foster 2012, p. 2f.

¹¹⁰ Ibid, p. 28.

¹¹¹ Hathaway, James C. and Foster, Michelle: *The Law of Refugee Status*, Cambridge: Cambridge University Press, 2014, p. 182f.

¹¹² Foster 2012, p. 7.

¹¹³ UNHCR Handbook, p. 16.

In cases of trafficking-related harm, the question is more often whether the state is unable to protect victims of sex trafficking rather than if they condone or tolerate such actions.¹¹⁴ This renders it necessary to consider how inadequate state protection must be before the international community takes over the responsibility for the human rights of the migrant. In terms of refugee recognition, the pertinent question is what standard of internal protection will negate a claim of persecution?¹¹⁵

The ability of a state to protect victims of trafficking upon return needs to be assessed primarily in relation to what legislative and administrative mechanisms on preventing and combating trafficking that are in place in national jurisdiction, as well as what instruments of protection and assistance that is implemented and practiced within the state. The sole existence of legal and/or administrative mechanism is not sufficient if they are not effectively utilized in practice. The assessment must therefore focus on the practical implementation and utilization, and the mechanisms must be both accessible and effectively implemented to be considered relevant.¹¹⁶ In the examination of the sufficiency of state protection, states often rely heavily on state reports on the protection against trafficking available. This render concerns about the gap between reports and *increasing efforts* to combat trafficking and protect victims, and the actual effectiveness of the said efforts.¹¹⁷ If they do not overlap, the protection for trafficking victim is watered-out, since no one is taking responsibility.

Further guidance on the adequacy of national protection in the state of origin can be drawn from Part II of the Trafficking Protocol, containing the obligations imposed on states regarding victim protection. The protective obligations imposed on states relates both the privacy and identification of the victim, their need of physical, psychological and social recovery, the right to return and information about and access to relevant court and administrative procedures. These obligations are not exhaustive and should further on be interpreted in accordance with general human rights norms.¹¹⁸ If relevant legislative or administrative mechanism on combating trafficking and protecting its victims are not in place, or they are not accessible or effectively implemented, the experienced fear is likely to be deemed well-founded.¹¹⁹ If this is the case however, a victim of trafficking will have a harder time proving the need of international protection.

¹¹⁴ Dorevitch, Foster 2008, p. 23.

¹¹⁵ Ibid, p. 18.

¹¹⁶ Guidelines No. 7, p. 9.

¹¹⁷ Saito 2007, p. 15.

¹¹⁸ Saito 2007; see further reference to Art 6-8 of the UN Trafficking Protocol.

¹¹⁹ Guidelines No. 7, p. 9.

A final question to be addressed is if the applicant must have sought and failed to receive state protection to demonstrate its failure? Trafficking victims, especially those who fear re-trafficking, may not be willing to seek state protection at all due to the risk of the state condoning the acts of trafficking.¹²⁰ The case of *Canada (Attorney General) v. Ward* stipulated that it was not necessary to seek protection to prove its insufficiency.¹²¹

Consequently, there is no direct need for the victim to seek protection from the state before launching a claim for refugee status – however, the burden of proof lies with the victim and if no protection is sought, this burden might be heavier to carry. This means that it is the duty of the victim to adduce evidence that there were no remedies that meaningful, accessible, and effective in the country of origin in order for the international protection to kick in.¹²² If the state was engaged in the act of trafficking, the burden is easier on the victim. There may even be situations where the trafficking *is* condoned by national authorities and where the trafficking act should be attributed to the state. Such may be the case when corrupt state officials actively facilitate the trafficking business, actively facilitating its ongoing. The direct or indirect responsibility of the state for its failure to protect trafficking victims will ultimately be determined by the nature of the role played by the official concerned when undertaking his/her acts or omissions. If they acted on the basis of their authority as state official, it might be determined that the persecution actually emanates from the state itself.¹²³

4.3 Establishing a Nexus to a Convention Ground

It is not enough to show a well-founded fear of persecution. The victim must show that this fear is on the account of, “for reasons of”, a conventional ground; race, religion, nationality, membership of a particular social group or political opinion.¹²⁴ This means that not all reasons one might have for leaving a country will mean the victim qualify for a refugee status.¹²⁵ The following part will develop on the different convention grounds and then discuss the *nexus requirement*, as one of the most persistent challenges in refugee recognition for victims of trafficking.

¹²⁰ Saito 2007, p. 15.

¹²¹ *Canada (Attorney General) v. Ward* [1993] 2 S.C.R.689, para. 49.

¹²² Saito 2007, p. 19.

¹²³ Guidelines no. 7, p. 10.

¹²⁴ Art 1(A) of the Refugee Convention.

¹²⁵ UNHCR Handbook, p. 13.

Trafficking in persons for sexual exploitation is to a large extent driven by the economic interests, or entirely personal interests such as revenge, of the perpetrators rather than interests relating to one of the convention grounds. This means that the primary reason for being a victim of trafficking rarely is due to race, religion, political opinion etc., but the perpetrators economic gain.¹²⁶ According to the UNHCR guidelines, the prevailing economic incentive of the trafficker should not to be regarded as obviating the relevant convention ground that is present simultaneously.¹²⁷ To what extent this is adhered to by national courts are however questionable. Foster further on claim that there is a global tendency to dismiss socio-economic claims for refugee protection, motivated by a lack of nexus to a convention ground. Economic migrants are determined to flee in the search for a better economic life which do not fall within the scope of the convention. These are subsequently deemed not eligible for refugee protection.¹²⁸

The following subchapters will explain how being a victim of sex trafficking can create a nexus to a convention ground in a way that would render them eligible for refugee status.

4.3.1 Grounds of Religion, Political Opinion, Nationality or Race

Victims of trafficking might be specifically targeted due to belonging to having any of the enlisted attributes that make up a convention ground, such as being of a particular ethnicity or belonging to a particular religion for example. This might be the case when an armed conflict where, as a part of the warfare, trafficking and exploitation is used and deliberately targets members of a specific ethnic or racial group. This might also be the case when there is no ongoing conflict, but simply a lack of state protective measures for a targeted group in relation to internal oppositions. Race as a convention ground for persecution is also specifically relevant to women and girls trafficked into sex trade, as a market demand for a specific race or nationality might lead to that specific group being targeted. The same goes for persecution due to religion, political opinion or nationality; where an ongoing conflict or lack of state protection might target a specific group.¹²⁹

¹²⁶ Guidelines No. 7, p. 12.

¹²⁷ Ibid.

¹²⁸ Foster 2012, p. 237.

¹²⁹ UNHCR Handbook, p. 13.

In general, it is important to understand the impact of discrimination in the denial of economic and social rights, as well as overarching gender- and race discrimination, as being *critical factors* in placing groups at a higher risk of becoming victims. It is not only a reason for the perpetrator to target such individuals, but the vulnerability also renders individuals to risk more to reach a better life. This primarily frames minorities, migrants and women. Such discrimination can to a high degree correlate to the above-mentioned convention grounds, laying the foundation for a valid refugee claim.¹³⁰

4.3.2 Victims of Sex Trafficking as Members of a Particular Social Group

For most victims of trafficking, especially women trafficked for sexual purposes, it is closest at hand to claim belonging to a particular social group, a PSG. This is the least precise but most comprehensive of the five grounds for refugee protection. Its existence shows that the protective grounds enumerated in the convention is not exhaustive, and neither is the specific ground of “social group” subject to any closed list of specified entities that constitute a relevant grouping. Without any clarification within the treaty itself, states have interpreted the phrase widely and inclusive of many social groups such as women, tribes, families, sexual preference and occupational groups that would otherwise lack protection. In its interpretation, this evolvement must however be subject to some restriction to not render the other four grounds superfluous. The interpretation of the ground must be in line with the object and purpose of the convention, as well as with the overall language of the convention, the structure and the integrity of the definition. The interpretation shall therefore not include all groups that fear persecution, and neither should a group be defined as a group simply by their united fear of persecution, there must be another unifying characteristic.¹³¹

Two main interpretive approaches exist in state jurisprudence today; the “protected characteristics” approach and the “social perception” approach.¹³² The European legal framework sets a high threshold what constitutes a particular social group. The approach is more or less a combination of both

¹³⁰ UNHCR, *Human rights and trafficking in persons*, Accessed <https://www.ohchr.org/EN/Issues/Trafficking/TiP/Pages/Index.aspx>, 2019-05-24.

¹³¹ UNHCR, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1(A)((2)) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 2002 (UNHCR Guidelines of PSG), p. 2

¹³² UNHCR Guidelines of PSG, p. 3.

the immutable characteristics approach and the social perception approach, as it requires both that the group “*share an innate characteristic*” and that the group has a “*distinct identity in the country, being perceived as different*”.¹³³

4.3.2.1 The Protected Characteristics Approach

The “protected characteristic” approach centers around the existing of an immutable characteristic of the individuals within the group. In defining what is an immutable characteristic guidance might be drawn from general human rights norms, referring to a characteristic that is so fundamental to human dignity that one should not be compelled to forsake it. These characteristics is either of an innate nature, such as sex or ethnicity of the applicant, or for other reasons unalterable, for example the historical fact that is a past occupation or membership of an association. As categorically framed by the UNHCR, a decision-maker would through this approach examine if an individual is a member of a group that is defined by either of the following three elements; (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it according to the protected characteristics approach.¹³⁴

The UNHCR acknowledges the possibility of sex in general to constitute a particular social group.¹³⁵ As frequently being treated differently than men, women are recognized as a particular social group in the context of sex being an innate and immutable characteristic. In a situation of sexual trafficking, women are primarily targeted for various reasons, which open up for a nexus to be established between trafficking and being a woman according to this approach.¹³⁶

¹³³ Art 10 (d) of the Directive 2011/95/Eu of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (The EU Qualification Directive), December 2011.

¹³⁴ Ibid.

¹³⁵ Christensen, Tyler Marie, *Trafficking for Sexual Exploitation: victim protection in international and domestic asylum law*, UNHCR, New Issues in Refugee Research Paper No. 206, April 2011, p. 18. Accessed:

<https://www.unhcr.org/research/working/4d9c7c869/trafficking-sexual-exploitation-victimprotection-international-domestic.html>, 2019-05-16.

¹³⁶ Guidelines No. 7, p. 14.

Except being a woman, a victim of trafficking for the purpose of prostitution or sexual exploitation could also create a particular social group based on the *unchangeable, common and historic characteristic* of having been trafficked. This possibility was framed by the Ward case, recognizing that the past experience of a group could lead to them being characterized as a particular social group. The past experience of being a victim of sexual trafficking could therefore in itself be acknowledged as such an unalterable characteristic, qualifying the formation a particular social group. Important to notice is that it is not the common fear of persecution among victims, but it is the defining characteristic of having been a victim of trafficking that will constitute the relevant foundation.¹³⁷ National case law provide further examples of how a particular social group has been established regarding victims of sexual exploitation, such as: “former victims of trafficking” or “former victims of trafficking for sexual exploitation” or “victims of systematically organized trafficking in human beings”.¹³⁸

Another question that arises is to what extent economic class could constitute a PSG. This is relevant to examine in relation to victims of trafficking since victims often come from a situation of poverty and poverty often place individuals at a higher risk of being subject to trafficking.¹³⁹ There are strong indicators meaning that poverty in itself do not constitute a characteristic able to shape a PSG, but if being poor puts the victim at risk of persecutory harm of any kind – that could suffice.¹⁴⁰ The question is often to assess whether “being poor” is sufficiently immutable to be referred to the “protected characteristic” approach.¹⁴¹ An example of where such considerations have been made is found in the in the previously cited case of *Bian v. Canada*. In the case, the Federal Court held that the lower tribunal had erred in not recognizing the victims as part of a PSG, based on the economical under-development of the province in combination with all the victims being from poor families, with little education and a depressing prospect of little opportunity to rise above the level of poverty, rendering them vulnerable to trafficking.¹⁴² This poses as evidence that it is possible to consider the situation that many trafficking victim come from could create a valid particular social group in the context of the refugee definition.

¹³⁷ Christensen 2011, p. 18f.

¹³⁸ Möller, Marie-Luise, *Recognizing victims of trafficking in human beings as refugees according to the 1951 UN Geneva Refugee Convention Impact of a witness statement of a victim of trafficking in human beings on Refugee Status Determination Procedures*, June 2017, accessed; <http://un-act.org/wp-content/uploads/2017/07/Recognizing-Victims-of-Trafficking-in-Human-Beings-as-Refugees-According-to-the-1951-UN-Geneva-Refugee-Convention.pdf>, 2019-05-16, p. 6.

¹³⁹ Foster 2012, p. 304.

¹⁴⁰ *Ibid*, p. 310.

¹⁴¹ *Ibid*, p. 306.

¹⁴² *Ibid*, p. 306 with further reference to *Bian v. Canada*, *supra* note 100.

Finally, a victim of human trafficking might provide a valid claim based on belonging to the PSG “family”. As the perpetrator in many trafficking cases is the victim’s own family, she often find herself targeted simply for being a part of the family and the family’s need for economic profit. Such a development, allowing the membership of a family to constitute a relevant PSG, has been seen in regard to children whom are trafficked by their family for sexual purposes mainly.¹⁴³ In a US case concerning a Mexican girls being trafficked by her family, the US Court of Appeals held that “[...] family membership is clearly an immutable characteristic, fundamental to one’s identity.” – making up a characteristic qualifying for creating a PSG.¹⁴⁴

4.3.2.2 The Social Perception Approach

The social perception approach instead focuses on any by the group in question shared characteristic in general that sets the group apart from the rest of its society. This approach is wider in its applicability and apply a lower threshold as it might define a social group based on characteristics that cannot be described as “immutable and fundamental” but however is defining a group in a society. Such characteristics could be occupation and social class for example.¹⁴⁵

The social perception approach, if applied correctly, should adhere to the social and legal position of women in many countries, referring to the ingrained discrimination they face in many societies. This general, discriminatory *perception* of women should suffice to form a PSG of women under the social perception approach.¹⁴⁶ This would also enable smaller fractions of women to constitute particular social groups within the meaning of the definition, such as single women, widowed, illiterate etc.¹⁴⁷ However, challenges arise if no such general discrimination is recognized by the assessing authorities of the receiving state. Therefore, it is important to always consider the social context of where the trafficking victim comes from when constructing a PSG, especially under the social perception approach.

¹⁴³ Foster 2012, p. 337.

¹⁴⁴ Foster 2012, p. 337 with further reference to Aguirre-Cervantes, 242 F 3d 1169 (pth Cir. 2001) at 1178.

¹⁴⁵ UNHCR Guidelines on PSG, p. 3.

¹⁴⁶ Dorevitch, Foster 2008, p. 32f.

¹⁴⁷ Guidelines No. 7, p. 14.

The group we want to construct, say *woman*, must be subject to a different treatment than the total population in order for a PSG to be formed.¹⁴⁸

Constructing a PSG based on the characteristic of *being a victim of human trafficking/sexual trafficking* could also face harder challenges under the social perception approach than under the protected characteristics approach. The main reason for this is to the increasing *invisibility* of trafficking and its victims within societies. As trafficking to a greater extent is taking place in private contexts by individual perpetrators, with individual victims and small payments, it disappears from the societal context. Additionally, the fear of retaliation, isolation, lack of social support and family rejection keep victims quiet and invisible. This is especially true with regard to victims of sex trafficking, that are primarily kept in sectors that are largely unregulated.¹⁴⁹

4.3.3 The Nexus Requirement

The conceptual challenge in establishing a relevant nexus between the inflicted harm and a convention ground is referred to what Foster frames as an issue of if *intention* by the perpetrator is required. While causation and intention are clearly distinguished in other areas of law, it is often so within refugee law that the nexus requirement is not found fulfilled unless the applicant can prove that the perpetrator intended to harm her for a convention reason.¹⁵⁰

One approach that have transpired in case law is that it is determined to be a need for the applicant to prove that the perpetrator intended to harm her for reasons of a convention ground. This is creating problems especially for women in general whose perpetrator often is a non-governmental actor whose motive often is highly personal and non-political. The same issue transpires for victims of trafficking, specifically those belonging to a vulnerable group in society due to poverty, discrimination, disadvantage or a combination of them all.¹⁵¹ By viewing the nexus requirement in the perspective of the “intent of the perpetrator”-approach, the societal context of socio-economic deprivation that place victims in especially vulnerable positions is often

¹⁴⁸ Mrekajova, Eva, *Recognizing victims of human trafficking as a „particular social group“ per se*, p. 4.

¹⁴⁹ Marouf, E. Fatma, *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*, Scholarly Works Paper 419, 2008, p. 98, accessed at <https://pdfs.semanticscholar.org/0420/e4e202f48e0b483fa8f11db22e9c0005dd32.pdf>, 2019-05-22.

¹⁵⁰ Foster 2012, p. 263.

¹⁵¹ Foster 2012, p. 265.

overlooked as reason enough to establish a nexus. Focus is instead shifted towards the intent of the trafficker.¹⁵²

A clear example of this approach is seen in the following decision by the RRT, the Refugee Review Tribunal in Australia. The trafficking victim was a young Colombian girl whom had been deceived into believing that a job opportunity was waiting for her in Australia, but instead she became a victim of trafficking. On her claim to refugee recognition in Australia, the court concluded the following about the establishment of a nexus to a convention ground;

*“The Applicant’s own personal circumstances in Colombia (including her expressed desire to travel overseas), together with the fact that she is a young woman, presented the opportunity for certain criminals to identify her as a suitable victim but does not of itself necessarily provide the motivation for the harm she suffered or feared. The Tribunal is satisfied that the motivation in first luring the Applicant into prostitution and then demanding regular payments from her was opportunistic self-interested criminality to make money ... Further, the ... harm the Applicant fears on return to Colombia arises out of her particular circumstances and is essentially a harm directed at her as an individual and not for any Convention reason ...”*¹⁵³

Foster argues that the intention approach not only is a faulty interpretation of the provision in the refugee convention, but that it is also practically useless in the case of victims of trafficking, whose persecutor most often is motivated by widely different interests than those covered by the convention, but their need of protection is equal.¹⁵⁴ The second approach, as categorized by Foster, instead requires the nexus criterion to include, as an alternative to the intention by the perpetrator, the intention of the state in their failure to provide protection for the victim.¹⁵⁵ This is a positive extension as it recognizes that persecution also is dependent on the failure of state protection and have been utilized in asylum claims by victims for sexual exploitation. In the judgement of K [2003] UKIAT 00023, the claim of an Albanian woman was accepted referring to this argument. The women argued that the Albanian society was male-dominated and patriarchal and consequently was complicit in the trafficking of women as the corrupt authorities of the state allowed for

¹⁵² Foster 2012, p. 267.

¹⁵³ Case No N98/24000 [2000] RRTA 33 (13 January 2000).

¹⁵⁴ Dorevitch, Foster 2008, p. 36.

¹⁵⁵ Ibid, p. 269.

trafficking to continue taking place within the state.¹⁵⁶ This is also a positive expansion of the nexus criterion, but it still requires the proving of a generally, wide-spread discrimination towards women in this case, in order for the claim to be convention based. And, it can still be questioned to what extent this is a claim generally accepted by national courts.¹⁵⁷

Instead of the *intention approach* to the nexus requirement, an approach asking whether the applicant is at risk of persecution because she belongs to a particularly vulnerable Convention-protected group, is more inclusive and better suited for cases related to trafficking. This *predicament approach* places greater emphasis on the context of poverty and discrimination and its impact on the risk of trafficking. This facilitates the nexus criteria, as it links the trafficking experience to a distinct convention ground also attributed to the victim, such as religion, nationality etc.¹⁵⁸

The following chapter will shift focus towards the complementary protection under art 3 of the ECHR, to examine to what extent it offers a more comprehensive protection than the refugee convention.

¹⁵⁶ The judgement of K [2003] UKIAT 00023, 7 July 2003.

¹⁵⁷ Dorevitch, Foster 2008, p. 36.

¹⁵⁸ Ibid p. 43.

5 The Principle of Non-Refoulement in the ECHR

States enjoy the right to determine who are allowed to enter and reside within the territory of the state. This is part of the prerogative that is the state sovereignty. However, the prerogative is secondary to, and must be exercised with due regard to, international law binding upon states. The obligations imposed by the refugee convention is one such example, the principle of non-refoulement makes up another such limitation. The principle originates from the 1951 Refugee Convention where it was first implemented in art 33 and is today codified in a number of international and regional treaties of both migratory and human rights character.¹⁵⁹

Essentially, the principle prohibits states from transferring any person from the state territory when there are substantial grounds to believe that the person would risk being subject to violations of certain fundamental rights; primarily referring to severe ill-treatment, arbitrary deprivation of life or persecution on account of race, religion, nationality, membership of a particular social group or political opinion.¹⁶⁰ The ECHR is a human rights treaty not explicitly regulating migration or migratory issues. Moreover, the ECHR contains no explicit referral to the principle of non-refoulement. Instead, it has through case law been interpreted as an inherent part of article 3 of the convention and the prohibition on torture, inhuman or degrading treatment or punishment contained therein. The principle is applicable both in extradition and expulsion cases and applies when there is a real risk that the applicant would be subject to treatment contrary to article 3.¹⁶¹ The protection from refoulement is absolute in its nature, and reasons of national security such as terrorist allegations have been dismissed as relevant reasons to derogate from the principle.¹⁶²

¹⁵⁹ Rodenhäuser, Tilman, for the International Committee of the Red Cross, The principle of non-refoulement in the migration context: 5 key points, March 2018, Accessed: <https://reliefweb.int/report/world/principle-non-refoulement-migration-context-5-key-points> 2019-04-25.

¹⁶⁰ ICRC, *Note on Migration and the Principle of Non-refoulement*, *International Review of the Red Cross*, 2018, p. 2.

¹⁶¹ *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, para 88; *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para 80.

¹⁶² *Chahal v. the United Kingdom*, para 75 and 76.

In the following subchapters, the core elements of the protection from refoulement and its application towards victims of trafficking will be addressed. What typically needs to be addressed regarding victims of trafficking are the same as under the refugee convention, the questions of individualization of the threat and risk and the question of state protection in the country of origin.¹⁶³ Initially, a minimum level of severity must of the feared harm must be established in order for article 3 to activate.

5.1 A Minimum Level of Serverity

To interpret what meets the minimum level of severity has many times been proven difficult. The physical and mental effects on the victim must be taken into consideration, as well as the sex, age and state of health of the individual. Where the severity of the harm is high, the risk does not necessarily need to be as high, and vice versa.¹⁶⁴ The jurisprudence from the ECtHR regarding what meets the minimum level of severity shows that the utilization of the principle has undergone an expansive development as to what situations are encompassed. The scope of the prohibition, as constructed through case law, could basically be said to be determined by the source of the feared harm. The fundamental division of cases could be categorized as the following; 1) Harm that emanates from direct and deliberate infliction by state or non-state actors in the receiving State, 2), harm that emanates from purely naturally occurring phenomena and the lack of sufficient resources to deal with it in the receiving State and 3) predominant cause cases where the harm is deemed to be caused predominantly by state or non-state actors in the receiving State.¹⁶⁵

The following subchapters will address the question in relation to the different kinds of threat that a victim of sex trafficking could fear upon return to their country of origin.

¹⁶³ Vladislava 2011, p. 790.

¹⁶⁴ Goodwyn-Gill, Guy S, McAdam, Jane, *The Refugee in International Law*, 3rd ed, Oxford University Press, New York: 2007, page 314.

¹⁶⁵ Scott, Matthew, *Refuge from Climate Change-Related Harm: Evaluating the Scope of International Protection within the Common European Asylum System*. In: *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, 2014, Leiden [2015], p. 412.

5.1.1 The risk of Re-trafficking and Retaliation

The risk of re-trafficking and retaliation are to be referred to the category of direct and deliberately inflicted harm by governmental and/or non-governmental actors. Feared harm of that character sets the lowest threshold of severity to meet but notably, there is a distinction made between treatment in a purely domestic context and in the context of extradition and/or expulsion. What constitutes a state violation of art 3 in a domestic context might not attain the minimum level of severity when a state is about to expulse someone to such a situation. This is narrowing the scope of the protection when applied in a migratory situation. This is explicitly stated in the case of Babar Ahmad and others v. the United Kingdom in the following citation; “[...] treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case.”¹⁶⁶

However, the risk of re-trafficking normally does suffice to meet the threshold of inhuman and degrading treatment. Rape, being held in captivity, forced prostitution, sexual assault etc. do meet the minimum level of severity required to amount to a breach of art 3 of the ECHR. The primary challenge is however to link the experienced trafficking to a future harm. The individualization of the threat to the specific applicant is crucial, as the general risk of re-trafficking does not engage the protection of art 3 – everyone is potentially at risk of being victims of a crime.¹⁶⁷ As an example in the case of H.L.R v. France the applicant feared reprisals from drug traffickers. The court stipulated that the general level of violence in Colombia, the country of origin, did not amount to a breach of art 3 and did not find any support for the claim that his personal situation was worse than that of other Colombians either.¹⁶⁸

The authoritative ruling on what is considered sufficient individualizing of a specific case is Salah Sheek v. the Netherlands. The case concerned a Somali man, claiming to be subject to ill-treatment contrary to art 3 if returned home, specifically vulnerable to such treatment due to his belonging to the national minority of Ashraf. The Dutch government objected his claim based on the

¹⁶⁶ Babar Ahmad and Others v. The United Kingdom, Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Council of Europe: European Court of Human Rights, 10 April 2012, para 177.

¹⁶⁷ Stoyanova 2011, p. 791.

¹⁶⁸ H.L.R v. France, Application no. 24573/94, Council of Europe: European Court of Human Rights, 29 April 1997, para 40-42.

argument that the ill-treatment he claimed to be threatened by was a result of a general unstable situation in Somalia, where criminals arbitrarily chose their victims of violence. The Court did however not adhere to the government's claim and instead highlighted the importance of the protection under art 3 to not become illusory, which would be the case if further distinguishing factor of the case than the applicant being of Ashraf minority known to be especially vulnerable where to be required.¹⁶⁹

For victims of trafficking for sexual exploitation or prostitution, such individualizing factors could relate to different aspects of the trafficking experience as well as the victim herself. It could be that the victim has left a testimony in a criminal procedure against the trafficker and therefore heightening the risk of retaliation, that the victim did not earn the targeted amount of money or she has not paid the debts she is claimed to own the trafficker. It could also relate to an individual factor of the victim herself, such as her being of a particular background, having a certain ethnicity or nationality, being of a certain age, residing in a specific area of a state or being illiterate. Another distinguishing factor could be that the victim has been a part of a trafficking organization, heightening the risk of re-trafficking.¹⁷⁰

Further on, a cumulation of characteristics that separately do not individualize the case sufficiently, might in cumulation reach the level of individuality needed.¹⁷¹ As stipulated in the case of *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, it is recognized that;

“if a victim has been trafficked by a gang of traffickers, as opposed to a single trafficker, then the risk of re-trafficking may be greater for someone who escapes before earning the target earnings set by the trafficker, because the individual gang members will have expected to receive a share of the target sum and will, therefore, be anxious to ensure that they do receive that share or seek retribution if they do not”¹⁷²

When the feared risk is retaliation from the trafficker, the individualization of the threat is more straight forward. The situation in the case of *Moldova v. Secretary of State for the Home Department*, as referred to previously, are

¹⁶⁹ Salah Sheekh v. The Netherlands, Application no. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007, para 146.

¹⁷⁰ Compare the argument made by Stoyanova 2011, p. 793.

¹⁷¹ Stoyanova 2011, p. 792.

¹⁷² *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, para. 192.

exemplary for this type of harm also in the context of refoulement protection.¹⁷³

5.1.2 Cases Relating to Socio-Economic Deprivation

The same dichotomy that previously was described under the Refugee Convention is present within the context of the ECHR and the prohibition on refoulement too. The notion of inhuman or degrading treatment is generally referring to civil-political rights rather than socio-economic, despite the ECHR covering all sorts of human rights.¹⁷⁴ The conceptual challenge in claiming socio-economic deprivation within the framework of non-refoulement is further established by the lack of legal basis to claim protection of non-refoulement within the ICESCR or any other treaty encompassing only socio-economic rights.¹⁷⁵ This could be compared to the fact that the principle of non-refoulement is enshrined not only within the ECHR, but within the ICCPR too which is covering civil-political rights exclusively.¹⁷⁶ Some adherence to the need to protect from such violations have however developed through case law, and how that relates to victims of trafficking will be presented below.

5.1.2.1 Lack of Social and Medical Assistance

The existence of adequate medical and social assistance in the country of origin is particularly pertinent to examine, due to the severe mental effects the trafficking experience is leading to for many victims. Conditions of post-traumatic stress disorder and suicidal tendencies are common among victims of sex trafficking. These experiences require proper social and/or medical treatment and assistance, and arguably the lack of such assistance in the country of origin could put the victim in a position of degrading treatment.¹⁷⁷

The case of *N v. The United Kingdom* concerned an applicant who was diagnosed with AIDS, and the victim claimed protection under article 3 due

¹⁷³ Vladislava 2011 p. 793.

¹⁷⁴ Foster, Michelle, *Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law*, 2009, accessed: <http://www.austlii.edu.au/au/journals/UMelbLRS/2009/31.pdf>, 2019-05-16, p. 2ff.

¹⁷⁵ Foster 2009, p. 279.

¹⁷⁶ Art 7 of the ICCPR.

¹⁷⁷ Stoyanova 2011, p. 798.

to the lack of social and medical assistance in his country of origin. The court established a threshold meaning that only cases of *very exceptional circumstances of naturally occurring illnesses* could render the protection of art three applicable in cases where the migrant fight expulsion in order to receive medical or social assistance.¹⁷⁸ The Court stipulated that an alien cannot enjoy the protection from refoulement simply to get access to a more progressed and medically advanced treatment or other forms of social assistance that are available in the receiving state, but not in the country of origin. Neither does the general risk of a shorter life expectancy due to a return to the country of origin amount to the needed level of severity. The Court also emphasized the primary scope of the convention to be civil and political rights, not socio-economic, and that states that are more advanced in medical science and/or socio-economic assistance shall not carry the burden to even out these differences by any obligation to authorize their stay on the territory.¹⁷⁹

The high threshold set up in *N v. the UK* has never been met since its introduction. *D v. The United Kingdom* concerned a man, diagnosed with AIDS at a terminal stage, who was being returned to St. Kitts from the UK. The applicant claimed that the return to St. Kitts would amount to treatment contrary to art 3 as St. Kitts could not provide sufficient medical care and his life would end in squalor and destitution.¹⁸⁰ This ruling is the only time the exceptionality of a risk have been sufficient according to the test set up in *N*, and this ruling came before the case of *N*. The implications of both the case of *D* and of *N* is however that death must be imminent to trigger the non-refoulement protection under the ECHR.¹⁸¹ The motives behind the rigid threshold set up in *N*, is by the court the fact that the feared harm do not emanate from intentional acts or omissions by any actor, but by *naturally occurring illness* and the lack of resources in the state of origin.¹⁸²

In *Paposhvili v. Belgium*.¹⁸³ The applicant suffered from life-threatening illness and argued that the expulsion to Georgia would be in violation of art 3 and art 8 of the ECHR following lack of adequate healthcare in Georgia.

¹⁷⁸ *N. v. The United Kingdom*, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008, para 42.

¹⁷⁹ *N v. the UK* para. 42-44.

¹⁸⁰ *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, para. 40-41.

¹⁸¹ *Ibid*, para 49-50.

¹⁸² *N v. UK* para 43.

¹⁸³ *Paposhvili v. Belgium*, Application no. 41738/10, Council of Europe: European Court of Human Rights, 13 December 2016.

The court ruled in favor of Mr. P, explicitly stating that the rigid threshold in *N v. the UK* had deprived many migrants the benefits of the provision (art 3).¹⁸⁴ In *Paposhvili*, the Court clarified that the narrow window created in *N v. the UK*, where the court stated that it did “*not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling.*”¹⁸⁵ means that art. 3 includes situations where the applicant would face a real risk of being exposed to a serious, rapid and irreversible decline in his or her health resulting in intense suffering or to a significant reduction in life expectancy”.¹⁸⁶

As argued by Stoyanova, this is a rather small opening in the strict approach by the *N* case, and it is hard to argue that any real reversing of the high threshold has been created.¹⁸⁷ According to relevant case-law, it is therefore possible, under very restrictive conditions, that the harm that emanates from a lack of social and/or medical assistance in the country of origin for a trafficking victim, could activate the protection under art 3. However, the possibilities for this is highly restrictive.

5.1.2.2 The Risk of Ostracism and Subsequent Social Deprivation

In relation to socio-economic deprivation, the case of *M.S.S v. Belgium* is relevant to consider.¹⁸⁸ The case concerned the situation of poor living conditions in Greece, and the return of an alien from Belgium. The applicant claimed that the living conditions in Greece amounted to degrading treatment contrary to art 3 of the convention. The Court agreed with him and stipulated that the return from Belgium to Greece was a violation of art 3 due to the dire humanitarian conditions the applicant would live under upon return to Greece. The Court concluded the following regarding what made up the dire humanitarian conditions;

“[...] in view of the obligations incumbent on the Greek authorities under the Reception Directive ... the Court considers that the Greek authorities have not had due regard to the applicant’s vulnerability as

¹⁸⁴ *Ibid*, para 181.

¹⁸⁵ *N. v. the UK*, para 43.

¹⁸⁶ *Paposhvili v. Belgium*, para 183.

¹⁸⁷ Stoyanova, Vladislava, *How Exceptional Must “Very Exceptional” be? – Non-refoulement, Socio-economic Deprivation, and Paposhvili v. Belgium*, in *International Journal of Law*, Vol 29, p. 584.

¹⁸⁸ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

*an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential need ... such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.*¹⁸⁹

Therefore, if it can be proven that the rejection of the society/family would lead to the victim facing severe societal exclusion and social deprivation, living under such dire humanitarian circumstances as present in the M.S.S case – arguably, the protection under art 3 would be activated. This would especially be the case if the socio-economic deprivation is combined with a lack of medical treatment for mental or physical consequences following the trafficking experience, the situation could be determined to meet the threshold. Important to consider in the assessment of such a risk is the particular society the victim would be send back to.¹⁹⁰

Further on, the case of *Sufi and Elmi v. the United Kingdom* provides guidelines on when the test of *N v. the UK* should be used in assessing the severity of the feared harm, and when the slightly lower threshold of *MSS* should be required,

*“If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State’s lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in N. v. the United Kingdom may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict.”*¹⁹¹

This means that the Court have established an entrenchment between situations of purely natural events, where the high threshold of the *N* case is applicable, and other situations where the risk is predominantly due to actions taken by governments and non-governmental actors, where the lower

¹⁸⁹ Ibid, para 263.

¹⁹⁰ Vladislava 2011, p. 794.

¹⁹¹ *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011.

threshold of M.S.S is applicable. If the state do not offer the protective needs a victim of trafficking need whilst being rejected by her own community, arguably it must be considered falling under the test of M.S.S v. Belgium, not N v. the UK.

5.2 Failure of State Protection

The prohibition to refouler under the ECHR is not limited to when threats emanate from governmental actors but also when the source of the threat is non-governmental actors. In H.L.R. v. France the ECtHR held that “[o]wing to the absolute character of the right guaranteed, Article 3 of the Convention may also apply where the danger emanates from persons or group of persons who are not public officials [...]”.¹⁹² Similarly as within the Refugee Convention, the international protection is depending on the absence of national protection, which must be assessed individually in each case.¹⁹³ In cases under the ECHR, The Court has framed it in the following words; “[...] it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection”.¹⁹⁴

When evaluating availability of state protection, the same factors as discussed under the Refugee Convention is relevant in the assessment under art 3 ECHR. Criminalizing the act of trafficking is the fundamental requirement under international law, but even that is done focus should be turned to the implementation of the law. Factors such as corruption or procedural orders where investigations *only* can be initiated by the victim are examples that render the protection insufficient.¹⁹⁵ Also, individual factors to the case could render existing protection insufficient. In the case of *PO*, as an example, it was said that the legal and institutional foundation for combating trafficking and, equally important, support for victims of trafficking, have been in place in Nigeria. However, as the victim suffered a real risk of retaliation, the existing protection was insufficient for her specifically.¹⁹⁶

What should be added, is the specific situation when the threat emanates from community/family rejection. In such cases, legal responses and the effectiveness in criminal procedures is not the appropriate benchmark for evaluation. The needs of the victims in such situations are the availability of

¹⁹² H.L.R. v. France, para. 40.

¹⁹³ Stoyanova 2011, p. 794.

¹⁹⁴ H.L.R. v. France, para. 40; Salah Sheekh v. the Netherlands, para. 13.

¹⁹⁵ Vladislava 2011, p. 795.

¹⁹⁶ *PO (Trafficked Women) Nigeria v. Secretary of State for the Home Department*, supra note 46, para. 191.

shelters and social assistance relevant for the individual victim, depending on her individual situation.¹⁹⁷ An example of such an argumentation is found in the case of *AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*, where the UK Upper Tribunal found that the shelters for victims of human trafficking in Thailand provide detention-like environment; that counseling services are very limited; that great a deal of personal information is required and “given the perception of corruption, and of the appellant’s belief that her trafficker had links with the authorities” victim would be reluctant to provide such information for fear of reprisals, would constitute a failure of state protection.¹⁹⁸ Hence, this is a relevant factor to take in consideration in cases relating to trafficking for sexual purposes.

¹⁹⁷ Stoyanova 2011, p. 796.

¹⁹⁸ United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), ‘*AZ (Trafficked women) Thailand v. Secretary of State for the Home Department*’ (8 April 2010).

6 Final Conclusions

This thesis has aimed at showing what substantive challenges that transpire when a victim of trafficking wants to enjoy the protection from being returned to their country of origin under the Refugee Convention and the ECHR. In the following section, I will sum up my finding and draw some final conclusions in order to answer my research questions.

6.1 A Lacking Human Rights Approach

As previously shown, The UN Trafficking Protocol does impose a very limited amount of victim protection obligations, nor does it provide any corresponding rights for victims to remain on the territory where they have been exploited. The CoE Trafficking Convention is said to cater for the needs of a victim more extensively, which is not a false statement but a statement that nevertheless needs to be further critiqued. The convention offers a reflection and recovery period of thirty days where the victim could not be send back against their will. After this period, it is left to the discretion of the state to decide if the victim should be allowed to stay on the territory or not. Not only is it left to the discretion of the state, but it is still highly connected to the victim's usefulness in the criminal proceedings. This goes hand in hand with the, for the victim, harmful approach to trafficking as merely an issue of international crime and border control. The overarching objection is to *combat trafficking*, not protect its victims. By viewing the individual as a witness, a part of the persecution and nothing more, the victim's perspective seems easily overlooked. The existence of a true regime of victim protection, with a clear human rights-based approach, seems to be lacking the victim protection is more or less, simply a witness protection established to facilitate the interest of the state.

The Trafficking Protocol notes that its application to a victim in no way shall affect neither the rights of the victim according to other international law, nor the obligations or responsibilities of the state as imposed by international law. An equivalent provision is contained within the CoE Trafficking Convention. Further-on, the UN Trafficking Protocol explicitly claims its purpose to be assisting victims of trafficking "*with full regard to their respective human rights*".

Pertinent to ask, I think, is to what extent this approach actually is permeating the protocols application towards victims and their protective needs? The statement seems a bit anodyne. Whilst the Protocol do not offer any extensive right to reside on the territory of the state, the ECHR and many other human rights treaties, is limited to require states to undertake their human rights obligations towards individuals only *within* their jurisdiction. Considering this, the purpose of a human rights-based protection becomes rather blunt. By immediate repatriation of identified victims of trafficking, the human rights obligations towards the victim also terminates. This creates an easy way out for the receiving state – if you do not let victims reside on the territory, you escape the obligations of securing their human rights. As neither the protocol, nor the convention, do de facto require states to allow victims to reside, the protocol facilitates this state practice and undermines the protective purpose.

Further on, even though the UN Protocol entail provisions on obligations of victim protection it strikes me as quite remarkable that no reference is made to the human rights of the victims in any of these provisions. No provisions are formulated as a right of the victim, but simply as soft obligations of the state. It is also strikingly clear that the provisions relating to the protective measures are vaguely formulated in terms of “in appropriate cases” and “to the extent possible” in both the UN Protocol and the CoE Convention. In contrast to the distinct formulations of obligations relating to criminal proceedings and border controlling measures, it becomes clear where the primary focus of the treaty lies. All of this, taken together with the great emphasis placed on the importance of facilitating the return of identified victims, strengthens the perception that the human rights of the victims are secondary and that the purpose of protecting human rights have little impact on the practical implementation of the protocol.

6.2 The Protection from Refoulement

Providing the victim do not fall prey to the barrier of identification, further challenges exist towards being recognized as a refugee or to fall within the scope of art 3 ECHR. This part of the analysis will discuss the main fractions of these respective legal framework that pose as critical challenges, in recognizing the protection of trafficking victims for sexual purposes.

6.2.1 Recognition as a Refugee

The most pressing challenge in the refugee recognition process is establishing a nexus to a convention ground. As have been shown, victims of trafficking often claim belonging to a particular social group. In this sense, case law from national courts have on many occasions shown great advancement in how to define such a PSG, beneficial for victims of trafficking. Such examples are the inclusion of *family* as a PSG, where the victim's vulnerability due to family belonging is recognized. Also, under the protected characteristics approach, the innate characteristic of being a woman is generally accepted as convention ground, especially once combined with another, specifying attribute. However, in the establishment of such a nexus, the victim might still fall prey to national authorities who interpret the nexus element as requiring an *intention* with the perpetrator, or to the power left to the state by the social perception approach in determining what makes up a special perception in the country of origin. Such an evaluation is particularly hard to conduct properly when the two countries largely differ in terms of values, morals and overall societal context. If the general discriminatory context of a state towards women is not adhered to by national authorities in the receiving country, it could be difficult to provide an accepted claim.

Further on, when the prevailing motive of the individual trafficker is economic gain or of purely personal character and not the victim's belonging to any PSG, national authorities might fail to see the full picture of the reasons behind trafficking. In this, they risk deducing the risk of women being trafficked to simply relate to the intent of the perpetrator and overlooking reasons of social structures within societies, where women specifically, but also other groups are targeted due to their position in society. This wide discriminatory nature of trafficking must not be forgotten.

In addition to the above said, the intention approach is arguably not suited for the way trafficking is conducted. Trafficking for sexual purposes are constructed as a chain of events, with a temporal and geographical continuum and with several perpetrators along the way, all with different interests and

different relations to the victim. To apply a test of intention of *the persecutor*, is highly problematic as questions of *whom even is considered* to be the actual perpetrator, the actual source of the threat, generally would arise. To overcome such challenges, focus should instead be placed on the much wider context in which the trafficking business is flourishing. That is, in societies characterized by poverty and general discrimination against vulnerable fractions of the population. This would more accurately point focus to the *reasons* of a victim being at risk of persecution.

Case law is also showing a rather narrow approach to *potential* trafficking victims. The construction of PSGs seem to target those who have been trafficked in the past. However, a limited possibility seems to be open for those women who have been threatened of trafficking of who for other reasons fear trafficking upon return but whom have not experienced it before. These women would presumably be required to adduce evidence of a widespread, deeply rooted gender discrimination in their country in order to make up a PSG relevant for the refugee status.

The most pressing challenge related to the requirement of *persecution* transpire when the threat emanate from the lack of support from family and community and the subsequent risk of stigmatization, ostracism and social rejection. As the refugee convention primarily address persecution related to civil-political right, cases of socio-economic deprivation are often tried under the protection of article 3 ECHR. Such risks must in general be assessed in light of the particular society, cultural norms and the family assistance. A lack of appropriate housing, education, work or rehabilitation could be the direct consequence of the rejection by the family, and in combination with the lack of social assistance and medical treatment the victim risk to find themselves in an extremely vulnerable situation. With a human-rights approach to the refugee convention, the violation of such rights should be equally relevant to determine as a *serious violation of human rights*, as any other, civil-political right. This is especially true, as the vulnerability of socio-economic deprivation and lack of supportive network place the individual victim at a higher risk of being re-trafficked, which must be taken into consideration in the assessment.

In respect of this, it is also relevant to question the notion of *voluntarism* that Foster argues as the distinctive feature in separating economic migrants from political refugees. As have been seen in national case law, a victim might face the rejection of her refugee application due to the perception that her “*own personal circumstances ... including her expressed desire to travel overseas*” and the desire to improve her quality of life posed as reason for her being lured into the exploitation. I however strongly question how voluntary might

one say that the consent to be sexually exploited to be able to provide for once family actually is? Within the trafficking definition, no such consent is altering the criminal liability of a perpetrator, so why would it alter the protective needs of the victim? Claiming that the reason for the victim's involvement in the trafficking experience, by to some extent having consented to the act, would distort the definitional interpretation of trafficking itself. One might also question what the victim has actually consented to. She might have consented to being involved in prostitution, but not living under such exploitive situations that she eventually ends up in, as an example. Where should the line be drawn on what consent that is relevant?

6.2.2 Protection under Art. 3 of the ECHR

The ECHR in general offer the most comprehensive protective framework, as it has little restrictions to its application other than the level of severity that needs to be met. It offers a better protection than the Refugee Convention as it does not require any nexus to a convention ground, but instead applies to all aliens at the border of a state. The applicability of the protection is not depending on the individual fitting into the conceptual model of a refugee, but instead centers around the prohibition of ill-treatment.

On the area of socio-economic deprivation as an anticipated harm, the case law from the ECtHR stretches the protection to expand a bit outside the scope of the refugee convention. As shown by *MSS v. Belgium*, the possibility that dire humanitarian conditions is a situation that could amount to the minimum level of severity as required. The specific situation of the case, where Greece was bound by the obligations under the reception directive and their inability care for the vulnerability of the applicant and provide according to these obligations, had a direct impact on the outcome. To this, I argue that the parties to the UN Trafficking Protocol, and the CoE Trafficking Convention not the least, have signed on obligations on victim protection and victim *reception* of similar character. This could in my opinion be equally relevant in the assessment of how the reception of returning victims of trafficking should be conducted. Equally, the unfulfilling of such obligations by the state of origin, resulting in the risk of dire humanitarian living conditions similar to those in *MSS*, should render the protection of article 3 applicable in such cases as well. I argue this is true despite the obligations being of a *soft character*.

The final question becomes to what extent the lack of medical and social assistance could suffice to meet the minimum level of severity of ill-treatment. It is a highly relevant question as many victims of sexual

exploitation faces severe mental issues after being exploited for which they need assistance and medical treatment. For a victim of trafficking to not fall short of protection due to this restrictive interpretation, it is pertinent to ask what really is a naturally occurring illness. Arguably, the suffering of mental conditions after a trafficking experience is *not* a naturally occurring phenomenon. The illness is indeed a direct, natural consequence of the treatment by governmental and/or non-governmental actors. However, one might not say it is *naturally occurring*. The effect on the mental and physical health of the victim is a direct effect following the act of trafficking, conducted by a (most often) non-governmental actor. Therefore, the threshold of *N* should not be applied in such cases.

Instead, one should turn focus on the impact of the states. Omissions of both the sending and the receiving state regarding their obligation to prevent and combat trafficking might have effectively facilitated the trafficking business. Additionally, their unwillingness to cater for the needs of the victim might additionally contribute to the harm experienced after the exploitation ended as it places the victim under a lot of mental distress. By states not fulfilling their international obligations they could arguably be regarded as contributing to the subsequent medical and/or social assistance need. Although the acts and/or omissions of the origin state are of central meaning when assessing the prohibition of refoulement, the responsibility of the receiving state should not be completely overlooked. By simply turning to repatriation as the standard response, and not adequately addressing or facilitating the medical or social needs of the victim upon identification, the receiving state should not be able to claim they have no responsibility on the matter. With this backdrop, the lack of medical and/or social assistance should be enough to meet the level of severity needed. It should also render the test of *N* not applicable.

6.3 Conclusion

The thesis shows that the human rights perspective that is supposed to permeate the trafficking frameworks, is highly unsatisfying. A greater focus on the incorporation of a victim perspective, with a stronger human rights-based approach ensuring the human rights of the victims to be secured, I believe would lead to a better protection regime for victims of trafficking. This above all obliges states to make different considerations in their identification process and their protective approach, and shift focus from the perpetrators to the victim. In the specific case of trafficking for sexual purposes, I believe that the inveterate opposition towards prostitution render states to be even more keen on returning victims. Therefore, this change of approach is even more necessary in this context.

Arguably, the overarching barrier towards a satisfying protection scheme is the inability to fully understanding the concept of trafficking; how it at large is a part of a general discrimination, targeting women under poor living circumstances, in society affecting whom is targeted and that the traditional means of protection do not suit the specifics of *how* and *why* trafficking is in practice. Problems arise largely due to the feared harm being related to socio-economic rights. Despite the human rights-approach to the refugee convention, and the human rights inherent in the protection of the ECHR, claiming socio-economic related harm is an obstacle. The rationale behind this is definitely questionable but will have to be left for other research to tackle.

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